

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM THE SOUTH CAROLINA
WORKERS' COMPENSATION COMMISSION

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

W.C.C. File No. 1102937
Case No. 2016-000514

Barry Adickes, Claimant,

Respondent,

v.

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

Appellants.

RECORD ON APPEAL

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SC Court of Appeals

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

Barry Adickes,

CLAIMANT,

vs.

Philips Healthcare,

Employer,
and

Fidelity and Guarantee Insurance Company,

Carrier

DEFENDANTS.

WCC FILE NO: 1102937

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 - \$1,057.69). 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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54. The Claimant is also entitled to ongoing radiofrequency ablations for the neck with Dr. Park.

CONCLUSIONS OF LAW

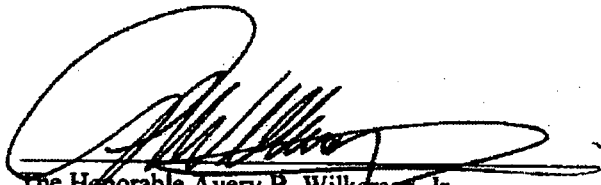
1. Pursuant to Section 42-1-160, claimant suffered a compensable injury by accident arising out of and in the course of his employment.
2. Pursuant to Section 42-9-20, claimant has sustained a permanent loss of wage earning capacity. The claimant now has a residual earning capacity of \$1,057.69. The 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.

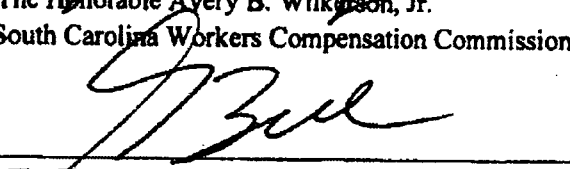
ORDER

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

BEFORE THE SOUTH CAROLINA
WORKERS' COMPENSATION
COMMISSION

Barry Adickes,

Claimant,

vs.

Philips Healthcare,

Employer,

and

Fidelity and Guarantee Insurance Company,

Carrier/Defendants.

WCC FILE NO: 1102937

DECISION AND ORDER

August 27, 2015

STIPULATIONS

The parties stipulated at the hearing to the following issues:

1. This is an admitted accident; the date of the accident being March 22, 2011.
2. The claimant has an average weekly wage of \$ 2,608.52 with a corresponding compensation rate of \$ 704.92.
3. Notice of the hearing was timely and properly served on all parties of interest.
4. Venue was proper in Lancaster County.

APA SUBMISSIONS

Pursuant to the Administrative Procedures Act, the following were submitted into evidence:

CLAIMANT'S SUBMISSIONS

	<i>Provider</i>	<i>Date of Service</i>	<i>Page Nos.</i>
APA 1.	L. Randolph Waid, Ph.D.	10/7/14	1-9
APA 2.	L. Randolph Waid, Ph.D.	Curriculum Vitae	10-34
APA 3.	Joel Leonard, CVE	8/25/14	35-47
APA 4.	Richard Park, M.D.	7/30/13 - 7/16/14	48-74
APA 5.	Jerry L. Barron, M.D.	12/12/12 - 1/14/15	75-77a
APA 6.	John Welshofer, M.D.	10/31/12 - 9/26/13	78-96
APA 7.	Howard Mandell, MD	4/06/11 - 10/08/13	97-134
APA 8.	Nicholas H. Tuttle, M.D.	3/24/11 - 9/12/14	135-159
APA 9.	James Rentz, MD	8/25/11 - 10/10/14	160-185
APA 10.	Piedmont Medical Center	3/23/11	186-196
APA 11.	Burke County EMS	3/23/11	197-198
APA 12.	Jerry Barron, MD Curriculum Vitae		199-202

EXHIBITS

Exhibit 1.	Email from HR Tracey DeBruin to claimant	3/09/12	199
Exhibit 2.	Performance Review	2009	200-203
Exhibit 3.	Performance Review	2010	204-207
Exhibit 4.	Performance Review	2011	208-211
Exhibit 5.	Performance Review	2012	212-216
Exhibit 6.	Employment offer VRI	5/20/14	217-218
Exhibit 7.	Photos of Vehicle Involved in the 3/22/11 accident	3/22/11	219-224

DEPOSITION

De Benne Esse deposition of Dr. Howard Mandell

DEFENDANT'S SUBMISSIONS

	<i>Provider</i>	<i>Date of Service</i>	<i>Page Nos.</i>
APA 1	Carolina Orthopaedic Surgery Associates	10/16/14	1-5

EXHIBITS

A. Philips Healthcare Job description	6-8
B. Philips Healthcare Pre-Injury Wages	9-11
C. Philips Healthcare Post-Injury Wages	12-14
D. Philips Healthcare Pre-injury Disciplinary Records	15-24
E. Philips Healthcare Settlement and General Release 1/28/14	25-29
F. VRI Application for Employment	30-41
G. VRI Job Descriptions	42-46
H. VRI Post-Injury Wages	47-64
I. Zoll Medical Supplies subpoena and response	65-68
J. McKesson Medical Supplies subpoena and response	69-81
K. Deposition of Joel D. Leonard, M.Ed.	82-180

STATEMENT OF THE CASE

Claimant 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 alleges entitled to a significant wage loss award pursuant to §42-9-20 commencing from January 17, 2014 when his employment with Philips ended. Claimant further alleges he has reached maximum medical improvement but will require ongoing Dodge medical care for his shoulder, neck, and post traumatic headaches as outlined by his physicians. Alternatively, if permanent wage loss is not found, claimant alleges very significant permanent partial disability to his shoulders, spine, and brain.

Defendants, on the other hand, deny that claimant has sustained a permanent loss of wage earning capacity and allege that any reduction in earnings is not caused by his injury. Defendants also argue that if the case is awarded as wage loss, the 340 weeks should commence as of the date of injury. If the case is awarded as a specific disability, defendants deny any

disability to the shoulders. Finally, defendants contend Claimant has not reached maximum medical improvement.

EVIDENCE OF THE CASE

Claimant is a fifty three (53) year old father of four, with a bachelor of science degree in marketing management from the University of South Carolina. His work history includes working in sales at Philips (as well as the predecessor company Philips acquired in 2006) for nearly twenty-one (21) years. His work in sales and distribution required loading products into and out of a car as well as spending many hours driving and flying.

Claimant testified that while traveling as a general manager of distribution, he was involved in a work related automobile accident in which he approached a sharp curve in the road too quickly causing his car to flip off the road into a mountainous ravine. Hearing Transcript p. 16. Claimant injured both of his shoulders and his neck and he also suffered a traumatic brain injury. Claimant testified that once he regained consciousness, he called emergency services. The Burke County EMS team assembled gear and traversed down a 75-100 foot embankment to reach claimant. With help, claimant was able to escape the vehicle and get up the embankment. Claimant refused transport from the EMS and his wife picked him up that night and took him back to his home in Rock Hill, South Carolina.

Upon returning home, claimant went to his family doctor, Dr. Nicholas Tuttle for treatment. From there claimant was treated by Dr. James Rentz and ultimately underwent shoulder surgery with Dr. Rentz. Claimant also suffered significant neck pain as well as post concussive headaches. Since that time claimant has primarily been treated by Dr. Rentz for his shoulder injuries, by Dr. Howard Mandell for his headaches and post concussive syndrome, and

Dr. Richard Park for his cervical spine. Claimant has undergone a variety of treatment including nerve root ablations by Dr. Park and a host of medication therapy by Dr. Mandell.

As stated earlier, claimant has worked for Philips and the company that Philips purchased for twenty-one (21) years. In 2008, claimant worked as a product sales specialist for the same division of Philips. He continued in that position until he was transitioned into a new position in 2011. Shortly after taking the new position in January of 2011, claimant suffered this injury on March 22, 2011. Claimant testified that he had performed well in his job prior to his injury. There was a period in 2009 when he was placed on a PIP (personal improvement program) because sales were low. However, claimant testified that this was during the height of the recession and they had also experienced difficulty getting product during that time. Claimant's performance evaluations backed up this testimony. In the calendar year prior to this injury claimant earned over \$128,000.

Claimant testified that following his injury he had great difficulty with headaches. Migraine headaches would appear that would put claimant out of commission for twenty-four (24) to forty-eight (48) hours. These headaches occurred every four to eight weeks and claimant's wife kept a headache diary of when the headaches occurred. Claimant also testified that he began noticing other cognitive problems that he tried to shrug off at first. Claimant testified that he experiences additional cognitive problems such as forgetfulness and an inability to process thoughts. For example, composing an email takes him much longer than it did previously. Claimant also has to deal with his headaches as well as chronic neck pain and shoulder pain. Claimant testified he has to have nerve root ablations done every six months to a year in his neck, has to take medication daily for his migraine headaches as well as break through

medication when headaches occur, and knows that he will require repeat surgery on his shoulder in the future.

Claimant was out of work during the time that he recuperated from his shoulder surgery. He returned to work and encountered the difficulties noted above. Claimant was terminated on January 17, 2014. The termination was part of a companywide layoff but claimant testified that he was told that it was, in part, performance related. The personnel evaluations showed that claimant was given glowing comments in the years prior to his accident but that those evaluations became worse following his accident. Claimant was out of work completely for a period of time while looking for work but eventually obtained a job with VRI in which he earned \$55,000 a year. The application submitted by the defendants showed that claimant's requested salary was \$55,000. However, claimant testified that he put that number on the job application because he was told that was what the job paid when he applied. Shortly before the hearing, claimant lost his job with VRI and he was unemployed at the time of the hearing.

Jeanie Adickes, wife of the claimant testified. She testified that she and the claimant have been married for twenty-eight (28) years and she had an opportunity to observe him on a daily basis during that time. Prior to his injury she testified the claimant was able to do his job, multi-task, and never had headaches. However, following his accident their life changed. Claimant takes medication on a daily basis and has trouble with focus, memory, and multi-tasking. She testified that it takes much longer for him to get things done. She also testified that claimant is a stoic individual and is not a complainer. She testified that claimant's severe headaches occur about anywhere from four to eight weeks depending on his medications and that the medications have to be tweaked from time to time. She testified that she did keep a headache calendar. She testified that when a headache comes on she can tell that it is coming and claimant

has to give himself an injection. He then will have to lay down and go to sleep. He often will have to take two of the injections during one of his headaches. The following day after one of his headaches he is very sluggish and foggy and often has a rebound headache. She further testified that claimant has trouble with his short term memory and he becomes distracted easily. She also testified that claimant has little patience which is a great change from prior to the accident.

Mark Johnson, regional manager for Philips Healthcare, testified on behalf of defendants. He testified that at the time of the accident that he was claimant's supervisor. He did not know the claimant well before he became his supervisor but knew of him. He testified that claimant had a history of poor follow-up with team members and an over all lack of urgency. He testified that during the time that claimant reported to him from January 1, 2011 until his termination in 2014 that claimant received middle of the road performance reviews and was not a top performer. He indicated claimant was in the bottom third of the ranking but was doing an adequate job. He testified that claimant was terminated as part of a reduction in force and that he did not tell claimant that he was being terminated in part because of performance.

Mr. Johnson testified that claimant did report to him that he was still having headaches from time to time immediately after the accident. However, he indicated that it was not routine and that over time he did not recall hearing further about the headaches.

On cross examination Mr. Johnson indicated that claimant was transferred to his team on January 1, 2011 and that he had only supervised claimant for a period of eleven (11) weeks prior to his accident. Further, because they worked remotely he would rarely see claimant and that any contact with the claimant was usually by email or telephone. Mr. Johnson was also cross

examined from the performance appraisals for the period prior to his accident that were completed by Paul Stoddard who served as both claimant and Mr. Johnson's superior. The performance evaluation showed that during the time claimant was on the PIP program that he was placed on that program because of a drop in sales that coincided with the recession of 2008 and 2009. Claimant was then the number one salesman in the region at the end of 2009. Mr. Johnson was also questioned regarding performance appraisals that he completed on Mr. Adickes after his injury that contained numerous quotes questioning Mr. Adickes' focus.

All of the medical reports were reviewed. The reports of Dr. Richard Park show that claimant was under his care beginning July 30, 2013. Dr. Park has performed facet joint injections, medial branch blocks, and radio frequency ablations. Dr. Park opined that Mr. Adickes would likely continue to require radio frequency ablations every six to twenty-four months for pain relief. APA p. 52. Claimant was treated for his shoulders by Dr. James Rentz. Dr. Rentz performed arthroscopic surgery on the right shoulder including a debridement of a grade IV slap tear and an anterior labrum, biceps tendonotomy, and open biceps tendodisis to the proximal humerus. Claimant did not undergo surgery on the left shoulder. A right shoulder MRI performed on October 10, 2014 showed supraspinatus and infra-supraspinatus insertional tendinopathy with an intra-substance delamination tear at their confluence.

Claimant was also evaluated by shoulder surgeon, Jerry L. Barron, MD. Dr. Barron saw claimant on December 12, 2012 and found that claimant did sustain an acute injury to his head, neck, and bilateral shoulders. He recommended an MRI/arthrogram of the right shoulder as well as a MRI of the cervical spine. Dr. Barron later reviewed the MRI report of October 10, 2014 and rated claimant as having a 15% impairment to the right shoulder and a 0% impairment to the left shoulder. He further opined that claimant would most probably eventually require surgery to

the right shoulder but that it was reasonable for Mr. Adickes to try to avoid surgery as long as possible. APA p. 77a.

Claimant was also evaluated by Dr. John Welshofer. Dr. Welshofer indicated that claimant has underlying cervical degenerative spondylosis that was made materially worse by the on the job motor vehicle accident of March 22, 2011. Dr. Welshofer also evaluated claimant's brain injury and diagnosed him with a post-concussive disorder. He rated claimant as having a 15% permanent impairment of the brain.

Claimant was also evaluated by neuropsychiatrist, Dr. Randolph Waid. Dr. Waid performed a neuropsychological evaluation and found that claimant had sustained a good recovery under the circumstances. However, he noted that claimant demonstrated variability in his capacity to sustain attention/concentration. He noted that claimant had compromise in the attentional executive aspects of immediate learning which caused complaints or forgetfulness in day to day pursuits. He found that claimant was suffering executive dysfunction potentially affecting both cognitive and emotional domains. He noted that in day to day pursuits claimant likely experienced episodic forgetfulness due to the interfering effects of attention-executive difficulties and headaches.

The physician that claimant has seen most for treatment throughout his ordeal has been neurologist Dr. Howard Mandell. Dr. Mandell noted that he had been treating Mr. Adickes for traumatic brain injury and post concussive syndrome as a result of his on the job injury. He opined that claimant would need ongoing care for post traumatic headaches to include doctor visits two or three times per year, medications for prevention and abortive treatment of headaches as well as possible missed days at work for headaches that were not aborted by

medications. He testified that claimant attempted to minimize his problems and understated the problems. Dr. Mandell reviewed the neuropsychological evaluation of Dr. Waid and testified that the problems shown on the neuropsychological examination were exactly the same as the problems that he observed with Mr. Adickes and he believed that these problems came from claimant's traumatic brain injury and post concussive syndrome. Dr. Mandell testified that claimant has problems with concentration, executive function, capacity to sustain attention and concentration, difficulty with attentional executive aspects of immediate learning, forgetfulness in daily pursuits, mild executive dysfunction, shorter fuse, and easier frustration. These skills affect people who perform jobs with higher aspects of functioning rather than those with menial jobs. He further testified that these problems could limit claimant's employment opportunities particularly those at a high level of employment.

Claimant was evaluated by vocational expert, Joel Leonard. Mr. Leonard reviewed all of the claimant's medical records, interviewed claimant, and administered some achievement and reading testing. In his report he outlined three potential vocational profiles. However, he endorsed profile "B" that acknowledges that Mr. Adickes was part of a general reduction in force in his employment but also finds that the amount of money that claimant is currently earning is a reasonable and proper representation of his likely earning capacity subsequent to the March 2011 accident because of his limitations and restrictions from his accident. Mr. Leonard's deposition was offered as evidence and he was cross examined regarding his opinion. However, he maintained his opinion that the \$55,000 job with VRI was an accurate reflection of claimant's post injury earning capacity because of his cognitive difficulties.

Based on the above-stated evidence as well as a review of the entire record, the following are made as:

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 postconcussive (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 - \$1,057.69). This computes to a compensation rate of \$1,033.94 ($\$1,550.83 \times .667$). 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.

CONCLUSIONS OF LAW

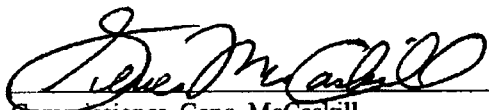
1. Pursuant to Section 42-1-160, claimant suffered a compensable injury by accident arising out of and in the course of his employment.
2. Pursuant to Section 42-9-20, claimant has sustained a permanent loss of wage earning capacity. The claimant now has a residual earning capacity of \$1,057.69. The 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 that defendants shall 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!


Commissioner Gene McCaskill
South Carolina Worker's Compensation Commission

Dated: August 27, 2015

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 Kellia Lindler on August 27, 2015

SC Workers' Compensation Commission

1333 Main Street, Suite 500 • Post Office Box 1715
Columbia, South Carolina 29202-1715
(803)737-5723



WCC File #: 1102937

Carrier File #: 002380-009116-WC-01

Carrier Code #: _____

Employer FEIN #: _____

Barry Adickes

Daimant's Name

SSN

1137 Hummingbird Lane
Rock Hill, South Carolina 29732

Address City State Zip

Home Phone #

Work Phone #

Preparer's Name

Law Firm

Philips Healthcare

Employer's Name

ALL CORRESPONDENCE TO DEBBIE

Address City State Zip

Fidelity & Guaranty Ins. Co. c/o Gallagher Bassett Services, Inc.

Insurance Carrier

Phone Number

Date of Injury: 3/22/2011

A. Total Wages Paid

1. Check Applicable Method:

- ☒ Report of earnings of injured employee based on four completed quarters.
- ☐ Report of earnings of injured employee who did not complete four quarters based on actual time worked.
- ☐ Report of earnings of similar employee. Injured employee did not work sufficient time before alleged injury. Hire date: _____
- ☐ Report of earnings of injured employee based on alternative method because Form 20 results in a compensation rate that is not fair and just (attach documentation to show how average weekly wage and compensation rate were calculated).

2. List total wages paid as reported to the Employment Security Commission on the Employer Quarterly Contribution and Age Reports during the four quarters immediately preceding the quarter in which the injury occurred. Do not include the quarter during which the injury occurred.

Quarter	Ending Date	Total Wages Paid
1st	03/2010	\$21,532.00
2nd	06/2010	\$21,538.44
3rd	09/2010	\$19,077.00
4th	12/2010	\$18,461.52

Total Paid 2. \$80,608.96

3. List total value of other allowances of any character made in lieu of wages during four quarters above.

3. \$55,034.29

4. Add lines 2 and 3.

TOTAL WAGES PAID:

4. \$135,643.25

5. List total number of weeks paid to employee during the four quarters immediately preceding the quarter in which the injury occurred.

5. 52

B. Average Weekly Wage

6. To calculate average weekly wage, divide total wages (line 4) by total weeks paid (line 5).

AVERAGE WEEKLY WAGE: 6. \$2,608.52

C. Compensation Rate

7. The general rule for calculating the compensation rate is to multiply average weekly wage (line 6) by .6667. Estimate compensation rate by multiplying average weekly wage (line 6) by .6667. See part 8 below to determine the actual compensation rate.

7. \$1,739.10

8. The compensation rate is as follows (choose one):

- ☐ When average weekly wage (line 6) is less than \$75.00, the compensation rate is the average weekly wage. Enter average weekly wage on line 8.
- ☐ When the estimated compensation rate (line 7) is less than \$75.00 and average weekly wage (line 6) is more than \$75.00, the compensation rate is \$75.00. Enter \$75.00 on line 8.
- ☒ When the estimated compensation rate (line 7) is more than the maximum compensation rate for the year in which the injury occurred, enter the maximum compensation rate for the year in which the injury occurred on line 8.
- ☐ Employee is within the exceptions listed in S.C. Code Ann. Section 42-7-65. List applicable exception here and enter appropriate compensation rate on line 8.
- ☐ The calculated compensation rate (line 7) applies. Enter amount from line 7 on line 8.

WEEKLY COMPENSATION RATE: 8. \$704.92

Employer's representative shall prepare a Form 20 and serve per R.67-211 a copy on the claimant within thirty days of beginning temporary compensation. See 37-1603 when no temporary compensation is paid. NOTE: Average weekly wage represents average gross pay before taxes and other deductions. WHEN THE CLAIMANT DOES NOT AGREE WITH THE COMPENSATION RATE ON LINE 8, HE OR SHE SHOULD CONTACT THE EMPLOYER'S REPRESENTATIVE TO TRY TO REACH AN AGREEMENT AS TO THE COMPENSATION RATE. IF NO AGREEMENT CAN BE REACHED, THE CLAIMANT SHOULD CONTACT THE CLAIMS DEPARTMENT AT (803)737-5723.

WCC Form # 20
Rev. Date 3/87

20

**STATEMENT OF EARNINGS
OF INJURED EMPLOYEE**

South Carolina Workers' Compensation Commission
1333 Main Street, Suite 500 • Post Office Box 1715
Columbia, South Carolina 29202-1715
(803) 737-5723 www.wcc.sc.gov



WCC File #: 1102937
Carrier File #: 002380009116WC01
Carrier Code #:
Employer FEIN #:

Claimant's Name: Barry Simmons Adickes SSN: Employer's Name: Philips Healthcare
Address: 1137 Hummingbird Lane Address: 3000 Minuteman Road
City: Rock Hill State: SC Zip: 29732 City: Andover State: MA Zip:
Home Phone: (803) 328-0160 Work Phone: Insurance Carrier: Gallagher Bassett Services
Preparer's Name: William L. Smith II Law Firm: Chappell, Smith and Arden, PA Preparer's Phone #: 803-929-3600

- A claim for workers' compensation benefits is made based on the following grounds: Date of Injury or Illness: 3/22/2011
- ☒ Injury ☐ Illness ☐ Repetitive Trauma ☐ Occupational Disease ☒ Physical Brain Injury ☐ Concurrent Jurisdiction
1. The claimant sustained an injury to brain, shoulders, & cervical spine (Part(s) of Body Injured) on 3/22/2011 (Month/Day/Year) in Burke county, state of NC. Body part(s) affected are: brain, shoulders, & cervical spine
 2. Briefly describe how the accident occurred. Claimant injured in an on the job car accident.
 3. Both the claimant and the employer were subject to the South Carolina Workers' Compensation Act at the time of injury.
 4. The relationship of employer and employee existed at the time of injury.
 5. At the time of the injury the claimant was performing services arising out of and in the course of employment.
 6. Notice of the accidental injury was given to the Employer on 3/22/2011 (Month/Day/Year) in the following manner:
Notified supervisor
 - ☒ 7. Due to injury, the claimant is in need of (check one):
☐ (a) medical examination and treatment for:
☒ (b) additional medical examination and treatment for: brain, shoulders, & cervical spine - will be necessary throughout claimant's lifetime.
 - ☒ 8. Due to injury, the claimant requests temporary total disability benefits because of lost compensable time from work and wages for the period of:
TTD has been paid.
 - ☒ 9. Due to the injury, the Claimant has permanent disability of the following nature and extent (check one):
☐ (1) General Disability: ☐ Total ☐ Partial ☐ (2) Specific Disability: ☐ Total ☐ Partial ☒ (3) Wage Loss
 - ☐ 9a. ☐ A determination of permanent disability is premature at this time.
 - ☐ 10. Due to the injury, the Claimant has a serious bodily disfigurement consisting of:

10a. At the time of the injury, the Claimant was paid weekly wages of \$2,608.52, and demands accounting of days worked and wages earned as provided by law.
 - 10b. Give names and addresses of all employers for whom the Claimant has worked since the date of the accident:
Philips Healthcare; VRI
 11. Further grounds or unusual aspects of claim:
Claimant has suffered permanent wage loss.
 - 11a. List names and addresses of all physicians or other medical specialists who have seen or treated the Claimant as a result of the accident:
Dr. Jerry Barron, Dr. Howard Mandell, Dr. Nicholas Tuttle, Dr. James Rentz, Piedmont Medical Center, Grace Hospital, Dr. Welshofer
 - 11b. To the best of your knowledge, did you have any prior permanent disability?
If yes, describe: No
 12. Appropriate benefits as provided in the Act for the above grounds and other relief as the Workers' Compensation Commission may direct as just and proper.
 - ☐ 13a. I am filing a claim. I am not requesting a hearing at this time. 14. Estimated time needed for hearing: 1 hour
 - ☒ 13b. I am requesting a hearing. A \$25 fee is required.
 - ☐ Mediation
☐ a. Mediation is requested to be ordered pursuant to Reg. 67-1801 B.
☐ b. Mediation is requested pursuant to Reg. 67-1802.
☐ c. Mediation is requested by consent of the Parties pursuant to Reg. 67-1803.
☐ d. Mediation has been conducted by a duly qualified mediator and resulted in an impasse.
Questions regarding mediation may be submitted to mediation@wcc.sc.gov.

I certify I have served this document pursuant to Reg. 67-211 by delivering a copy to Brooke A. Payne
address 1037-D Chuck Dawley Blvd, #210, Mt. Pleasant, SC 29464 on the day of 20 14, by ☒ first class postage ☐ certified mail ☐ personal service.

I verify the contents of this form are accurate and true to the best of my knowledge.

Preparer's Signature William L. Smith II Title Email bsmith@csa-law.com Date 9-23-14

Questions about the use of this form should be directed to the Claims Department at 803.737.5723. Refer to Regulations 67-204 through 67-211 and Regulations 67-601 through 67-615 as well as Reg. 67-1801.

WCC Form # 50
Revised 7/13

50

Employee's Notice of Claim and/or
Request for Hearing

South Carolina Workers' Compensation Commission
1333 Main Street, Suite 500
P.O. BOX 1715
Columbia, SC 29202-1715
803-737-5675



WCC File #: 1102937
Carrier File #: 002380009116WC01
Carrier Code #: _____
Employer FEIN #: _____

Claimant's Name: Barry Simmons Adickes SSN: Employer's Name: Phillips Healthcare
Address: 1137 Hummingbird Lane Address: 3000 Minuteman Road
City: Rock Hill State: SC Zip: 29732 City: Andover State: MA 01810
Home Phone: (864) 328-0160 Work Phone: () - Insurance Carrier: Galagher Basset Services
Preparer's Name: Brooke A. Payne Law Firm: Lueder, Larkin & Hunter, LLC Preparer's Phone #: (843) 353 - 0796

Date of Injury or Illness: 03/22/2011

Estimated time for hearing: 1 hour

Complete each information blank. Clearly specify when contentions are admitted in part and denied in part. The Employer/Carrier in answer to the claim, respectfully shows:

1. It is ☒ Admitted ☐ Denied the employee sustained an injury or illness on or about the date set forth in the Form 50. The reasons for denial are: _____
2. It is ☒ Admitted ☐ Denied both the employer and employee were subject to the Workers' Compensation Act at the time in question. The reasons for denial are: _____
3. It is ☒ Admitted ☐ Denied the relationship of employer and employee existed at the time in question. The reasons for denial are: _____
4. It is ☒ Admitted ☐ Denied at the time in question the employee was performing services arising out of and in the course of employment. The reasons for denial are: _____
5. It is ☒ Admitted ☐ Denied notice of injury was given the employer. The reasons for denial are: _____
6. It is ☒ Admitted ☐ Denied the employee ☐ Needs ☒ Is Entitled to Additional medical care as a result of injury or illness. The reasons for denial are: _____
7. It is ☐ Admitted ☒ Denied the employee is entitled to temporary total disability for the period(s) of: _____
8. It is ☐ Admitted ☒ Denied the employee is permanently disabled. The reasons for denial are: Permanency determination is premature at this time.
9. It is ☐ Admitted ☒ Denied the employee has serious disfigurement.
10. It is contended that an average weekly wage of \$ 2,608.52 applies, according to attached Form 20 as provided by law.
11. Further contentions, grounds of defense, or unusual aspects are: As evidenced by the medical records and Claimant's Form 50, permanency is premature. Thus, the claimant is not entitled to wage loss.

☐ **Mediation**

- ☐ a. Mediation is requested to be ordered pursuant to Reg. 67-1801 B.
- ☐ b. Mediation is required pursuant to Reg. 67-1802.
- ☐ c. Mediation is requested by consent of the Parties pursuant to Reg. 67-1803.
- ☐ d. Mediation has been conducted by a duly qualified mediator and resulted in an impasse.

Questions regarding mediation may be submitted to mediation@wcc.sc.gov.

I verify the contents of this form are accurate and true to the best of my knowledge.

Brooke A. Payne
Preparer's Signature

Attorney for Employer/Insurer
Title

bpayne@luederlaw.com
Email

October 15, 2014
Date

Refer to R.67-204 through R.67-210 and R.67-601 through R.67-615. Refer to R. 67-1801 for mediation. Questions about the use of this form may be directed to the Commission's Judicial Department at 803-737-5675 or judicial@wcc.sc.gov or mediation@wcc.sc.gov. Pursuant to R.67-606, a Form 20 must be filed with the Claims Department at least 30 days from the date of filing this form.

WCC Form # 51
Revised 07/13

51

Employer's Answer to Request for Hearing

South Carolina Workers' Compensation Commission
1333 Main Street, Suite 500
P.O. BOX 1715
Columbia, SC 29202-1715
(803) 737-5739 www.wcc.sc.gov



PRE-HEARING BRIEF
WCC File No: 1102937

Claimant's Name: Barry Simmons Adickes SSN: [REDACTED] Employer's Name: Phillips Healthcare
Address: 1137 Hummingbird Lane Address: 3000 Minuteman Road
City: Rock Hill State: SC Zip: 29732 City: Andover State: MA 01810
Home Phone: (864) 328-0160 Work Phone: () Insurance Carrier: Gallagher Basset Services
Preparer's Name: Brooke A. Payne Law Firm: Lueder, Larkin & Hunter, LLC Preparer's Phone #: (843) 353-0796

A claim for workers' compensation benefits is made based on the following grounds:

X Injury ☐ Illness ☐ Repetitive Trauma

1. Compensation Rate: \$704.92 2. AWW: \$2,608.52 Date of Injury: 3/22/11
3. Type of injury and body part(s): Head/Brain, Bilateral Shoulders, Cervical spine
4. Facts in controversy: Whether the claim is ripe for a permanency determination. If so, a determination of the Claimant's permanent disability and whether he is entitled to permanent wage loss benefits.
5. Legal issues involved: 42-9-30; 42-9-20; If Claimant is entitled to wage loss benefits, determination of the number of weeks to be included in such benefits.
6. Unusual aspects: Whether the claim is ripe for a permanency determination, as he has yet to receive a PPD rating in 2 of his 4 accepted injuries.
7. Witnesses (designate if expert):* Mark Johnson - Phillips Healthcare National Sales Director, Emergency Care and Resuscitation.
8. Exhibits: See Employer/Insurer's Notice of Submission of Written Expert Reports and Exhibits as Direct Evidence, attached. Defendants reserve the right to supplement any additional information received from subpoenas served on subsequent employers and/or employers with whom the Claimant has allegedly applied. Additionally, Defendants will supplement additional post-injury wage records and any records received as a result of subpoenas served as a result of information learned in the Claimant's upcoming discovery deposition.
9. Medical evidence (indicate report pursuant to R.67-612; deposition or appearance):
See Employer/Insurer's Notice of Submission of Written Expert Reports and Exhibits as Direct Evidence, attached. Defendants reserve the right to supplement with any medical records received pursuant to subpoenas served, or those served as a result of information learned in the Claimant's upcoming discovery deposition. Defendants also reserve the right to supplement with their own vocational expert report, should the further investigation into the Claimant's vocational opinion warrant same.
10. Name, address, and specialty, if any, of the treating physician: Dr. James Rentz (right shoulder); Dr. Nicholas Tuttle (left shoulder); Dr. Howard Mandell (head/brain); Dr. Richard Park (cervical spine, pain management); Dr. James Welshofer (cervical spine, head/brain).
11. Impairment rating(s); body part(s); physician and date of opinion: 10% to cervical spine, Dr. Welshofer, 7/19/13; 15% to brain, Dr. Welshofer, 11/1/12.
12. I am amending my Form 50/51 in the following manner: N/A

☐ **Mediation**

- ☐ a. Mediation is requested to be ordered pursuant to Reg. 67-1801 B.
- ☐ b. Mediation is required pursuant to Reg. 67-1802.
- ☐ c. Mediation is requested by consent of the Parties pursuant to Reg. 67-1803.
- ☐ d. Mediation has been conducted by a duly qualified mediator and resulted in an impasse.

Questions regarding mediation may be submitted to mediation@wcc.sc.gov.

I verify the contents of this form are accurate and true to the best of my knowledge.

I certify I have served this document pursuant to Reg. 67-211 by delivering a copy to William L. Smith II, P.O. Box 12330

Columbia, SC 29211 on the 15th day of January 2015 by: ☒ first class postage ☐ certified mail ☐ personal service.

Signature: [Signature]
Date of hearing: January 21, 2015

Email: bpayne@luederlaw.com
Time needed for hearing: 1.5 hours

Questions about the use of this form should be directed to the Jurisdictional Commissioner. Refer to Regulations 67-204 through 67-211 and Regulations 67-601 through 67-615; as well as Regulation 67-1801. File this form and proof of service on the opposing party according to R.67-611 and R.67-212. Do not send medical reports. * Commissioners reserve the right to admit expert witnesses at hearings.

WCC Form # 58
Revised 7/13

58

PRE-HEARING BRIEF

BEFORE THE SOUTH CAROLINA
WORKERS' COMPENSATION COMMISSION
WCC FILE NO.: 1102937

BARRY ADICKES,	)	
	)	
Employee/Claimant,	)	
	)	
v.	)	
	)	FORM 58 ADDENDUM
PHILIPS HEATHCARE and FIEDELITY	)	ON BEHALF OF THE
& GUARANTY INS. CO C/O	)	EMPLOYER/CARRIER
GALLAGHER BASSETT	)	
SERVICES, INC.,	)	
	)	
Employer/Carrier/Defendants.	)	
_____	)	

Employer/Carrier
Form 58 Addendum

Relevant Statutory Provisions

Section 42-9-20 S.C. Code of Laws: "...when the incapacity for 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 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, but not more than the average weekly wage in this State for the preceding fiscal year. In no case shall the period covered by such compensation be greater than three hundred forty weeks from the date of injury."

Relevant Case Law

The facts of this claim are similar to those in *Floyd v. City of Charleston*, wherein a firefighter sustained a work-related neck injury in 1980. The Claimant 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 in September 1980. The Claimant passed the Air Force physical entrance exam and entered the reserves in April 1981, completing basic training. In January 1982, he opened his own part-time washer-dryer repair service. During this time, Floyd remained employed by the fire department. In April 1982, he returned to a physician that had previously treated him, and was diagnosed with degenerative disc disease with spur formation. Floyd brought a claim against the Fire Department for loss of earnings, as he was no longer able to perform his part-time job.

Noteworthy Excerpts from the Defendants' Exhibits

1) Joel Leonard's Vocational Evaluation

- (a) The Claimant reported that he was informed that his termination was performance-related, however, there is evidence to show the contrary.
- (b) The Claimant reported that he had always met or exceeded his production goals, however, **the Claimant failed to meet his goals in 2009, and the first quarter of 2010.**
- (c) The Claimant purports his \$55,000 base salary as a significant loss in wage, however, **the Claimant requested this salary on his application with his current employer.**
- (d) Leonard notes that the Claimant, at the time of his report, had not been evaluated by a neuropsychologist, and notes that as of "May 8, 2012, [the Claimant's] treating neurologist was of the opinion that his cognitive issue had resolved."
- (e) Leonard assesses certain profiles to determine the Claimant's vocational ability, and places the Claimant within Profile "B," which assumes the Claimant's termination was performance-based, and that his current employment represents a reduction in earning capacity; both of these assumptions are based on the Claimant's own statements, to which, evidence exists to prove otherwise.
- (f) Leonard's report relies exclusively upon "... [the Claimant's] word with respect to his representation of the events surrounding his claim and their relevant impact on his functional status and prospective employability," however, significant evidence and testimony exists to dispute the Claimant's representations, none of which were considered prior to Leonard reporting his evaluation.

2) Dr. Randolph Waid's Neuropsychological Evaluation

- (a) The Claimant is "functioning in the high average range of intellectual abilities."
- (b) "Neuropsychological evaluation generally provided favorable results."
- (c) With respect to the Claimant's loss of memory, Dr. Waid found that "assessment of anterograde memory generally **revealed intact immediate learning/memory** as well as an efficient ability to retain and recall information. . . ."
- (d) Neuropsychological evaluation showed that there was no evidence of visual spatial/perceptual reasoning abilities, **receptive and expressive language is intact**, no evidence of compromise in sensory perceptual functions, and the Claimant is generally able to meet the demands of higher reasoning/problem solving tests.
- (e) The Claimant has had a good recovery from head and other injuries sustained in a motor vehicle accident.

3) **Mark Johnson Deposition Testimony**

- (a) "A. ... There were performance issues in the past with Barry and that there was concern about Barry's ability to comprehend the complicated sale that he was being asked to engage." (T. 13)
- (b) "Q. Would you characterize Barry had done very well in sales during the time prior to him coming to work for you?
A. No, sir, I would not characterize that." (T. 15)
- (c) "Q. ... Now did you see the problems that Barry had following his injury with concentration, focus, those sorts of things?
A. No, sir. I didn't notice any difference in Barry pre-accident to post-accident" (T. 15)
- (d) "Q. ... What was the reason that you were told for his termination?
A. Reduction in Force.
Q. Okay. Did you tell Barry that it was somewhat performance related?
A. No, sir." (T. 20)
- (e) With respect to the notification to the Claimant of his termination, Mr. Johnson testified that he was specifically trained to "let employees know that this was a business decision by the company and that it's not performance related." (T. 21)

4) **Joel Leonard Deposition Testimony**

Based on the following deposition testimony given by Joel Leonard on December 30, 2014, Mr. Leonard's report should be disregarded wholly, or at least not given any persuasive weight as evidence.

Testimony Related to the Claimant's Termination as he First Understood it, and Now:

- (a) Q So depicted wage loss requires you to accept an assessment of same from the claimant. What does that mean; that you just have to accept that what the claimant is telling you is true?
A Not so much necessarily true in that strict a manner, yes, but that the turn of events and the circumstances adequately portray what transpired. And, you know, to a certain degree, yes, that is that you accept at face value, what's going on. But the issue of, you know, the strict truth, can sometimes be difficult in these cases, especially when you're dealing with multiple parties that you don't always have access to. (T. 13)
- (b) Q It looks like you chose Profile B, which essentially is based on your conclusion, based on the facts as you understood them, was that his release

from Phillips Healthcare was due, at least in part, to performance-based deficits arising from his work-related injury; right?

A That's correct.

Q And that's just based on the information relayed to you by Mr. Adickes?

A That is correct.

Q You'll agree that Mr. Adickes had informed you that, prior to his work-related injury, he didn't have any performance issues at Phillips Healthcare?

A No, nothing in a significant manner. That's correct.

Q So now that you've had an opportunity to review the documents regarding his performance at Phillips, would you agree that, in 2009, he actually had been placed on a performance improvement plan because of his issues with performance?

A Yes; that's my understanding after reading that document. I don't -- I couldn't find in that document where it said the PIP was, but that might just be it. (T. 22)

(c) Q So you'll agree that, based on this Performance Improvement Plan which you are now being shown 3 for the first time, Mr. Adickes actually did have issues with his performance, prior to his work-related injury?

A According to that document; yes.

Q Okay. So when you testified earlier that you had seen that there was a Performance Improvement Plan mentioned and you hadn't seen it, were you referring to 9 the People Performance Management, 2009?

A Yeah. (T. 26)

(d) Q But my question isn't would you agree that that was his testimony. My question is, based on the fact that two months prior to the work-related injury, Mr. Adickes was placed in a less-complicated position by his supervisor. Wouldn't you agree that that indicated issues with performance?

A It could. My understanding was, though -- and this could be an issue. My understanding was that it was more of a promotion than a demotion.

Q But your understanding is based on what Mr. Adickes told you?

A That's correct. (T. 33)

(e) Q You'll agree that he also had job performance issues before his injury?
A That is documented; yes. And the interesting thing though -- and you know, I never knew -- I was unaware that the concept of the job that he identified as a promotion is depicted within Mr. Johnson as being almost

a -- not necessarily a demotion, but a reduction in tasks that he is required to accomplish because of the sophistication of who he is selling to and what he is doing. To me, that's sort of interesting that he then had further demise after that, meaning after they put him in an easier job per their arguments, but he then had demise after that. There's potential for that to be interpreted and implied as -- you know, that there is a greater degree of dysfunction that persisted.

Q You would agree that could also be interpreted or implied as he's just bad employee?

A Yes (T. 70).

(f) Q Okay. So you'll agree that even following the 12/2009 performance review, that there is documentary evidence of continued performance issues with Mr. Adickes?

A As of March 2010, that appears to be so.

Q When was that email sent to Mr. Adickes?

A May 2010.

Q Okay. So he was counseled about it at least in May of 2010? (T. 93)

(g) Q I want you to read the first sentence in the second paragraph in its entirety.

A The first sentence, "Barry, in 2010, you were on a PIP for lack of performance. I'd like to bring your attention to some concerns that I have" -- that I have -- "I have that are resurfacing."

Q What does "resurfacing" mean to you?

A That would mean coming back to the top.

Q Coming back from 2010; right?

A In that case it would appear to be the frame of reference; yes.

Q So you'll agree that, based on your reading of this email, it indicates that Tracey is informing Barry that he is now suffering from the same performance concerns that he had back in 2010?

A I don't know if it says the same performance concerns, but some performance concerns of some type -- (T. 94).

(h) Q Based on the information that you have been provided with today, you will agree that his performance before the accident was actually not all favorable performance?

A Based upon what you presented, I think that's reasonable.

Q That at least within two years, in 2009, he goes on a PIP plan, and then in 2010 he received an email about his being below quota, and then in 2012 the HR representative kind of reminded him of the issues that he had in 2010 that she's bringing back up again in 2012. So you will agree that he

- definitely had performance issues prior to date of accident?
- A Based upon the evidence presented, I think that supports some of that; yes. (T. 95)

Testimony Related to Mr. Leonard's Overall Impression of the Findings in Dr. Waid's Report:

- (a) Q And Dr. Waid's report?
- A And Dr. Waid's report, which basically attended to some attention and concentration, persistence issues.
- Q So reading that lengthy report from Dr. Waid, that was what you took away from it, was that he did have attention issues?
- A In summary; yes. I mean there was some other 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. There was some issues that were -- you know, at one point you would think he would have problems with memory, then some of the testing didn't necessarily show that out. But then he had some other -- You know, with the Stroop test, he was well below -- I don't know how to put -- I don't recall, impaired performance or low or poor performance, or something to that effect. But in the end, he -- I felt like he was having attention/concentration deficits, source attributable, if I can remember, possibly to the headache issues and what-not. (T.19)

Testimony Related to Issues Obtaining Employment with other Employers:

- (a) Q Okay. Did Mr. Adickes ever inform you that he was seeking a salary of \$55,000 when he applied to VRI?
- A No, ma'am. (T. 21)
- (b) Q So you haven't seen any indication of Mr. Adickes being unable to secure any jobs following his termination from Phillips, related to his cognitive abilities or disabilities?
- A I have no specific evidence indicating that he can't secure a job due to his cognitive abilities or limitations. (T. 68).
- (c) Q Well, my question is, where is the evidence to prove that he is now earning lesser wages than he would be earning if it weren't for his cognitive issues?
- A Well, to a certain degree, in his demonstrated work activity.
- Q So you're just basing that on his base salary at VRI?
- A To a certain degree; yes. Also, to the evidence within the record that suggests consistency with the pattern of dysfunction in terms of the

- nature of his injury and how it impacts him. (T. 69)
- (d) Q You'll agree that you haven't spoken to any of his supervisors for his current employment at VRI; right?
- A That's correct.
- Q And you haven't spoken with anyone at Phillips?
- A That's correct.
- Q And you don't have any sort of documentation of time cards or wage statements as definitive proof that he's missed any days or had any absences due to headaches?
- A That's correct. In this particular case, I don't think that the headaches are -- I think they are a significant issue for him, but I don't think that they're a preclusive area for him; that's correct.
- Q In fact, Mr. Adickes never even reported to you that he had to miss significant periods of days a month or for per year due to his headaches; did he?
- A No. He did report to me that there were days that he was out of commission.
- Q And that was right after the accident; right?
- A Well, no; that persists presently. But, you know, his statement is I just deal with it, you know, to that degree.
- Q He just deals with it by continuing to work?
- A That's right.
- Q Right. So he hasn't actually missed any days of employment due to his headaches?
- A That, I don't know for sure. (T. 91)

Testimony regarding Whether the Additional Information Changes his Overall Opinion:

- (a) Q I know you said you were provided with the deposition transcript of Dr. Mandel's deposition. Were you provided with the deposition transcript from Mark Johnson's deposition?
- A I am not in possession of that deposition; no, ma'am. (T. 26)
- (b) Q Assuming Mr. Johnson's testimony --
- A Assuming everything you just said is to be accurate?
- Q That's correct.
- A Yes, ma'am.
- Q Okay. And assuming Mr. Johnson's -- or assuming all those facts to be true with regard to Mr. Johnson's testimony as well as, you know, the 3 documentation that we've looked at here regarding his 2009 performance issues, as well as the issues right before his 5 work-related injury, wouldn't you agree that assuming all those facts to be true, if you

had to reevaluate these profiles, that again you would place Mr. Adickes in a different profile?

A It's possible. But if I have to give you a definitive opinion, I would say no, at this juncture.

Q What is that based on?

A Well, I think it's based on a couple of things. I would agree that as you present that information that it certainly begs for further consideration to move away from my opinion on that matter. I agree with that. But my definitive statement as to halting my opinion would be basically this with respect to it. I would want to know a little bit about the e-mail document that I have been given in which in 2012, I believe it's Mr. Johnson apparently sent an e-mail concerning Barry's (T. 38) performance. Also within the context of the performance appraisal that I believe was done the year before, and I may be messing up the dates, I hope not, where he apparently performed very well, if I'm not mistaken, in 2010. And there was a lot of very kind statements about him, if I remember correctly, from whoever the manager is, which in that case I believe would be Mr. Johnson, if I remember that correctly. And then you have a pop-up of his performance issue roughly one year following the injury within the context of that email. Now let me also say that in addition to that some of the additional evidence provided by Dr. Waid, as well as Dr. Mandel, would factor into that opinion, as well. I would state that there is perhaps additional evidence that might pull me off of that opinion. But at this point, it is still not fully compelling enough until I find some resolution as to the outcome of where that person is with that performance issue, also understanding that I can't necessarily make that determination. (T. 39). So what I would generally do is hold a conservative opinion until I get to see that evidence come to fruition in a final manner. So at the current state, I wouldn't change my opinion with respect to my impression of his employability. I would agree, though, that there is some additional evidence that may impact it and may potentially pull it off from where it is. But it hasn't -- in my opinion, it's not fully resolved because in addition to the issue with Johnson, you then have the stuff with Waid, you then have the stuff with Mandel. It's not enough for me to say, you know what, yeah, I think I need to switch my opinion. I agree that it is -- it gives me greater contemplation to that, but not enough for me to definitively move off of it at this point.

Q Okay. Well, knowing what you've heard about Mark Johnson's testimony where he testified that the reduction in force had absolutely nothing to do with performance issues or production or meeting quota, or anything like that, that it was solely a reduction of force, and it didn't even come from him, it came from a higher chain of command. Wouldn't you agree

- that just knowing that information alone would place him in your Profile A, which characterizes his departure from Phillips. (T. 41)
- Healthcare as an unfortunate personnel event completely unrelated to the March 2011 injury? It discounts a potential impact of any adverse functional deficits attributable to the accident and points to his length of employment at Phillips as support of such circumstances?
- A It could potentially move it towards that, that certainly would be a potential impact of that information. Whether or not it is the definitive 10 outcome --
- Q But you'll agree that if you assume Mr. Johnson's testimony to be accurate, it would place him within Profile A?
- A As a sole directive variable, exclusive of the other information; yes. (T. 42)
- (c) Q Wouldn't you agree that, based on information you have been presented with today, there is a likelihood that Mr. Adickes could also or could fall into Profile A?
- A There is a possibility of it; certainly. (T. 71).

Testimony Regarding Whether the Claimant has Cognitive Issues Resulting from his Work injury that has Impacted his Employment:

- (a) Q So now I'm just focused on the second part of your consideration, which was that Mr. Adickes continues to experience level functional compromise that precludes his ability to return to work -- or return to such work, I (T. 51) should say. You already stated in your report, the presence or absence of cognitive difficulties is of great importance with respect to his employability and you'll agree that the best way to test cognitive abilities or inabilities is through a neuropsych eval?
- A I'm sorry?
- Q The best way to test cognitive abilities or inabilities is through a neuropsych evaluation?
- A It's the best way we have, but I know of no other than performance-based assessments. But, yes; I think that's a fair statement.
- Q And that's why in your report you actually recommended that one be performed?
- A That's correct. (T. 52)
- Q Have you had any reason to disagree with any of his opinions?
- A No. I mean he's a neuropsychologist; I'm a vocational expert.
- Q So you would defer to him when it comes to an analysis of Mr. Adickes' neuropsychological abilities?
- A Yes ma'am. (T. 53)

- (b) Q Well, would you agree that falling in a high average range for his age and educational level when it comes to information processing speed and attentional regulation doesn't indicate any sort of cognitive deficiencies that would impact his performance at work?
- A I'm not so sure I would agree with that, either. I would say he's got a high average, high range, was at high average range with a T score of 59, on the 21 PASAT, but that there are -- if you drill down they are very subtle, perhaps subtle, perhaps not subtle. This is one of the concerns I have with these circumstances. I'm not sure to what point some of these individual citations of impaired performance or lower (T. 57). performance. I'm not sure to what degree they represent any functional manifestation. So in this circumstance, I would agree that he got the test scores that he got and that some are suggesting that he has capacities and is capable without deficits and impairments in those areas, and that some of the subtests suggest he has a weakness or perhaps a deficit. And I use the term "weakness" or "deficit," ma'am, because I don't know if it is a weakness in his cognitive functioning, in the way he analyzes, or if it represents a deficit derived from impairment. I don't know.
- Q Would you agree that his performance on tests that assessed his immediate memory was in the high average range? That's on page six, second paragraph. And he was superior when it came to delayed memory tests?
- A Yes ma'am; I agree that's what that says. (T. 58).
- (c) Q So how is it that, based on Dr. Waid's summary where he essentially performed all of these tests and found Mr. Adickes to be very high functioning when it comes to his neuropsychological capabilities, how is it that your takeaway from this report is that he's got deficits?
- A Because he cited them. He said certainly, in day-to-day pursuits, he likely experiences episodic (T. 60). forgetfulness due to the interfering effects of attention/executive difficulties and headaches.
- Q But you will agree that he didn't -- there is no test to perform on complaints of forgetfulness?
- A There is no test? Apparently, he did test him.
- Q He tested forgetfulness?
- A On issues of memory.
- Q And he found that --
- A Semantically, I'm not sure.
- Q -- the tests of -- the memory tests revealed intact immediate learning/memory as well as an efficient ability to retain and recall information once it is effectively learned?
- A Yes. I agree.

- Q I believe that what he stated is even though Mr. Adickes complains of forgetfulness, that his findings with regard to the memory show otherwise.
- A I agree. And further up on page eight, the third paragraph, he basically says he's got -- mild executive dysfunction appears to be present potentially (T. 61), affecting both cognitive and emotional demands.
- Q So your reading of this report is that Dr. Waid has determined him to be impaired?
- A Yes. And, generally -- but I would consider that from my impression, appears to be relatively mild in nature. But I would certainly defer to Dr. Waid, as anyone would expect that I would, as to the quantification thereof.
- Q Well, when Dr. Waid states here that Mr. Adickes is generally able to meet demands of higher reasoning/problem-solving tests, doesn't that indicate to you that there are no cognitive disabilities with regard to problem solving and higher reasoning that would affect his employability? (T. 62).
- A Not necessarily. I mean he met the demands of higher reasoning/problem solving tests. If that is your only measure of employability and in those specific two domains, then yes. Keep in mind the guy is working. It's not like he's not working.
- Q Right. But if you're referring to Dr. Waid, Dr. Waid found that he was -- Mr. Adickes was able to meet the demands of higher reasoning/problem-solving tests. He was functioning at a high average range of intellectual abilities. The neuropsychological evaluation provided favorable results. The assessment of his memory revealed that he had intact immediate memory and he was able to retain information. How can you look at all of those and state that he has any sort of disability which could (T. 63) affect his employability?
- A Because of what else Dr. Waid has stated.
- Q Because of the one sentence that states mild executive dysfunction?
- A Well, it's not the one sentence. There's additional sentences, as well. I think that for the most part he has a pretty decent neuropsych. I mean he's got good tests and demonstrates good functioning in a number of areas.
- Q Well, you would agree that he --
- A He has these --
- Q -- actually has favorable neuro -- if you're going to defer to Dr. Waid, it's actually a favorable neuropsych --
- A Yes.
- Q -- evaluation?
- A Yes.

- Q Okay. We can agree that the findings of Dr. Waid's neuropsychological evaluation actually contradicts the subjective complaints relayed to you by Mr. Adickes about his ability to function at work?
- A Possibly, and possibly not. It's hard to answer that question right now based upon the evidence in the record. (T. 64).
- (d) A Granted, he did well. I'm not trying to make him have greater dysfunction than what he has. **He did well on the neuropsych and he should be happy about that**, all right, but there's a lot more that needs to be drilled down out of this stuff. (T. 67).

South Carolina Workers' Compensation Commission
1333 Main Street, Suite 500
P.O. BOX 1715
Columbia, SC 29202-1715
(803) 737-5739 www.wcc.sc.gov



PRE-HEARING BRIEF
WCC File No: 1102937

Claimant's Name: Barry Simmons Adickes

Employer's Name: Phillips Healthcare

Address: 1137 Hummingbird Lane

Address: 3000 Minuteman Road

City: Rock Hill

State: SC Zip: 29732

City: Andover

State: MA

Zip: _____

Home Phone: (803) 328-0160

Work Phone: _____

Carrier: Fidelity & Guaranty Company

Preparer's Name: _____

William L. Smith II

Preparer's Phone #: _____

803-509-5839

A claim for workers' compensation benefits is made based on the following grounds:

☒ Injury ☐ Illness ☐ Repetitive Trauma

1. Compensation Rate: \$ 704.92

2. AWW: \$ 2,608.52

Date of Injury: 3/22/2011

3. Type of injury and body part(s): See attached

4. Facts in controversy:
See attached.

5. Legal issues involved:
See attached.

6. Unusual aspects: See attached.

7. Witnesses (designate if expert):*
See attached.

8. Exhibits:
See attached.

9. Medical evidence (Indicate report pursuant to R.67-612; deposition or appearance):
See attached.

10. Name, address, and specialty, if any, of the treating physician:
See attached.

11. Impairment rating(s); body part(s); physician and date of opinion:

12. I am amending my Form 50/51 in the following manner:

☒ Mediation

- ☐ a. Mediation is requested to be ordered pursuant to Reg. 67-1801 B.
☐ b. Mediation is required pursuant to Reg. 67-1802.
☐ c. Mediation is requested by consent of the Parties pursuant to Reg. 67-1803.
☒ d. Mediation has been conducted by a duly qualified mediator and resulted in an impasse.

Questions regarding mediation may be submitted to mediation@wcc.sc.gov.

I verify the contents of this form are accurate and true to the best of my knowledge.
I certify I have served this document pursuant to Reg. 67-211 by delivering a copy to

address Leader, Larkin & Hunter LLC 1037-D Chuck Dawley Blvd, #210 Mount Pleasant, SC 29464

Brooke A. Payne, Esq.

on the 6th day of January 2015

by first class postage

Signature: _____

Email: bsmith@csa-law.com

Date of hearing: 1/21/2015

Time needed for hearing: _____

Questions about the use of this form should be directed to the Jurisdictional Commissioner. Refer to Regulations 67-204 through 67-211 and Regulations 67-601 through 67-615; as well as Regulation 67-1801. File this form and proof of service on the opposing party according to R.67-611 and R.67-212. Do not send medical reports. * Commissioners reserve the right to admit expert witnesses at hearings.

WCC Form # 58
Revised 7/13

58

PRE-HEARING BRIEF

3. Type of injury: Claimant was in a very serious car accident resulting in traumatic brain injury; post concussive syndrome; traumatic headaches; cervical spine injury, and bilateral shoulder injuries resulting in surgery to the right shoulder for a grade IV SLAP tear of the right shoulder; a bucket handle tear of the biceps attachment with labral fraying. Recent MRI shows an intrasubstance rotator cuff tear and moderate to severe AC joint arthropathy.
4. Fact in Controversy: Claimant's traumatic brain injury, post concussive headaches and need for daily medication has resulted in a significant loss of earning capacity. Claimant had a pre-injury AWW of \$2,608.52. He lost his position at Philips after 21 years and is now earning only \$55,000 per year (post injury AWW is \$1,057.69). This residual earning capacity also is supported by the report and deposition of vocational expert, Joel Leonard.

Claimant's loss of executive function in his brain is documented by the neuropsychological report of Dr. Randy Waid and the deposition testimony of treating neurologist, Dr. Howard Mandell.

Claimant also requires ongoing medical care as outlined by Dr. Mandell (APA, p. 101) and Dr. Richard Park (APA, p. 52). Claimant may also require additional shoulder surgery in the future (APA, p. 77 and APA, p. 160).
5. Legal issues involved: Extent of permanent wage loss under §42-9-20; lump sum payment; Dodge medicals under §42-15-60.
6. Unusual aspects: Claimant's attorney very recently received the most recent shoulder MRI report and he has been attempting to schedule depositions of Dr. James Rentz or Dr. Jerry Barron. So far, neither have been available prior to hearing but attempts to schedule continue.
7. Witnesses: Claimant; Jeannie Adickes; de benne esse deposition of Dr. Howard Mandell (expert); de benne esse deposition of Joel Leonard, CVE (expert); possible de benne esse depositions of Dr. James Rentz or Dr. Jerry Barron (expert). Dr. Rentz may potentially be subpoenaed to hearing.
8. Exhibits: Wage records before and after accident; documents from personnel file including emails and personnel evaluations from before and after accident, photos of car involved in the accident.
9. Medical evidence: See attached sheet. APA – Dr. Randolph Waid, Joel Leonard, CVE, Dr. Richard Park, Dr. Jerry Barron, Dr. John Welshofer, Dr. Howard Mandell, Dr. Nicholas Tuttle, Dr. James Rentz, Piedmont Medical Center, Burke County EMS. De benne esse deposition of Dr. Howard Mandell and Joel Leonard (CVE).
- 10: Treating Physicians:

Dr. James Rentz
Dr. Richard Park
Dr. Howard Mandell
Dr. John Welshofer

Orthopedics (shoulders)
Pain management (cervical spine)
Neurologist (brain injury/headaches)
Neurosurgeon (brain/ cervical spine)

11. Impairment ratings:

Dr. John Welshofer

10% spine- 6/20/13 APA p. 82

Dr. Howard Mandell

15% brain- 11/01/12 APA p. 96

Concurred with 15% brain rating. (deposition
p. 42) 12/09/14

Shoulders have not yet been rated.

Joel Leonard opined in report and deposition that claimant's current earnings of \$1,057.69 are a reasonable and proper representation of his likely earning capacity subsequent to the March 2011 accident. APA p. 45

South Carolina Workers' Compensation Commission
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Columbia, SC 29202-1715
803-737-5675 www.wcc.sc.gov



WCC File #: 1102937
Carrier File #: 002380009116WC01
Carrier Code #: 01026
Employer FEIN #: 133429115

Claimant's Name: Barry Adickes (Respondent) SSN: [REDACTED] Employer's Name: Philips Healthcare (Appellant)
Address: 1137 Hummingbird Lane Address: 3000 Minuteman Road
City: Rock Hill State: SC Zip: 29732 City: Andover State: MA Zip: 01810
Home Phone: (864) 328-0150 Work Phone: () - Insurance Carrier: Gallagher Bassett Services (Appellant)
Preparer's Name: Brooke A. Payne Law Firm: Lueder, Larkin & Hunter, LLC Preparer's Phone #: (843) 353-0796

REQUEST FOR COMMISSION REVIEW

Request for Commission Review by ☐ Claimant ☒ Employer (check one) Date of Injury or Illness: 3/22/11

The undersigned makes application for review of the findings of the Commissioner in the above-captioned case. The request for review is based on the following grounds: (State the grounds of your appeal in the form of questions presented. Each question presented must contain a concise statement of one proposition of law or fact. Refer to evidence by title and exhibit number. Use additional pages if necessary).

[Please see Attached Addendum for Questions Presented]

SCWCC

SEP 08 2015

JUDICIAL

(Check one) Oral argument ☒ is ☐ is not requested. Appellant's request for oral argument is waived if not indicated on this form.

☐ Mediation

☐ Mediation is requested by consent of the Parties pursuant to Reg. 67-1803.

Questions regarding mediation may be submitted to mediation@wcc.sc.gov.

I certify I have served this document pursuant to Reg. 67-211 by delivering a copy to: William L. Smith
Address P.O. Box 12330, Columbia, SC 29211 on the 3rd day of September 2015, by X first class postage.

Brooke A. Payne
Preparer's Signature

Attorney for Appellants
Title

bpayne@luederlaw.com
Email

9/3/2015
Date

Questions about the use of this form should be directed to the Judicial Department at 803.737.5675 or appeals@wcc.sc.gov.

If the claimant appeals and is not represented by counsel, the Judicial Department will properly serve this form pursuant to Reg. 67-607 C. Pursuant to Reg. 67-205 and Reg. 701, the appeal must be postmarked no later than 14 days from the date of service of the Decision and Order of the Hearing Commissioner along with the filing fee. Attach a Form 32, if you are unable to pay the filing fee. Refer to Reg. 67-211 and Reg. 67-701 through 711.

BEFORE THE SOUTH CAROLINA
WORKERS' COMPENSATION COMMISSION
WCC FILE NO.: 1102937

BARRY ADICKES,

Respondent,

vs.

PHILIPS HEALTHCARE and FIDELITY
& GUARANTY INS. CO. C/O
GALLAGHER BASSETT
SERVICES, INC.,

Appellants.

**FORM 30 ADDENDUM:
QUESTIONS PRESENTED**

Form 30 Questions Presented:

- (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 the 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 the 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 also constitute 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.

**BEFORE THE SOUTH CAROLINA
WORKERS' COMPENSATION COMMISSION
WCC FILE NO.: 1102937**

BARRY ADICKES,	)	
	)	
Claimant,	)	
	)	
Respondent,	)	APPELLANTS' BRIEF TO
	)	THE FULL COMMISSION
vs.	)	
	)	
PHILIPS HEALTHCARE and FIDELITY,	)	
AND GUARANTEE INSURANCE CO.,	)	
	)	
	)	
Defendants,	)	
	)	
Appellants.	)	

STATEMENT OF THE CASE

A Form 50/51 Hearing was held before Commissioner Gene McCaskill ("the Single Commissioner") of the South Carolina Workers' Compensation Commission ("the Commission") on January 21, 2015, in Lancaster, South Carolina. The parties and/or their representatives appeared at the Hearing and presented evidence in the case.

At the Hearing, the Defendants ("the Appellants") took the position that the Respondent had not yet reached maximum medical improvement as to his bilateral shoulders and a hearing was premature. The Appellants also argued the Respondent had failed to show by a preponderance of the evidence that he had sustained a causally related wage loss based on the facts that the Respondent retained his position with the Employer for over two years and that he specifically requested a salary of \$55,000.00 per year with subsequent employer, Valued Relations Incorporated. Finally, the Respondents also argued that Section 42-9-20 of the South

Carolina Code of Laws must be applied by the plain language of the statute, and that any wage loss benefits shall not exceed three hundred forty (340) weeks from the date of accident.

The Claimant ("the Respondent") alleged that he sustained an injury by accident arising out of and in the course of his employment with the Employer on March 22, 2011, injuring his neck, bilateral shoulders, and head. The Respondent argued that he has reached MMI for all alleged injuries, including MMI as to his shoulders by way of an IME conducted by Dr. Jerry Barron on January 14, 2015. The Respondent further alleged that he has sustained cognitive impairment which has affected his ability to work, and as a result, has experienced a loss of wages and earning capacity.

After considering the testimony from the Respondent, Respondent's wife, and Employer Representative, Mark Johnson; reviewing the APA Submissions provided by the parties; and consideration of the applicable law, the Single Commissioner issued a Decision and Order dated August 27, 2015 (hereinafter "August 27, 2015 Decision and Order") in which the Single Commissioner found as fact and concluded as matters of law (in part pertaining to the request for review):

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.
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.
- ...
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. [John] 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 postconcussive (sic) symptomatology and headaches." (Claimant's APAs, page 96).
- ...
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 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.
- ...
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.)
- ...
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.
- ...
44. When I consider all of those opinions and 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 with Philips Healthcare.
46. While the Claimant did continue to work for the Employer for 2.5 years after the work-related accident, the 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 - \$1,057.69). 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 on 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.

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.

This claim now comes before the Full Commission of the South Carolina Workers' Compensation Commission on Appellants' Form 30, Request for Review of the Decision and Order issued by the Single Commissioner on August 27, 2015. Appellants assign errors in the Commissioner's Decision and Order in the findings of fact and conclusions of law that the Respondent has reached MMI as to his bilateral shoulder injuries. The Appellants also argue that the Single Commissioner erred when he found that the Respondent has sustained wage loss as a

result of his work accident in light of evidence presented showing that the Respondent has not suffered from a decreased earning capacity as a result of his work injury. Further, Appellants assign error in the Single Commissioner concluding as a matter of law that the Respondent is entitled to three hundred forty (340) weeks of benefits commencing on January 17, 2014, when the plain language of Section 42-9-20 states that, "[i]n no case shall the period covered by such compensation be greater than three hundred forty weeks *from the date of injury*," and case law evidences that permanent benefits are not commenced until after the Claimant reaches MMI. (emphasis added). Appellants assert that the greater weight of the evidence does not support the above findings and conclusions.

STANDARD OF REVIEW

S.C. Code Ann. §42-17-50 governs appeals from the Single Commissioner to the Full Commission. Section 42-17-50 statutorily empowers the Full Commission to review the Decisions and Orders of the Single Commissioner, and when appropriate; to make its own Findings of Fact and Rulings of Law. Brayboy v. Clark Heating Company, Inc., 306 S.C. 56, 409 S.E.2d 767 (1991). The Full Commission is the ultimate fact finder in Workers' Compensation cases and is not bound by the Single Commissioner's findings of fact. Ross v. American Red Cross, 298 S.C. 490, 381 S.E.2d 728 (1989). *See also* Hoxit v. Michelin Tire Corp., 304 S.C. 461, 405 S.E.2d 407 (1991) (Full Commission is fact finder and it is not within Supreme Court's province to reverse Commission's findings if they are supported by substantial evidence). Although it is logical for the Full Commission, which did not have the benefit of observing the witnesses, to give weight to the Single Commissioner's opinion, the Full Commission is empowered to make its own findings of fact and to reach its own conclusions of

law consistent or inconsistent with those of the Single Commissioner. McGuffin v. Schlumberger-Sangamo, 307 S.C. 184, 414 S.E.2d 162 (1992).

SUMMARY OF EVIDENCE

The Respondent earned a Bachelor's degree in Marketing from the University of South Carolina. (Hr. Tr. p. 9). Prior to the work-related accident on March 22, 2011, the Respondent worked in his position for over twenty years, approximately five of those years directly for Philips Healthcare after an acquisition. (Hr. Tr. pp. 10-11). Several years prior to the work accident, the Respondent transitioned into a new position where he was engaged in direct sales. (Hr. Tr. pp. 11-12). According to his personnel records and annual reviews, his sales were inadequate in 2009 and the Respondent was placed on a probationary period for his low sales volume. (See Ex. D). The Respondent eventually came out of the probationary period, but his sales volume remained low. (Ex. D, pp. 21, 24; Ex. 4, p. 199). The Respondent was involved in a single-car accident on March 22, 2011, in which he sustained injuries to his head, neck, and bilateral shoulders. He remained out of work until May 1, 2011 when he returned to his normal job duties. (Hr. Tr. p. 29).

As corporate restructuring was commonplace within Philips Healthcare, and the Respondent was transferred into a new sales position in January 2011, placing him under the direct supervision of Mark Johnson. (Hr. Tr. p. 122). Mr. Johnson testified that he had met the Respondent one time prior to the work injury, but that his reputation preceded him regarding his poor follow-through with clients and co-workers alike. (Hr. Tr. pp. 120-21, 124-25). As a result, prior to the work injury, Mr. Johnson suggested that the Respondent be assigned to a less complex sales position. (Hr. Tr. 123). Mr. Johnson went further testified that the Respondent was often slow to respond to emails and phone calls and he was able to witness first-hand the

performance issues which he had heard prior to taking over management of the Respondent. (Hr. Tr. 124-25).

The Respondent was involved in a car accident on March 21, 2011, wherein he sustained compensable injuries to his head, neck and bilateral shoulders. Dr. Welshofer assigned a 10% rating to his cervical spine on July 19, 2013 and a 15% rating to his brain on November 1, 2012. He underwent an MRI scan of his right shoulder on October 10, 2014 however, he never returned to his authorized treating physician, Dr. Rentz, following the scan. (APA 9, p. 160). Dr. Rentz has yet to place the Respondent at MMI or assign a PPD rating associated with his right shoulder. An IME physician, Dr. Jerry L. Barron, completed a questionnaire provided by Claimant's counsel, wherein he opined that the Respondent had sustained an impairment rating of 15% to the right shoulder, but also stated that the Respondent will "most probably eventually require additional surgery to the right shoulder." (APA 5, p. 77a).

According to Mr. Johnson's testimony, the Respondent did not display any different performance or behavioral issues following the accident. (Hr. Tr. p. 125). He continued to receive complaints about the Respondent's follow-up and performance after the March 22, 2011 accident. (Hr. Tr. p. 124). Specifically, Mr. Johnson testified that the Respondent was consistently in the "bottom third of the ranking" among fellow employees in his position. (Hr. Tr. p. 125). Mr. Johnson recalled challenging the Respondent in his work performance but that he was difficult to coach. (Hr. Tr. p. 129). He also testified about Respondent's disciplinary issues, one involving the improper use of his company credit card. (Hr. Tr. p. 130). 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. (Hr. Tr. p. 133-34).

Mr. Johnson remained the Respondent's direct supervisor for approximately three years

until Philips Healthcare underwent another corporate restructuring and the Respondent's position was eliminated. Mr. Johnson testified that he spoke with the Respondent in January 2014 and informed him that he was being let go as part of a Reduction in Force ("RIF"). (Hr. Tr. p. 126). Mr. Johnson is adamant that he 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, as there is a script that he is required to follow when informing an employee they are being let go as a result of a RIF which is resolute about not discussing performance issues. (Hr. Tr. pp. 126, 128). Mr. Johnson recalled that the Respondent requested a probationary period similar to his previous performance-related disciplinary actions; however, Mr. Johnson reiterated that the downsizing was company-wide and was solely the result of a restructuring. (Hr. Tr. p. 128).

The Respondent testified that he began looking for employment immediately after being released from Philips Healthcare. (Hr. Tr. p. 35). According to his testimony, the Respondent applied for employment with D-E-X, ZOLL, McKesson and Valued Relations, Inc. ("VRI"). (Hr. Tr. p. 68). Within the various applications and resumes submitted to potential employers, he portrayed himself as an "impactful" public speaker and communicator as well as being "expertly organized and focused. (Hr. Tr. p. 69; Ex. J, p. 76). Respondent disclosed to these potential employers that he was no longer employed by his prior employer because he had recently been involved in a "downsizing and his position was eliminated." (Ex. J, p. 72).

The Respondent testified that he was offered a position with VRI in January 2015, but did not immediately accept the position. (Hr. Tr. p. 36). He alleges that he was turned down for employment with McKesson due to his brain injury which was discovered during a prescription

medication questionnaire; however, subpoena responses from McKesson failed to show where the Respondent completed any such questionnaire or informed McKesson of any such injury. (Hr. Tr. pp. 75, 77; Ex. J).

When he eventually accepted the position with VRI in May 2015, the Respondent received a salary of \$55,000 annually with additional incentives and commissions for sales performance. In his official application for employment with VRI the Respondent specifically requested this salary. (Hr. Tr. p. 78; Ex F). At the time of the hearing, the Respondent had not completed any sales for VRI, thus he did not earn any additional compensation by way of commission. (Hr. Tr. p. 100). In January 2015 the Respondent was terminated from VRI due to his failure to complete any sales during his employment. (Hr. Tr. p. 39).

The Respondent underwent numerous evaluations related to his alleged neurological deficits, including a neuropsychological evaluation with Dr. Randy Waid on October 7, 2014. (See APA 1). In this evaluation, Dr. Waid concluded that the Respondent had a high range of intellectual ability. (APA 1, p. 8). Similarly, the Respondent underwent a vocational evaluation with Joel Leonard on August 25, 2014. (See APA 3). Mr. Leonard opined that the Claimant was likely limited in his employment options and should not expect to earn more than he was earning (at the time) with VRI; however, the Respondent did not accurately report his prior work history, especially as to his poor performance records prior to his March 22, 2011 work injury, which was discovered by Mr. Leonard during his subsequent deposition. (Ex. K, p. 22). According to Mr. Leonard's report, the Respondent had never had any performance issues in the past, allowing him to erroneously conclude that the Respondent's vocational aptitude was limited by his alleged psychological injuries. In fact, the Respondent testified that he did not inform Mr. Leonard of his 2010 Performance Improvement Plan, stating that the topic was not brought up during the

evaluation. (Hr. Tr. p. 50). Moreover, Mr. Leonard concluded in his report that the Respondent's reduction in wages with VRI was due to his work injury based on the Respondent's statements that he was terminated from Philips due to poor work performance and that his alleged cognitive disabilities arose from his work injuries. (APA 3, pp. 44-45). With respect to the Respondent's overall neuropsychological condition, Mr. Leonard deferred to a neuropsychological evaluation (APA 3, p. 46), yet largely disregarded Dr. Waid's report during his deposition testimony. (Ex. K, p. 19).

QUESTIONS PRESENTED

1. Whether the Single Commissioner erred when he determined that the Respondent had reached maximum medical improvement for all accepted injuries, specifically the Claimant's right shoulder, when the preponderance of evidence in the record does not support that finding?
2. Whether the Single Commissioner erred when he awarded permanent wage loss benefits to the Respondent for three hundred forty (340) weeks commencing on January 17, 2014, when the preponderance of evidence in the record does not support that finding?

ARGUMENT

D) THE PREPONDERANCE OF EVIDENCE IN THE RECORD SHOWS THAT RESPONDENT HAS NOT REACHED MMI AS TO ALL ACCEPTED INJURIES, SO PERMANENCY IS PREMATURE.

The Respondent has proposed that he has reached maximum medical improvement as to all of his accepted injuries, including his right shoulder, which he claims is supported by a medical questionnaire completed by Dr. Barron on January 14, 2015. Appellants contend that the Respondent has not yet reached MMI for his right shoulder, as demonstrated by the lack of rating from the ATP, Dr. Rentz, and Dr. Barron's opinion that the Respondent will require

additional surgery. The Single Commissioner found that the Respondent had reached MMI for his right shoulder, citing Dr. Barron's medical questionnaire as supporting evidence (Order, Findings of Fact ¶5); the Appellants maintain that this finding is incorrect and also constitutes an error of law.

a) The 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 (1995). (emphasis added). However, it is well established that the fact that a claimant has reached MMI does not preclude a finding that the claimant may still require additional medical care or treatment. Dodge v. Brucoli, Clark, Layman, Inc., 334 S.C. 574, 514 S.E.2d 593 (Ct. App. 1999). In making the determination as to whether additional medical treatment is supplemental to a determination of MMI or whether it prevents MMI, the Court must consider whether, "additional medical treatment may improve [a Claimant's] overall quality of life and ability to cope, but not otherwise impact the finding of maximum medical improvement." Pearson v. JPS Converter & Indus. Corp., 327 S.C. 393, 397, 489 S.E.2d 219, 221 (Ct. App. 1997).

Ultimately, MMI is a factual determination left to the discretion of the Appellate Panel. Gadson v. Mikasa Corp., 368 S.C. 214, 224, 628 S.E.2d 262, 268 (2006). Further, "[a]ny disagreements in the evidence are to be resolved exclusively by the Appellate Panel. Martin v. Rapid Plumbing, 369 S.C. 278, 278, 631 S.E.2d 547, 553 (Ct. App. 2006) (citing Tiller v. Nat'l Health Care Ctr. of Sumter, 334 S.C. 333, 338, 513 S.E.2d 843, 845 (1999) (instructing that the

Appellate Panel's findings of fact are conclusive as to conflicting evidence, whether from different witnesses or from the same witness. (emphasis added)).

The award of certain additional medical treatment has been upheld when the prescribed treatment tends to lessen the period of disability, and to at least maintain the Claimant's degree of physical impairment. Lee v. Harborside Cafe, 350 S.C. 74, 81, 564 S.E.2d 354, 358 (Ct. App. 2002); See also Scruggs v. Tuscarora Yarns, Inc., 294 S.C. 47, 50, 362 S.E.2d 319, 321 (Ct. App. 1987) (claimant awarded continuation of physical therapy after determination of MMI); O'Banner, 319 S.C. 24, 28, 459 S.E.2d 324, 327 (Ct. App. 1995) (renewing the claimant's prescription for pain killers was not inconsistent with MMI). However, not all determinations of MMI can be sustained when additional treatment is necessary. In Hall v. United Rentals, the claimant had been released at MMI by his authorized treating physician in relation to his back injury with future medical care to include pain medication and epidural spinal injections. [371 S.C. 69, 636 S.E.2d 876 (2006)]. The authorized treating physician opined that the claimant had exhausted all of his treatment options and was not a candidate for surgery. (Id. at 76.). After his release, the claimant received a second opinion from a physician who recommended surgery, which was carried out successfully and with significant improvements in the Claimant's pain. (Id. at 77.). The Claimant sought payment of his surgery by the carrier, who had declined additional treatment in light of his previous release at MMI. The Court found that the claimant's significant pain relief from surgery was sufficient evidence to find that the claimant had not reached MMI initially. (Id. at 89.) In support of its opinion, the Court discussed that it had been presented with conflicting expert evidence, yet the evidence as a whole supported the conclusion that the claimant had not reached MMI prior to the recommended surgery. (Id. at 90.).

Similarly, in Gadson v. Mikasa Corporation, the South Carolina Supreme Court 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 (2006)]. In Gadson, the Claimant's physician specifically addressed surgical intervention and opined that she was not a candidate, and that the continued treatment was "nothing more than maintenance care to maintain Gadson's condition." (Id.) The distinction between maintenance care and surgery allow the Commission to consider the two types of future treatment as distinct from one another. The Appellants argue that, while maintenance care does not prohibit a determination of MMI, surgical treatment belongs in a separate category as it is a procedure used to attain MMI, not to maintain it, and to lessen the degree of physical impairment.

In the present case, the Commission has been presented conflicting expert evidence albeit contained within a single document. In Dr. Barron's report, he opines that the Respondent has sustained a permanent impairment rating to his right shoulder of 15%, which the Single Commissioner has interpreted as a statement of MMI. However, within the same questionnaire response, Dr. Barron also opines that the Respondent will "most probably eventually require additional surgery to the right shoulder." The Appellants contend that Dr. Barron is not in a position to declare the Respondent at MMI nor to assign impairment ratings as he is not the Claimant's authorized treating physician. Further, Dr. Barron has not unequivocally stated that the Respondent has reached MMI; in fact, he has contradicted himself by also stating that the Respondent will require surgery to his right shoulder.

Although it has been well established that additional medical treatment does not necessarily impede a determination of MMI, case law affirming that issue has largely consisted

of ongoing physical therapy, prescription medications, epidural spinal injections, and other pain management services which allow a claimant to enjoy a stabilized level of disability rather than an invasive surgery which is expected to correct a physical injury. As such, the Appellants argue that the medical questionnaire completed by Dr. Barron, being the only evidence to support MMI as to the Respondent's right shoulder, does not rise to the level of substantial evidence to support the single Commissioner's determination of MMI. The Appellants respectfully request that the Full Commission reverse the Decision and Order wherein the single Commissioner determined that the Respondent had reached MMI as to his right shoulder solely based on the opinion of Dr. Barron.

b) Permanency Benefits Cannot be Awarded At This Time.

The South Carolina Supreme Court has held that, "[e]ssentially, 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 (MS), 376 S.C. 23, 29, 655 S.E.2d 482, 485 (2007) (citing Smith v. NCCI, Inc., 369 S.C. 236, 631 S.E.2d 268 (Ct. App. 2006)). This schedule of benefits places a definite milestone at MMI, where permanent benefits, whether under § 42-9-10, § 42-9-20, or § 42-9-30, may be appropriately awarded by the Commission. Prior to a claimant reaching MMI for all of his accepted injuries, he is only entitled to temporary benefits, if applicable.

In Curiel, the Claimant sustained an injury to his eye after being struck while working. Id. at 26. The claimant was eventually terminated for falsely exaggerating his vision, further complicating his medical treatment. (Id. at 30.) The Supreme Court affirmed the single

~~Commissioner's ruling that the Claimant was not entitled to temporary total disability benefits~~
between his date of termination and MMI. (*Id.* at 30–31.) That Court further established the continuum of benefits, where permanent benefits are not proper until a claimant has reached MMI. (*Id.* at 29.)

In the case *sub judice*, the Appellants argue that the Respondent has yet to reach MMI for his right shoulder injury, as discussed *supra*. The Respondent has abandoned treatment with his authorized treating physician, Dr. Rentz, who conducted an MRI scan on his right shoulder on October 10, 2014, yet the Respondent did not return for further treatment or evaluation. Rather, the Respondent presented his MRI scan results to an IME physician, Dr. Barron, who assigned an impairment rating, yet did not definitively state that he had reached MMI. In direct contradiction to a declaration of MMI, Dr. Barron opined that the Respondent will “most probably eventually require additional surgery to his right shoulder.” As a result, the Respondent has yet to achieve MMI as to his right shoulder, and pursuant to the ruling in *Curiel*, an award of permanent disability is premature. The Appellants respectfully request that the Commission reverse the Order of the single Commissioner in light of the Claimant’s failure to achieve MMI in relation to all of his injuries.

II) ALTERNATIVELY, IF THE RESPONDENT IS DEEMED TO BE AT MMI, HE IS NOT ENTITLED TO WAGE LOSS BENEFITS

The Commissioner found that the Respondent is entitled to wage loss benefits attributable to his work injury, finding that the Respondent suffered a cognitive deficiency as the result of his work-related accident of March 22, 2011. (Order, Findings of Fact ¶ 44). He further found that the Respondent’s impact of that deficiency is limited to his executive functioning, which is determinative of the Respondent’s ability to hold employment similar to his employment at Philips Healthcare. (*Id.* at ¶ 45). The Commissioner found that “the Respondent is clearly not as

he was before this work-related accident,” and he is unable to find comparable employment as a result. (Id. at ¶¶47-48). As such, the Commissioner ordered the Employer/Insurer to pay \$704.92 per week for three hundred forty weeks commencing January 17, 2014. (Id. at Order ¶1).

As the Full Commission is aware, 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.” 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.”

With regard to the award of wage loss benefits, the Commissioner erred in (1) finding the Respondent to be entitled to wage loss benefits, (2) ordering the benefits to commence the date of his termination from Philips Healthcare and (3) ordering the benefits to be paid for a period of 340 weeks.

a) The Respondent Did Not Meet His Burden of Proving that He Has Suffered an Incapacity to Work Resulting From the Work-Related Injury.

(i) The Respondent Earned Higher Wages Immediately Thereafter His Work Injury.

The most compelling evidence on the Respondent’s ability to earn wages is his actual history of having done so. The Respondent returned to work on May 1, 2011 and remained in his pre-injury position until January 2014 when his position was eliminated as part of a reduction in force. During this 2.5 year period, the Respondent’s wages were higher than pre-injury, which is corroborated by the Respondent’s actual earnings. During the three years preceding the March

22, 2011 work accident, the Respondent averaged approximately \$85,354 per year, compared to the approximately \$108,876 per year that he earned from 2011–2013.

Similar to the Floyd v. City of Charleston claim, the 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. [287 S.C. 474 (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. The Claimant passed the Air Force physical entrance exam and entered the reserves in April 1981, completing basic training. In January 1982, he opened his own part-time washer-dryer repair service. During this time, Floyd remained employed by the fire department. In April 1982, he returned to a physician that had previously treated him, and was diagnosed with degenerative disc disease with spur formation. 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. 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. Moreover, 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.

(ii) The Respondent's Termination Was Not a Result of Work Injury.

Mr. Johnson remained the Respondent's supervisor when he returned following the injury, and testified that he spoke with the Respondent in January 2014 and informed him that he was being let go as part of a reduction in force. He specified that the reduction in force was

commenced at a higher corporate level and that the Respondent's termination was not related to
performance or any other motive. Mr. Johnson recalled that the Respondent requested a probationary period similar to his previous performance related disciplinary actions; however, Mr. Johnson reiterated that the downsizing was company-wide and was solely the result of a restructuring, not performance.

(iii) Respondent Failed to Perform a Diligent Job Search.

The Respondent failed to make reasonable efforts to obtain gainful employment after his employment with Philips ended due to a reduction in force. He was unemployed for five months thereafter. 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, 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 (1967).

The Respondent testified that he attempted to obtain employment with many different employers, stating that he began his employment search within an hour after learning of the reduction in force. In contrast to this testimony, he was only able to produce the names of four companies to which he applied: McKesson, Zoll, D-E-X and VRI. The position to which he applied at McKesson was at a higher corporate level than his previous position with Philips Healthcare. By his own admission, in his resume and application responses, the Respondent represented to McKesson that he was a capable individual and an impactful public speaker, as well as being "expertly organized and focused." The Respondent testified that he did not get

~~offered employment with McKesson due to a medical questionnaire wherein he alleged that he~~
declared Nadaloi as his headache medication; however, subpoena responses from McKesson failed to produce any such medical questionnaire despite ample documents related to his application process and subsequent interviews. Subpoena responses from ZOLL failed to provide any documentation of the Respondent. Moreover, the Respondent admitted that he was offered a position with Valued Relations, Inc. ("VRI") in January 2015, but did not immediately accept the position. The evidence above proves that the Respondent did not make a reasonable effort to obtain employment and that his efforts failed due to his handicap; thus, the Appellants argue that he is unable to prove entitlement to wage loss benefits.

(iv) Respondent's Subsequent Decrease in Wages Are Not a Result of His Work Injury.

Prior to his work accident on March 22, 2011, the Respondent had significant performance issues related to work performance. Specifically, in 2009, he was placed on a Performance Improvement Plan. During frequent follow-up correspondences with his supervisors, it is apparent that the Respondent struggled with performance, failing to meet his sales quota in October 2009 and failure to achieve 65% of his goal five times in a six-month period. He did eventually come out of the PIP, but his supervisors did not believe that his job was right for him. The Respondent continued to exhibit poor performance following his March 22, 2011 accident, but his performance was merely a "resurfacing" of his prior issues from 2010 according to Mr. Johnson.

Despite the Respondent's increase in average wages after the accident, Mr. Johnson testified that he continued to receive complaints about the Respondent's follow-up and performance. According to Mr. Johnson's credible testimony, the Respondent did not display any performance or behavioral differences following the accident, indicating no change in his

cognitive abilities resulting from the work injury. Specifically, Mr. Johnson testified that the Respondent was consistently in the "bottom third of the ranking" among fellow employees in his position. Mr. Johnson recalled challenging the Respondent in his work performance but that he was difficult to coach. According to Mr. Johnson, during that 2.5 year period, the Respondent did not mention any of the alleged symptoms that he relates to his head injury including headaches, lack of focus, or any other cognitive impairments.

Most importantly, the Respondent specifically requested the salary he was given at VRI. The Single Commissioner erroneously found that there is no evidence in the record that the Respondent would choose to self-limit as to his earning potential. (Order, Findings of Fact ¶47). In contrast, on his application for VRI, next to "requested salary," the Respondent specifically indicated \$55K.

(v) There is No Objective Evidence that his Work Injury Impacted his Earning Capacity.

(i) The Respondent Portrayed Himself as a Proficient Executive When Applying for Jobs.

The Respondent has a Bachelor's degree of Science from the University of South Carolina in Marketing. (Hr. Tr. p. 9). In addition, he has had over twenty years' experience in direct sales and earned a presence achievement award eight times earlier in his career. (Hr. Tr. pp. 10, 73). In addition to his education and experience, the Respondent portrayed himself as an impactful public speaker and as "expertly organized and focused" to subsequent employers. (Hr. Tr. p. 69, 70).

**(ii) Dr. Randy Waid's Neuropsychological Evaluation Evidences
that the Respondent Suffers From No Cognitive Deficits.**

The Single Commissioner found that in many of the measurements in Dr. Waid's report, the Respondent scored quite high, while others indicated deficits. (Decision and Order, Findings of Fact ¶35) Even so, he found that the impact of the Respondent's deficiency is limited to his executive functioning. (*Id.* at ¶45). The Single Commissioner further found that it is the executive functioning that is determinative of the Respondent's ability to hold employment for Philips Healthcare. (*Id.*).

In contrast to the Commissioner's findings, Dr. Waid found the Respondent to be neuropsychologically intact, as his detailed 9-page report thoroughly tested and examined all of the potential cognitive deficits, which determined that he was functioning in the high average range of intellectual abilities, 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. Further, 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." Dr. Waid also found the Respondent to have average to above-average performance on most of the tests that were performed during his evaluation. Most notably, he found that the Respondent has a high average IQ, and performed within the 90th percentile on many occasions, particularly when reasoning, computation, and memory were involved. In sum, Dr. Waid determined that the Respondent's neuropsychological evaluation provided favorable results, that the Respondent's brain behavior functioning is intact and that Respondent made a good recovery from his head and other injuries.

**(iii) The Vocational Report by Mr. Joel Leonard Should be
Granted No Persuasive Weight.**

The Single Commissioner found that Mr. Leonard had to rely on the subjective complaints of the Respondent in the absence of a neuropsychological evaluation. (Decision and Order, Findings of Fact ¶ 34). Not only does this evidence that the Single Commissioner did not even read Mr. Leonard's deposition transcript tendered into evidence which evidenced that Mr. Leonard was provided with the report and questioned about same, but the Single Commissioner also erred in noting that "those complaints are, for the most part, congruent with the findings of the neuropsychological report."

Mr. Leonard concluded his report by finding that the Respondent's reduction in wages with his subsequent employer is due to his work injury based on: (1) Mr. Leonard's understanding that the Respondent was terminated from Philips due to his poor work performance, and (2) Mr. Leonard's understanding of the Respondent's cognitive disabilities arising from his work injury. Mr. Leonard's report stated that he would defer to the findings of a neuropsychologist and any additional information about his termination, but he went out of his way when deposed to disregard or misinterpret those findings when presented to him.

As reflected in the vocational report, the Respondent informed Mr. Leonard that he had no performance issues prior to his work injury; however, Mr. Leonard was subsequently presented with his Philips employment file at his deposition. Mr. Leonard agreed that the personnel documentation contradicted the information relayed by the Respondent. Further, Mr. Leonard was presented with the deposition testimony of Mark Johnson, indicating that the Respondent was terminated from the Employer due to a Reduction in Force. Even in the face of contradictory evidence, Mr. Leonard refused to take this additional information into account and re-evaluate whether the Respondent was better suited under a different profile.

Moreover, Mr. Leonard agreed that the best way to test cognitive abilities or inabilities is through a neuropsychological test and also admitted that he would defer to Dr. Waid's opinions in this regard, yet he went out of his way to argue around Dr. Waid's actual findings. Mr. Leonard testified that his overall impression of Dr. Waid's report was that the Respondent has a "measurable or discernable degree of functional deficit." Further, he testified that "Dr. Waid's report basically attended to some attention and concentration, persistence issues," which is an intentional misrepresentation of the findings. Although Mr. Leonard agreed to the favorable results in each individual tests (memory, IQ, reasoning abilities, functioning abilities, etc.), he remained unyielding that the Respondent suffered from forgetfulness and attention issues, even though these issues were tested and no deficits were shown. No doubt, Mr. Leonard was grasping at straws to maintain his former opinion regardless of the actual facts; as such, his opinion as to the Respondent's vocational abilities should be disregarded.

Based on the preponderance of the evidence contained in the record, the Appellants request that the Full Commission reverse the Single Commissioner's determination that the Respondent is entitled to wage loss benefits.

b) If Respondent is Found to be Entitled to Wage Loss Benefits, his Benefits would Not Commence Until the Date of MMI for All Injuries.

The Single Commissioner erred in concluding that the Respondent is entitled to wage loss benefits commencing January 17, 2014, the date that the Respondent's wage loss began. (Decision and Order, Conclusions of Law ¶ 2). As discussed above, the Supreme Court in Curiel v. Environmental Management Services (MS) 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, 655 S.E.2d 482, 485 (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 would not commence until the date of MMI.

Here, although the Single Commissioner did not specify a date of MMI, but 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, in contrast to the Single Commissioner's Award, the wage loss award commences as of the date of MMI.

c) If Respondent is Found to be Entitled to Wage Loss Benefits, he Would Not Be Entitled to a Full 340 Weeks of Benefits.

The Single Commissioner erred in concluding that "the Respondent 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 Respondent is awarded \$704.92 a week for 340 weeks." (Order, Conclusions of Law, ¶ 2, with emphasis).

As the Full Commission is aware, SC Code Ann § 42-9-20 states that "In no case shall the period covered by such compensation be greater than three hundred forty weeks from the date of injury." 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). Under the plain meaning rule, it is not the court's place to change the meaning of a clear and unambiguous statute. In re Vincent J., 333 S.C. 233, 509 S.E.2d 261 (1998). 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 (2003).

Here, SC 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 is against the rules of construction. The Respondent was injured on March 22, 2011, making 340 weeks from that date fall on September 26, 2017. Should the Full Commission uphold the Single Commissioner's finding that the Respondent reached MMI as of the date of Dr. Barron's IME (January 14, 2015) and is entitled to wage loss benefits, pursuant to the statute the Respondent would only be entitled to wage loss benefits for an additional 141 weeks, amounting to \$96,729.12 (\$704.92 x 137.22 commuted weeks)

CONCLUSION

For the foregoing reasons, and in light of the accepted and established standard for review for review of the Single Commissioner's Decision and Order by the Full Commission, the Appellants respectfully request the Full Commission reverse and vacate the Single Commissioner's August 27, 2015 Decision and Order.

[signature on following page]

Respectfully submitted,

/s/ Brooke A. Payne

Brooke A. Payne

SC Bar #: 81085

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November 11, 2015

BEFORE THE SOUTH CAROLINA

WORKERS' COMPENSATION COMMISSION

W.C.C. FILE NO.: 1102937

BARRY ADICKES,)
)
 Employee,)
 Claimant/Respondent,)
)
 vs.)
)
 PHILIPS HEALTHCARE.,)
)
 Employer,)
)
 and)
)
 FIDELITY AND GUARANTEE)
 INSURANCE CO.,)
)
 Carrier,)
 Defendants/Appellants)
)
)

MEMORANDUM ON BEHALF OF
CLAIMANT/RESPONDENT TO THE
FULL COMMISSION

STATEMENT OF THE CASE

This claim came before Honorable Commissioner Gene McCaskill (Single Commissioner) pursuant to Form 50 filed by the Claimant, Mr. Barry Adickes. The Claimant suffered an admittedly compensable accident on March 22, 2011, when he had a motor vehicle accident whereby his car went off the side of a mountain on a winding road while employed with Philips Healthcare. As a result of his accident, Claimant suffered from a closed head injury (brain), bilateral shoulder injuries, and a cervical spine injury. Accordingly, Claimant alleged entitlement to significant wage loss award pursuant to §42-9-20 commencing from January 17, 2014 when he was terminated from Philips Healthcare. Claimant further alleged he reached

maximum medical improvement but will require ongoing Dodge medical care for his shoulder, neck and post-traumatic headaches as outlined by his physicians. Alternatively, if permanent wage loss was not found, Claimant alleged very significant permanent partial disability to his shoulders, spine and brain.

Philips Healthcare and their carrier, Fidelity and Guarantee Insurance Company, (Defendants), denied that Claimant had reached maximum medical improvement as to his bilateral shoulders and a hearing was premature. Defendants further denied that Claimant had sustained a permanent loss of wage earning capacity as a result of his work-related injuries. Defendants further argued that if the case was awarded on a wage loss basis, that the 340 weeks should commence as of the date of injury. Defendants further argued that if the case was awarded as a specific disability, there was no disability to the shoulders.

A hearing on these issues was held before the Single Commissioner on January 21, 2015 in which all parties were present, medical evidence was submitted and testimony was given. The parties stipulated that jurisdiction and venue were proper in the case. The parties further stipulated to an average weekly wage of \$2,608.52 with a corresponding compensation rate of \$704.92. After considering the testimony from Claimant, Claimant's wife, and Employer Representative, Mark Johnson; reviewing the APA Submissions and Exhibits provided by both parties; and consideration of the applicable law, the Single Commissioner issued a Decision and Order dated August 27, 2017 (Order) in which the Single Commissioner listed his Findings 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.
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 also 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 on 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 APA, page 82)

17. As to his brain injury, Dr. Welshofer opines, "I believe the patient's injury was a SOUTH CAROLINA injury based on the AMA guidelines. I would grade him at a permanent impairment rating of 15% of the brain for continuous postconcussive (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 the 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 of forgetfulness on daily pursuits, mild executive dysfunction, shorter fuse, easier frustrations....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 has 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 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 the 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 3/22/11 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 experts 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 a 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 - \$1,057.69). 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.

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 \$1033.94. 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 the 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 medication 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.

This claim now comes before the Full Commission of the South Carolina Workers'

Compensation Commission on Defendants' Form 30, Request for Review of the Decision and Order issued by the Single Commissioner on August 27, 2015. Defendants allege the Single Commissioner erred in finding MMI to the bilateral shoulders, finding that Claimant sustained wage loss as a result of his work accident, concluding as a matter of law that Claimant is entitled to three hundred forty (340) weeks of benefits commencing on January 17, 2014.

SUMMARY OF EVIDENCE

The Claimant is a fifty three (53) year old father of four, with a bachelor of science degree in marketing management from the University of South Carolina. His work history includes working in sales at Philips (as well as the predecessor company Philips acquired in 2006) for nearly twenty-one (21) years. His work in sales and distribution required loading products into and out of a car as well as spending many hours driving and flying.

Claimant testified that while traveling as a general manager of distribution, he was involved in a work-related automobile accident in which he approached a sharp curve in the road too quickly causing his car to flip off the road into a mountainous ravine. (Hr. Tr., p.16). Claimant injured both of his shoulders, his neck and also suffered a traumatic brain injury. Claimant testified that once he regained consciousness, he called emergency services. (Hr. Tr., pp. 16-17). The Burke County EMS team assembled gear and traversed down a 75-100 foot embankment to reach Claimant. With help, Claimant was able to escape the vehicle and get up the embankment. Claimant refused transport from the EMS and his wife picked him up that night and took him back to his home in Rock Hill, South Carolina to seek medical treatment. (Hr. Tr., pp. 17-19).

~~Upon returning home, Claimant went to his family doctor, Dr. Nicholas Tuttle for~~
treatment. From there, Claimant was treated by Dr. James Rentz and ultimately underwent
shoulder surgery with Dr. Rentz. Claimant also suffered significant neck pain as well as post
concussive headaches. Since that time, Claimant has primarily been treated by Dr. Rentz for his
shoulder injuries, by Dr. Howard Mandell for his headaches and post concussive syndrome, and
by Dr. Richard Park for his cervical spine. Claimant has undergone a variety of treatments
including nerve root ablations by Dr. Park and a host of medication therapy by Dr. Mandell. (Hr.
Tr., pp. 21-29).

As mentioned earlier, Claimant worked for Philips and the company that Philips
purchased for twenty-one (21) years. In 2008, Claimant worked as a product sales specialist for
the same division of Philips. He continued in that position until he was transitioned into a new
position in 2011. Shortly after taking the new position in January of 2011, Claimant suffered this
injury on March 22, 2011. Claimant testified that he had performed well in his job prior to the
injury. There was a period in 2009 when he was placed on a PIP (personal improvement
program) because sales were low. However, Claimant testified that this was during the height of
the recession and they had also experienced difficulty getting product during that time. (Hr. Tr.,
pp. 11-13). Claimant's performance evaluations back up this testimony. (Claimant's Exhibits
No.'s 2-5). In the calendar year prior to this injury, Claimant earned over \$128,000. (Hr. Tr., p.
14; Defendant's Exhibit B, p. 11). However, Claimant's subsequent wages decreased every year
after the date of injury. (Hr. Tr., pp. 31-32).

Claimant testified that following his injury he had great difficulty with headaches.
Migraine headaches would appear that put Claimant out of commission for twenty-four (24) to
forty-eight (48) hours. These headaches occurred every four to eight weeks and Claimant wife

~~kept a headache diary of when the headaches occurred. (Hr. Tr., pp. 25-28). Claimant also~~

testified that he began noticing other cognitive problems that he tried to shrug off at first.

Claimant testified that he experiences additional cognitive problems such as forgetfulness and an inability to process thoughts. For example, composing an email takes him much longer that it did previously. (Hr. Tr., pp. 28-29). Claimant also has to deal with his headaches as well as chronic neck pain and shoulder pain. Claimant testified that he has to have nerve root ablations done every six months to a year in his neck, has to take medication daily for his migraine headaches as well as break through medication when headaches occur, and knows that he will require an additional surgery on his right shoulder in the future.

Claimant was out of work during the time that he recuperated from his shoulder surgery. He returned to work and encountered the difficulties noted above. Claimant was terminated on January 17, 2014. The termination was a part of a companywide layoff but Claimant testified that he was told that it was, in part, performance related. (Hr. Tr., pp. 32-34). The personnel evaluations showed that Claimant was given glowing comments in the years prior to the accident, but that those evaluations became worse following his accident. (Claimant's Exhibits, No.'s 2-5). Claimant was out of work completely for a period of time while looking for work but eventually obtained a job with VRI in which he earned \$55,000 a year. The application submitted by the Defendants showed that Claimant's requested salary was \$55,000. However, Claimant testified that he put that number on the job application because he was told that was what the job paid when he applied and not because that was the salary he wanted. (Hr. Tr., pp. 36-37). Shortly before the hearing, Claimant lost his job with VRI and he was unemployed at the time of the hearing. (Hr. Tr., pp. 38-39).

~~Jeanie Adickes, wife of the Claimant, testified. She testified that she and the claimant~~
have been married for twenty-eight (28) years and she had an opportunity to observe him on a daily basis during that time. Prior to his injury, she testified the Claimant was able to do his job, multi-task and never had headaches. (Hr. Tr., pp. 102-103). However, following his accident their life changed. Claimant takes medication on a daily basis and has trouble with focus, memory and multi-tasking. She testified that it takes much longer for him to get things done. (Hr. Tr., p. 103). However, she also testified that Claimant is a stoic individual and not a complainer. To the contrary, he minimizes his issues. (Id.). She testified that she attended doctor's appointments with the Claimant because his clarity wasn't there. (Id.). She testified that Claimant's severe headaches occur about anywhere from four to eight weeks depending on his medications and that the medications have to be tweaked from time to time. (Hr. Tr., pp. 103-104). She testified that she did keep a headache calendar, which was helpful for Dr. Mandell. She testified that when a headache comes on she can tell that it is coming and Claimant has to give himself an injection, which usually requires him to sleep, then he has to repeat the injection. (Hr. Tr., p. 106). The following day after one of his headaches is he is very sluggish and foggy and often has a rebound headache. He averaged being out of commission for two to four days on average after his headaches. (Hr. Tr., p. 107). She further testified that Claimant has trouble with his short term memory, focus and patience. She also testified that Claimant has little patience, which is a great change from prior to the accident. (Hr. Tr., p. 109).

Mark Johnson, regional manager for Philips Healthcare, testified on behalf of Defendants. He testified that at the time of the accident that he was claimant's supervisor. He did not know the Claimant well before he became his supervisor, but knew of him. He testified that Claimant had a history of poor follow-up with team members and an overall lack of urgency.

(Hr. Tr., p. 124). He testified that during the time the Claimant reported to him from January 1, 2011 until his termination in 2014 that Claimant received middle of the road performance reviews and was not a top performer. He indicated that Claimant was in the bottom third of the ranking but was doing an adequate job. (Hr. Tr., p. 125). He testified that Claimant was terminated as part of a reduction in force and that he did not tell Claimant that he was being terminated in part because of performance. (Hr. Tr., pp. 125-129).

Mr. Johnson testified that Claimant did report to him that he was still having headaches from time to time immediately after the accident. However, he indicated that it was not routine and that over time he did not recall hearing further about the headaches. (Hr. Tr., pp. 133-134).

On cross examination, Mr. Johnson indicated that Claimant was transferred to his team on January 1, 2011 and that he had only supervised Claimant for a period of eleven (11) weeks prior to his accident. (Hr. Tr., pp. 139-140). Further, because they worked remotely, he would rarely see Claimant except for five to six days per year and that any contact with the Claimant was usually by email or telephone. (Hr. Tr., pp. 147-148). Mr. Johnson was also cross-examined regarding the performance appraisals for the period prior to his accident that were completed by Paul Stoddard, who served as both Claimant's and Mr. Johnson's superior. The performance evaluation showed that during the time Claimant was on the PIP program that he was placed on that program because of a drop in sales that coincided with the recession of 2008 and 2009. Claimant was then a top salesman at the end of 2009. Mr. Johnson was also questioned extensively regarding the performance appraisals that he completed on Claimant after his injury that contained numerous quotes questioning Claimant's focus, concentration and time-management. (Hr. Tr., pp. 151-159).

~~All of the medical reports were reviewed. The reports of Dr. Richard Park show that~~

Claimant was under his care beginning July 30, 2013. Dr. Park has performed facet joint injections, medial branch blocks, and radio frequency ablations. Dr. Park opined that Claimant would likely continue to require radio frequency ablations every six to twenty-four months for pain relief. (Claimant's APA #4, p. 52). Claimant was treated for his shoulder by Dr. James Rentz. Dr. Rentz performed arthroscopic surgery on the right shoulder including a debridement of a grade IV SLAP tear and an anterior labrum, biceps tendonotomy, and open biceps tenodesis to the proximal humerus. Claimant did not undergo surgery on the left shoulder. A right shoulder MRI performed on October 10, 2014 showed supraspinatus and infra-supraspinatus insertional tendonopathy with an intra-substance delamination tear at their confluence.

Claimant was also evaluated by shoulder surgeon, Jerry L. Barron, MD. Dr. Barron saw Claimant on December 12, 2012 and found that Claimant did sustain an acute injury to his head, neck and bilateral shoulders. He recommended an MRI/arthrogram of the right shoulder as well as an MRI of the cervical spine. (Claimant's APA #5, pp. 76-77). Dr. Barron later reviewed the MRI report of October 10, 2014 and rated Claimant as having a 15% impairment to the right shoulder and 0% impairment to the left shoulder. He further opined that Claimant would most probably eventually require surgery to the right shoulder but that it was reasonable for Claimant to try to avoid surgery as long as possible. (Claimant's APA #5, p. 77a).

Claimant was also evaluated by Dr. John Welshofer. Dr. Welshofer indicated that Claimant has underlying cervical degenerative spondylosis that was made materially worse by the on-the-job motor vehicle accident of March 22, 2011. He rated Claimant as having a 10% impairment to his spine. (Claimant's APA #6, p. 82). Dr. Welshofer also evaluated Claimant's

brain injury and diagnosed him with a post-concussive disorder. He rated Claimant as having a 15% permanent impairment of the brain. (Claimant's APA #6, p. 96).

Claimant was also evaluated by neuropsychiatrist, Dr. Randolph Waid. Dr. Waid performed a neuropsychological evaluation and found that Claimant had sustained a good recovery under the circumstances. However, he noted that Claimant demonstrated variability in his capacity to sustain attention/concentration. He noted that Claimant had compromise in the attentional executive aspects of immediate learning which caused complaints or forgetfulness in day to day pursuits. He found that Claimant was suffering executive dysfunction potentially affecting both cognitive and emotional domains. He noted that in day to day pursuits, Claimant likely experienced episodic forgetfulness due to the interfering effects of attention-executive difficulties and headaches. (Claimant's APA # 1, pp. 1-9).

The physician that Claimant has seen most for treatment throughout his claim has been neurologist Dr. Howard Mandell. Dr. Mandell noted that he had been treating Mr. Adickes for traumatic brain injury and post concussive syndrome as a result of his on the job injury. He opined that Claimant would need ongoing care for post-traumatic headaches to include doctor visits two or three times per year, medications for prevention and abortive treatment of headaches as well as possible missed days at work for headaches that were not aborted by medications. He testified that Claimant attempted to minimize his problems and understated these problems. Dr. Mandell reviewed the neuropsychological evaluation of Dr. Waid and testified that the problems shown on the neuropsychological examination were exactly the same as the problems that he observed with Mr. Adickes and he believed that these problems came from Claimant's traumatic brain injury and post concussive syndrome. Dr. Mandell testified that Claimant has problem with concentration, executive function, capacity to sustain attention and

~~concentration, difficulty with attentional executive aspects of immediate learning, forgetfulness~~
in daily pursuits, mild executive dysfunction, shorter fuse, and easier frustration. These skills affect people who perform jobs with higher aspects of functioning rather than those with menial jobs. He further testified that these problems could limit Claimant's employment opportunities particularly those at a high level of employment. (See Dr. Mandell's deposition transcript).

Claimant was evaluated by vocational expert, Mr. Joel Leonard. Mr. Leonard reviewed all of the claimant's medical records, interviewed Claimant and administered some achievement and reading testing. In his report, he outlined three potential vocational profiles. However, he endorsed profile "B" that acknowledges that Claimant was part of a general reduction in force in his employment but also find that the amount of money that Claimant is currently earning is a reasonable and proper representation of his likely earning capacity subsequent to the March 2011 accident because of his limitations and restrictions from his accident. (Claimant's APA # 3, pp. 35-47). Mr. Leonard's deposition was offered as evidence and he was cross-examined regarding his opinion. However, he maintained his opinion that the \$55,000 job with VRI was an accurate reflection of Claimant's post-injury earning capacity because of his cognitive difficulties. (See Mr. Leonard's deposition transcript).

QUESTIONS PRESENTED

- 1. Whether the Single Commissioner was correct in finding that Claimant reached maximum medical improvement for his admitted injuries.**
- 2. Whether the Single Commissioner was correct in awarding permanent wage loss benefits under §42-9-20.**

ARGUMENT

1. The Single Commissioner was correct in finding that Claimant reached maximum medical improvement for his admitted injuries, including the right shoulder.

The Single Commissioner was correct in finding that Claimant reached maximum medical improvement (MMI) for his admitted injuries in this claim, including the right shoulder. Maximum medical improvement is a term of art which indicates “that a person has reached such a plateau that in the physician’s opinion there is no further medical care or treatment which will lessen the degree of impairment...” *Bass v. Kenco Group*, 366 S.C. 450, 622 S.E.2d 577 (S.C. App. 2005); *Lee v. Harborside Café*, 350 S.C. 74, 564 S.E.2d 354 (S.C. App. 2002). However, the fact that a claimant has reached MMI does not preclude a finding the claimant still may require additional medical care or treatment. *Dodge v. Brucoli, Clark, Layman, Inc.*, 334 S.C. 574, 514 S.E.2d 593 (Ct. Ap. 1999).

Here, the overwhelming preponderance of the evidence in record clearly indicates that Claimant reached maximum medical improvement for the work-related injuries sustained on March 22, 2011. As to his spinal injury, Dr. Welshofer opined that Claimant has a 10% permanent impairment of the spine. (Claimant’s APAs, page 82). As to the brain injury, Dr. Welshofer opined that Claimant has a permanent impairment rating of 15% to the brain for continuous post-concussive symptomatology and headaches. (Claimant’s APAs, page, 96). There is no evidence in the record to dispute the findings of MMI and permanent impairment opined by Dr. Welshofer. Furthermore, Defendants’ brief does not allege that he has not achieved MMI for these injuries. Therefore, the only allegation made by Defendants that Claimant has not reached MMI is regarding his admitted right shoulder injury.

As to the right shoulder, the Claimant underwent an arthroscopic surgery by Dr. Rentz in October of 2011. (Claimant’s APAs, page 178). This was an extensive surgery involving

debridement of grade IV SLAP tear and anterior labrum, biceps tenotomy right shoulder, and an open biceps tenodesis to the proximal humerus. (Id.). Subsequently, the Claimant underwent additional conservative treatment for his right shoulder with Dr. Rentz, including injections.

Claimant was next seen by Dr. Rentz for a rating and release in September of 2014. However, he continued to have some pain in his right shoulder and was referred for an MRI. While the Claimant's counsel received this MRI shortly before the hearing, he was not able to see Dr. Rentz and Claimant's counsel was unable to schedule Dr. Rentz's deposition prior to the hearing. Accordingly, the Claimant's records were sent to Dr. Barron, who had previously evaluated the Claimant. After a thorough review of the records, including the updated MRI, Dr. Barron opined that Claimant had sustained a 15% permanent impairment to the right shoulder and a 0% permanent impairment to the left shoulder. While Dr. Barron indicated that Claimant most probably would eventually require surgery to the right shoulder, he specifically indicated that it **"is reasonable for Mr. Adickes to try to avoid surgery as long as possible."** (CAPA #5, p. 77a, emphasis added). There is no objective medical evidence or conflicting expert evidence in the record to dispute Dr. Barron's opinions.

Defendants have alleged in their brief that Claimant has not reached MMI as to his right shoulder for multiple reasons. First, Defendants have alleged that because Dr. Barron opined that Claimant will likely require additional surgery in the future, he is not at maximum medical improvement. However, Defendants ignore that Dr. Barron specifically stated that it was reasonable for Claimant to try to avoid surgery for as long as possible. They further assert that there is a distinction between maintenance care and surgery. They argue that if a Claimant needs surgical treatment in the future, then surgical treatment belongs in a separate category as it is a procedure used to attain MMI, not to maintain it, and to lessen the degree of physical

impairment. This argument is patently false. Following Defendants' reasoning, no claimant who will eventually require surgery could ever be placed at MMI until they undergo that surgery. For instance, if a claimant undergoes an arthroscopic knee surgery, but will eventually need a total knee replacement at some point in their future, they could ostensibly never reach MMI under Defendant's logic and remain in a perpetual legal limbo. This is patently against the spirit of the Act and would only act as a detriment to injured workers who are seeking timely adjudication of their claim. Moreover, this is exactly the situation addressed by Section 42-15-60 and the Dodge case. The undersigned scarcely believes that this argument warrants further discussion, as it is patently unreasonable on its face and unsupported by case law.

Second, Defendants have alleged that Claimant has not reached MMI because he was not rated by an authorized treating physician. Quite simply, there is no requirement in the Act that a Claimant be rated solely by an authorized treating physician. Defendants had every opportunity to send Claimant for an independent medical evaluation of their own, but did not elect to do so. Moreover, the Claimant has the innate right to seek medical evaluation on his own and without the authorization of Defendants. Dr. Barron's ratings are not disputed by any conflicting evidence in the record and he is an imminent shoulder surgeon who is highly qualified and experienced in this regard. (Claimant's APA #12, p. 199-202). Therefore, the argument that only an authorized treating physician can provide impairment ratings or determine MMI is also without merit.

Third, Defendants have also alleged that, although Dr. Barron assigned permanent impairment ratings to the shoulders, that he did not specifically say the words "maximum medical improvement." However, the Single Commissioner specifically addressed this issue in his Order. (See Findings of Fact No.'s 3-5). As the ratings are permanent in nature, this

language is also determinative as to maximum medical improvement. Using the plain meaning of the words "permanent impairment", it is only logical for a determination of maximum medical improvement upon the assignment of such ratings. Therefore, the Single Commissioner was correct in finding that Claimant reached maximum medical improvement for all of his work-related injuries as of Dr. Barron's January 14, 2015 statement. Accordingly, the Single Commissioner was also correct in proceeding with a determination of Claimant's entitlement to permanent disability benefits as a matter of law.

2. The Single Commissioner was correct in awarding wage loss disability under §42-9-20

The preponderance of the evidence in the record supports the Single Commissioner's finding that Claimant is entitled to an award of permanent partial disability under §42-9-20.

Section 42-9-20 provides:

"Except as otherwise provided in §42-9-30, when the incapacity for 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 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, but not more than the average weekly wage in this State for the preceding fiscal year. In no case shall the period covered by such compensation be greater than three hundred forty weeks from the date of injury. In case the partial disability begins after a period of total disability, the latter period shall not be deducted from a maximum period allowed in this section for partial disability.

(S.C. Code Ann. §42-9-20, emphasis added).

Here, the record is replete with evidence that Claimant sustained a traumatic brain injury with resulting permanent cognitive deficits that have resulted in a permanent loss of wage earning capacity.

**A. MEDICAL EVIDENCE OF TRAUMATIC BRAIN INJURY AND
COGNITIVE DEFICITS**

Defendants have alleged that there is no evidence that Claimant has suffered a permanent loss of wage earning capacity due to the cognitive deficits resulting from his traumatic brain injury. However, the record is replete with evidence that supports the Single Commissioner's finding that Claimant has suffered a cognitive deficiency as the result of his work-related accident on 03/22/11. (See Order, Finding of Fact No. 44).

i. Dr. Welshofer opined that Claimant has sustained a permanent impairment to his brain.

First and foremost, Dr. Welshofer provided treatment for Claimant's traumatic brain injury and related symptoms. On November 1, 2012, Dr. Welshofer stated, "I would grade him at a permanent impairment rating of 15% of the brain for continuous postconcussive symptomatology and headaches." (Claimant's APA #6, p. 96). There is no opinion from any other expert that disputes Dr. Welshofer's opinion as to permanent impairment or causation. Defendants make absolutely no mention of their own authorized treating physician's opinion that concretely establishes that Claimant has permanent impairment and symptoms causally-related to the admitted traumatic brain injury.

ii. Dr. Waid's neuropsychological evaluation is clear evidence of permanent cognitive deficits as a result of his traumatic brain injury.

Dr. Waid has opined that Claimant has sustained cognitive deficits as a result of his work-related traumatic brain injury. On October 7, 2014, Dr. Randolph Waid conducted a neuropsychological evaluation of the Claimant to determine the effects of his documented traumatic brain injury. (Claimant's APA #1, pp. 1-9). In his report, Dr. Waid performed a litany of neuropsychological tests to assess Claimant's cognitive function. While Defendants have

~~attempted to characterize Dr. Waid's report as evidence that Claimant suffers from no cognitive~~
deficits. However, a thorough reading of Dr. Waid's report repudiates this characterization.

Specifically, Dr. Waid's summary of the neuropsychological evaluation notes several cognitive deficits. First, Dr. Waid stated that Claimant "did demonstrate variability in his capacity to sustain attention/concentration." (Claimant's APA #1, p.8). "It appears that compromise in the attentional/executive aspects of immediate learning are causal for complaints of forgetfulness in day to day pursuits." (Id.). Further, Dr. Waid opined that "mild executive dysfunction appears to be present potentially affecting both cognitive and emotional domains." (Id.). While Dr. Waid indicated that the results of the neuropsychological testing were generally positive, he still opined that "certainly, in day to day pursuits, he likely experiences episodic forgetfulness due to the interfering effects of attention/executive difficulties and headaches." (Claimant's APA #1, pp. 8-9).

The Single Commissioner cited to Dr. Waid's report in his Order, almost specifically quoting verbatim the above conclusions that Claimant suffered from cognitive deficits. (See Order, Findings of Fact #19). However, Defendants elected to omit this Finding of Fact in their brief. Yet, it is difficult to imagine how Defendants could attempt to characterize this report as evidence that Claimant suffers from no cognitive deficits whatsoever when Dr. Waid has clearly opined Claimant experiences ongoing problems with focus, attention, executive aspects of immediate learning, executive dysfunction and forgetfulness. Thus, Defendants characterization of Dr. Waid's uncontested neuropsychological report is patently false on its face and disingenuous at best. Rather, Dr. Waid's report is clear evidence of the cognitive dysfunction resulting from Claimant's traumatic brain injury and the Single Commissioner specifically found the same as a matter of fact.

iii. Dr. Mandell's records and testimony further confirm the presence of cognitive deficits as a result of traumatic brain injury.

Dr. Mandell's reports and deposition testimony offer clear support that Claimant suffered cognitive deficits as a result of his traumatic brain injury. Interestingly, Defendants have not mentioned Dr. Mandell's treatment or deposition testimony anywhere within their brief. Even further, they omitted the Single Commissioner's specific findings of fact related to Dr. Mandell's deposition testimony in their brief, including that he had read this deposition in its entirety. (See Defendants' brief, p.3; See also Order, Findings of Fact No.'s 20-22).

Dr. Mandell has been the authorized treating neurologist for Claimant's traumatic brain injury and resulting symptoms. In his deposition testimony, Dr. Mandell confirmed his diagnosis that Claimant has a traumatic brain injury and post-concussive syndrome to a reasonable degree of medical certainty. (Dep. Tr., p. 24). He further opined that Claimant's cognitive deficits were not a result of medications, but related to the traumatic brain injury. (Dep. Tr., p. 25). Dr. Mandell even further stated that he endorsed Dr. Welshofer's permanent impairment rating of fifteen (15%) percent to the brain as a result of his traumatic brain injury, post-concussive symptomatology and headaches. (Dep. Tr., p. 42).

As noted by the Single Commissioner in his Order, Dr. Mandell reviewed the neuropsychological testing performed by Dr. Waid prior to his deposition. (Dep. Tr., p. 33; Order, Finding of Fact No. 21). Dr. Mandell testified that this neuropsychological evaluation "basically says exactly what I've been saying word for word, practically yes." (Dep. Tr., p. 34). Per Dr. Waid's report, Dr. Mandell stated that while Claimant 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.” (Dep. Tr., p. 35). Dr. Mandell then reaffirmed that these problems were caused by the traumatic brain injury and post-concussion syndrome from his on-the-job injury. (Dep. Tr., p. 36).

Accordingly, Dr. Mandell’s medical reports and deposition testimony are clear and compelling evidence that Claimant suffered cognitive deficits as a result of his traumatic brain injury and post-concussive syndrome. Dr. Mandell endorsed Dr. Welshofer’s impairment rating to the brain, both of whom are authorized treating physicians. Further, Dr. Mandell fully supported Dr. Waid’s neuropsychological findings that Claimant suffered from cognitive deficits as a result of his traumatic brain injury, post-concussive symptoms and headaches. Where two authorized treating physicians opine that Claimant has permanent impairment to his brain and further support a neuropsychological evaluation evidencing cognitive deficits, there is absolutely no support whatsoever for Defendants’ assertion to the contrary. When considering the purposeful omission of the Single Commissioner’s relevant Findings of Fact on this point and complete disregard of multiple experts’ medical opinions, Defendants’ allegation is misleading and patently false.

B. Vocational evidence supports Single Commissioner’s finding that Claimant has sustained permanent loss of wage earning capacity.

The vocational evaluation performed by Joel Leonard is clear evidence that Claimant has sustained permanent wage loss disability due to the cognitive deficits resulting from his admitted traumatic brain injury, post-concussive syndrome and headaches. Mr. Leonard performed his vocational evaluation on August 25, 2014 and was later deposed on December 30, 2014. The Single Commissioner further specifically indicated that he had read Mr. Leonard’s deposition in

~~its entirety. (See Order, Findings of Fact No.'s 31—34). However, Defendants have~~
incredulously alleged in their brief that the Single Commissioner did not even read Mr. Leonard's deposition transcript tendered into evidence. (See Defendants' brief, pg. 23). It is one matter to disagree with a Commissioner's interpretation of evidence, but it is entirely another to allege judicial impropriety. Yet, despite this highly questionable allegation, a review of the relevant evidence and testimony supports Mr. Leonard's expert vocational opinion that Claimant suffered a permanent loss of earning capacity as a result of his work-related injury.

In his evaluation on August 25, 2014, Mr. Leonard reviewed medical evidence, interviewed the Claimant, and administered achievement and reading testing. Claimant indicated to Mr. Leonard during his evaluation that he continued to experience ongoing cognitive deficits with specific attention to speech formation, verbal fluency, attention, concentration, focus and overall ability to converse in a fluid manner. In the report, Mr. Leonard noted that he did have to rely on Claimant's subjective cognitive deficiencies in the absence of a neuropsychological evaluation at the time. Mr. Leonard provided three potential vocational profiles, but concluded that Claimant fell into "Profile B". Per the report, while "Profile B" acknowledged that Claimant was part of a general reduction in force, it accepts his impression that he became part of that reduction given his inability to effectively meet the demands of his job due to the effects of his injuries. This profile also considered that Claimant was unable to meet his production goals following his accident. Within this profile, Claimant's estimated weekly wage of \$1,057.69 would be considered a reasonable and proper representation of his likely earning capacity after the accident. Mr. Leonard then concluded that "within the continuum of the noted profiles, however, it is my opinion that Mr. Adickes' current capacity to work is most accurately portrayed by the outcomes associated with Profile B." (Claimant's APA #3, p. 46).

~~Defendants have alleged that Mr. Leonard's vocational evaluation should not be given~~
any weight as evidence because he intentionally misrepresented Dr. Waid's neuropsychological findings in his deposition testimony and did not change his opinion in light of additional documents reviewed in the deposition. However, as discussed *supra*, Dr. Waid's findings of cognitive deficiencies were completely supported by Dr. Mandell's deposition testimony. Rather, it appears from the preponderance of the evidence in the record that it is Defendants who are intentionally misrepresenting the opinions of Dr. Waid and Dr. Mandell. Mr. Leonard further agreed with Dr. Mandell that people with higher IQ's can suffer more greatly from lesser cognitive deficits than those with low IQ's.

Even after reviewing the additional documents, records and depositions, Mr. Leonard stated "right now I don't think the evidence as a total is sufficient enough for me to change my opinion in this matter, though it appeared there is some evidence that I think strongly supports maintaining that opinion", but did state there was some evidence that could be interpreted in a different way. (Dep. Tr., p. 88-89). Mr. Leonard was then presented with the hypothetical that Claimant was terminated through no fault of his own and asked to consider the new evidence (Dr. Waid's neuropsychological evaluation, Dr. Mandell's deposition testimony, the documented headaches, medications and cognitive issues) and asked to provide an opinion on whether the new evidence alone would affect Claimant's residual earning capacity. Mr. Leonard definitively opined, "I would continue to endorse what I have within my report, which would be Profile B, which basically that his current earning capacity is a more than reasonable representation of his access to the labor market and his residual employability and earnings subsequent to the event." (Dep. Tr., p. 89-90).

~~Defendants have further alleged that Claimant did not prove entitlement to wage loss~~

benefits because his termination was not the result of his work injury. Claimant showed that he was terminated as a result of his diminished cognitive function, as evidenced by the multiple performance reports following his injury showing repeated issues with focus, concentration and memory, despite the overall reduction in force. Yet, regardless of the reason for his termination, Claimant's ability to earn similar wages had been compromised because of his work-related injury, as discussed *supra*. Defendants further alleged that Claimant did not perform a diligent job search and self-limited his wages at his subsequent employer. However, Claimant's credible testimony shows he applied to numerous companies, but was unable to find employment that paid similar wages. In regards to the \$55,000 salary he purportedly "requested", Claimant clearly testified that this was what the job paid. If a fast-food employee knows the ranges of salary for his position, but requests a six-figure wage, it can hardly be said that would be reasonable to assert he purposefully limited his income and he would be less likely to even be offered that position.

Obviously, Claimant would have no reason whatsoever to intentionally limit his salary solely for the purpose of obtaining a workers compensation award. The reality of the situation is that Claimant would much rather have a six-figure job, as opposed to only a \$55,000 job, regardless of any one-time award. Additionally, Claimant even lost his job at VRI prior to the hearing and was unemployed and continuing to look for employment. The Single Commissioner specifically took note of the above issues in his Order, finding that Claimant credibly testified that he applied for over 15 potential employers, would have no reason to self-limit his earning potential, and could only find a job paying \$55,000, which has now ended. (See Order, Findings of Fact No.'s 24-30). Furthermore, the Single Commissioner found that Claimant was

cooperative and candid in both his presentation to the experts in this case as well as his testimony and is reliable. (See Order, Finding of Fact No.35).

C. Claimant is entitled to permanent partial wage loss disability benefits for 340 weeks.

The Single Commissioner was correct in finding that Claimant sustained a permanent loss of wage earning capacity and awarding permanent partial disability benefits in the amount of \$704.92 per week for 340 weeks as of January 17, 2014. As discussed exhaustively above, the preponderance of the evidence supports that Claimant suffered permanent impairment to the brain, cognitive deficits and a permanent loss of wage earning capacity as a result of his injuries.

Defendants have argued that Claimant is not entitled to permanent wage loss benefits under 42-9-20 until he reached maximum medical improvement on January 14, 2015, per Dr. Barron's report. Section §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." However, 'maximum medical improvement' is a distinctly different concept from 'disability.'" *Dodge v. Bruccoli*, 334 S.C. 574, 581, 514 S.E.2d 593,596 (Ct. App. 1999). Defendants assert that Claimant would not be entitled to wage loss benefits until maximum medical improvement for all injuries. However, Claimant's disability, in terms of his incapacity to earn the same wages at the time of his injury, clearly began on the date he was terminated from Philips Healthcare on January 17, 2014 and was unable to procure subsequent employment that paid the same wages.

Defendants have further argued that under §42-9-20, that Claimant is not entitled to permanent wage loss benefits past 340 weeks from the date of injury. However, the last sentence of this statute clearly states that "in case the partial disability begins after a period of total

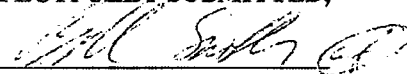
disability, the latter period shall not be deducted from a maximum period allowed in this section for partial disability.” (S.C. Code Ann. §42-9-20). This means that 340 weeks is the maximum Claimant could receive because the last sentence of §42-9-20 extends the period. The 340 week period from the date of injury only applies where no temporary total disability benefits were ever paid. Here, Claimant’s permanent partial disability began after two separate periods of total disability whereby he received temporary total disability benefits. Here, the Form 18 clearly shows that Claimant was paid a period of temporary total disability benefits prior to his period of permanent partial disability benefits. As the Form 18 is part of the Commission’s file, it is part of the record of evidence in the claim. (Hr. Tr., p. 5). Therefore, the Single Commissioner was correct in finding that Claimant was entitled to 340 weeks of permanent partial wage loss benefits as of the date his disability (incapacity to earn wages he previously earned) began on January 17, 2014.

CONCLUSION

As discussed exhaustively above, the record is replete with evidence to support the Single Commissioner’s Findings of Fact and Conclusions of Law. The medical evidence supports that Claimant reached MMI for all of his work-related injuries. The medical evidence in the record also supports that Claimant sustained a traumatic brain injury and resulting cognitive deficits, as evidenced by at least three experts’ opinions. Further, the vocational evidence in the record supports that Claimant suffered a permanent loss of wage earning capacity and is entitled to the award of 340 weeks of benefits as of the date his disability became permanent on January 17, 2014. While Defendants have alleged that the Single Commissioner did not even read Mr. Leonard’s deposition, that allegation speaks for itself and bears no comment from the

undersigned. However, the Single Commissioner specifically found that Dr. Waid, Dr. Mandell and Mr. Leonard had all provided expert opinions in this case. Further, the Single Commissioner found that there was no competing evidence from any other expert. Quite simply, Defendants don't agree with the expert opinions that constitute the evidence in the record, including those of their own authorized treating physicians. Yet, they had every opportunity during the four-plus years since the accident to obtain competing opinions from their own experts and failed to do so to support their defense. It is clear that the Single Commissioner exhaustively reviewed the evidence, testimony and legal standards in ruling in Claimant's favor. Therefore, Claimant respectfully requests the Full Commission affirm the Single Commissioner's Order in its entirety.

RESPECTFULLY SUBMITTED,


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December 4, 2015

NOTICE OF APPEAL FROM ADMINISTRATIVE TRIBUNAL

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

**APPEAL FROM THE SOUTH CAROLINA
WORKERS' COMPENSATION COMMISSION**

Appellate Panel Decision
SCWCC No. 1102937

Barry Adickes,

Respondent,

v.

Philips Healthcare and Fidelity &
Guarantee Insurance Co.,

Appellants.

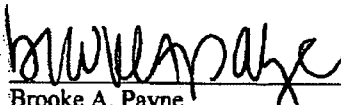
NOTICE OF APPEAL

Philips Healthcare and Fidelity & Guarantee Insurance Company appeal the Decision and Order of the Appellate Panel of the South Carolina Workers' Compensation Commission dated February 8, 2016. Appellants received a copy of this Order on February 8, 2016.

Appellants allege errors of law as follows:

1. The Appellate Panel erred in concluding that Respondent reached Maximum Medical Improvement for all accepted injuries;
2. The Appellate Panel erred in concluding that Respondent met his burden of proving entitlement to permanent partial disability benefits resulting from loss of earning capacity under SC Code Ann. §42-9-20;
3. The Appellate Panel 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 SC Code Ann. §42-9-20.

March 7, 2016


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KIMBERLY T. POWER, CCR (803) 622-9057

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1 THE COURT: Today's date is
2 January 21, 2015. This is Workers'
3 Compensation Commission File Number 1102937.
4 This is the case of Barry Adickes vs. Phillips
5 Healthcare. Fidelity and Guarantee Insurance
6 Company is the carrier. The claimant is
7 represented today by William L. Smith, II and
8 the employer/carrier are represented by Brooke
9 Payne and Ryan Oxford.

10 The date of accident is March 22,
11 2011. The claimant has an average weekly wage
12 of \$2,608.52, and I assume that the max comp
13 rate, because I don't keep these things in my
14 head, for 2011 was \$704.92.

15 MR. SMITH: Yes, sir.

16 THE COURT: All right. Very good.
17 Are there objections to jurisdiction, venue, or
18 APA submissions?

19 MR. SMITH: No, sir, Your Honor.
20 Commissioner, I don't have an objection to an
21 APA. They have an addendum to their
22 pre-hearing brief that cites -- and I know
23 that's not evidence, but it cites testimony
24 from Mr. Johnson's deposition. That deposition
25 is not in evidence. He's here to testify

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1 today-- So I would just ask that you not
2 consider those parts of their argument in that
3 pre-hearing brief that references Mr. Johnson's
4 deposition testimony. Certainly you can
5 consider anything he testifies to today.

6 THE COURT: You want to speak to
7 that?

8 MS. PAYNE: No.

9 THE COURT: Very well. Any
10 objection to jurisdiction or venue?

11 MR. SMITH: None from claimant.

12 MS. PAYNE: No.

13 THE COURT: All right. Very well.
14 The Commission file becomes a part of the
15 record with the exception of self-serving
16 declarations and unstipulated medical reports.

17 All right. We're here today,
18 Mr. Smith, pursuant to the Form 50 that you
19 filed on behalf of the claimant or your client.
20 If you would, please, place your client's
21 position on the record.

22 MR. SMITH: Yes, sir, Your Honor:
23 As we stated in the pre-hearing conference,
24 Mr. Adickes was involved in a very serious car
25 accident on the job on March 22, 2011. He

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1 suffered injuries to both of ~~his shoulders~~, to
2 his cervical spine, and he also had a traumatic
3 brain injury. We are here today seeking an
4 award for wage loss pursuant to Section 42-9-20
5 as he has had significant wage loss as a result
6 of this injury.

7 It is further our position, and you
8 have the records and my APA and I pointed out
9 in the pre-hearing brief, he's going to need
10 ongoing medical care as taken by the physicians
11 in this case. So we're here seeking the wage
12 loss award and the ongoing medical care
13 pursuant to Dodge.

14 THE COURT: All right. I really
15 don't know which one of you to call on.

16 MS. PAYNE: I'll go.

17 THE COURT: All right. If you would
18 place your client's position on the record,
19 please, ma'am.

20 MS. PAYNE: I will try to make it
21 more succinct than last time. It's the
22 position of the employer and insurer that the
23 claimant is not entitled to wage loss benefits
24 as any reduction in his salary since his
25 termination at Philips is not related to the

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1 work injury that occurred on March 22, 2011.

2 It's further our contention that the
3 claimant did not sustain any -- is not
4 currently suffering from any cognitivecognitive
5 issues as a result of that work injury, and we
6 believe that that is not only supported by the
7 testimony of his supervisors at Philips, but
8 also supported in the neuropsychological report
9 by Dr. Randy Waid.

10 It's also our contention that the
11 reduction in salary that he received at his
12 most recent employer, which was ERI,VRI was due
13 to the fact that he specifically requested that
14 salary which, again, is not related to his work
15 injury at Philips. Should the Commission agree
16 with our arguments with regard to this not
17 being a wage loss case and analyze the case
18 under the scheduled member statute, it's our
19 contention that the claimant does not have a
20 PPD rating associated with either his right or
21 left shoulders.

22 THE COURT: Anything else?

23 MS. PAYNE: No, Your Honor.

24 THE COURT: Anything else?

25 MR. SMITH: Just briefly, Your

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1 Honor. We certainly feel the evidence supports
2 a wage loss award in this case. Should you
3 disagree with us on that point, it is our
4 contention that he has sustained significant
5 permanent partial disability to all the
6 affected body parts, those being the brain,
7 cervical spine, and bilateral shoulders.

8 THE COURT: Anything else,
9 Ms. Payne?

10 MS. PAYNE: No.

11 THE COURT: All right. Ready to
12 hear from your witness?

13 MR. SMITH: Yes, sir.

14 THE COURT: All right. Mr. Adickes,
15 two things. First, I need you to speak up.
16 Actually, the P.A. system here is on.
17 Ms. Power is making a record of the proceeding,
18 so it's imperative that she hear you. And,
19 also, please avoid using uh-huh, huh-uh,
20 shaking and nodding your head, anything like
21 that. If you're asked a yes or no question,
22 please give me a yes or no verbal answer. That
23 will move it along and it will also keep it
24 very clean and clear in the record. Okay?

25 THE WITNESS: Yes, sir.

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1 (BARRY ADICKES, being duly-sworn to
2 tell the whole truth, testified as follows:)

3 THE COURT: Please state your full
4 name for the record.

5 THE WITNESS: Barry Simmons Adickes.

6 THE COURT: Thank you, sir.

7 Mr. Smith, your witness.

8 MR. SMITH: Thank you, Your Honor.

9 DIRECT EXAMINATION

10 BY MR. SMITH:

11 Q. Mr. Adickes, how old are you, sir?

12 A. Fifty-three.

13 Q. Excuse me?

14 A. Fifty-three.

15 Q. Okay. How far did you go in school?

16 A. I finished with a Bachelor's of
17 Science degree in marketing management,
18 University of South Carolina.

19 Q. Are you married?

20 A. Yes.

21 Q. And how long have you been married?

22 A. This is our 29th year.

23 Q. Do you have children?

24 A. I have four children.

25 Q. Are they all still at home?

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1 A. They are not.

2 Q. How many are still at home dependent
3 upon you for support?

4 A. Well, now we have one. Al is now
5 12.

6 Q. And you have a couple in college?

7 A. I do.

8 Q. All right. So they're still
9 dependent upon you?

10 A. Very much.

11 Q. Okay. Mr. Adickes, before this
12 injury, had you ever had a workers' comp claim
13 before?

14 A. No.

15 Q. Had you ever been hurt in a car
16 wreck where you sued anybody or anything like
17 that?

18 A. No.

19 Q. Now, you were employed at the time
20 of this injury with Philips?

21 A. Yes.

22 Q. How long had you worked for Philips?

23 A. Philips acquired the company that I
24 was with in 2006. I had been with that company
25 for 14 years. Technically, I had 21 years --

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1 nearly 20 and a half years tenure with Philips.

2 Q. At the time of your injury, what was
3 your job?

4 A. I was the general manager for
5 distribution -- one of the general managers of
6 distribution in the southern region.

7 Q. Let me go back with you. Let's go
8 back to 2008. What was your job in 2008?

9 A. I was the product sales specialist
10 for the same division of Philips, but different
11 capacity. I had just transitioned to the new
12 position just shortly before the accident in
13 2011.

14 Q. And I should back up a second. What
15 the heck does Philips do?

16 A. Philips is a worldwide leader of
17 development of inventions in this arena for --
18 and in this particular division for cardiac
19 resuscitation, cardiac monitors and
20 defibrillators.

21 Q. And in 2008, is that what you were
22 doing? You were selling cardiac
23 defibrillators?

24 A. Yes.

25 Q. Now, did your job change in 2008?

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1 A. I transitioned after a year with --
2 the previous company that I was with was
3 Lifeline. It became Philips Lifeline. The
4 last year that I was with Philips Lifeline, I
5 became the business development manager
6 introducing a defibrillator into the line of
7 products that we were selling, Philips
8 Lifeline, into retirement communities.
9 Basically for a year I worked with our sales
10 people to train them on introducing
11 defibrillators to the product line that we had,
12 selling them to retirement communities
13 specifically.

14 Q. There's been a document offered as
15 evidence by the defense called a PIP, PIP which
16 is a performance improvement plan that you went
17 on in 2009. Are you familiar with that?

18 A. Yes.

19 Q. What was your job at that point in
20 time and what was the issue?

21 A. At the point in time of receiving
22 the PIP, I was in the -- I came in August of
23 2008 into this North and South Carolina
24 territory. In 2009, and I don't recall exactly
25 when, Mr. Hendrix, Jim Hendrix, my previous --

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1 a few managers before Mark Johnson, introduced
2 this performance improvement plan potentially
3 five months into the year 2009.

4 Q. What was going on with that
5 territory and the economy at that time?

6 A. Well, the territory, and
7 specifically I will say in the state of North
8 Carolina, we began to develop opportunities,
9 develop business with some -- with some
10 opportunities coming to fruition. But
11 economically there were tough times certainly
12 all over the country. I know the state of
13 North Carolina particularly at that time was
14 bankrupt, so there were no purchases being
15 made. It's noted in the PIP previously by Jim
16 Hendrix and he was sympathetic in that regard
17 because there were -- there were economic
18 factors. We had some -- we had a recall issue
19 with our lead product, the HeartStart MRx and
20 sales were soft.

21 Q. Let's move into 2010. Did you come
22 off the performance improvement plan?

23 A. I don't recall exactly when I came
24 off the PIP, but, yes, I did.

25 Q. And were sales good?

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1 A. Sales began to really escalate
2 favorably when North Carolina began to spend
3 some money. We actually by June of 2010 began
4 to have good signs for a positive year. A
5 positive year for us is achieving the financial
6 commitment to the company which is your quota
7 and that is how that is measured.

8 Q. And 2010 would have been the year
9 prior to your accident; is that correct?

10 A. 2010 was, right, the year prior to
11 my accident.

12 Q. And I am referring to the -- another
13 document in the exhibits admitted by the
14 defense --

15 MR. SMITH: And unfortunately, Your
16 Honor, I don't see a page number on it.

17 BY MR. SMITH:

18 Q. But it's the 2010 W2 form. Did you
19 earn \$128,276.01 that year?

20 A. Yes.

21 Q. And that would have been the year
22 prior to your injury?

23 A. Yes.

24 Q. Now, let me fast forward over to
25 2011. Did you get a promotion starting in

1 2011?

2 A. No, it was not a promotion. It was
3 a new position.

4 Q. Okay. You took a new position?

5 A. Took a new position.

6 Q. And when did that start?

7 A. Started into the year and I'm going
8 to say duties in that job began in February of
9 2011, still somewhat overlaid with some wrap-up
10 duties in the previous position.

11 Q. Now, you suffered your injury on
12 March 22, 2011?

13 A. Right.

14 Q. You had just taken that job?

15 A. Within a month of the new job.

16 Q. This is an admitted injury, so we
17 don't have to go into a whole lot of detail.
18 Describe for the Commissioner what happened to
19 you.

20 A. What happened in the accident?

21 Q. Yes, sir.

22 A. I was traveling south on Highway
23 181 -- North Carolina Highway 181 which is
24 above Morganton and in between Blue Ridge
25 Parkway and the Town of Morganton. I had just

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1 previously wrapped up the day at the hospital's
2 critical transport station right at the
3 parkway. Instead of going back down into
4 traffic and get on I-40, I did travel on the
5 Blue Ridge Parkway and was able to get to the
6 point of the parkway, make some phone calls,
7 return some e-mails, return some phone calls,
8 call home. At that time I concluded that and
9 continued my route realizing on the map that
10 I've never driven 181, but said let's see if I
11 can book on down to 181, hit Morganton, and
12 then travel east on I-40.

13 It was about -- well, I don't know
14 exactly. It was three miles below the parkway
15 where there was a very sharp -- the speed limit
16 is 50 miles an hour. I was going 50 miles an
17 hour, 52 maybe, and did not heed the warnings
18 of an upcoming hairpin turn and went into the
19 turn way too fast. Right side rode the rail
20 for 100 feet, I think they measured out, and
21 then it barrel-rolled my car, left the road.
22 And based on the markings through the trees, it
23 barrel-rolled through the trees kind of a
24 corkscrew way and landed about 100 feet down
25 the mountain.

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1 Q. Were you knocked unconscious?

2 A. Yes. I was out for a period. I'm
3 not really certain exactly how long.

4 Q. And I'm not going to try to make
5 this take long, but you were actually down the
6 mountain for quite a ways before you were
7 found; is that correct? Quite a long time?
8 Excuse me.

9 A. Yeah, it was five hours.

10 Q. Just to speed through this, you were
11 able to eventually hear your cell phone dying?

12 A. It was about 1:30 that -- 1:30, the
13 23rd, I guess that would make it, that my cell
14 phone chirped and I had already recombed the
15 vehicle to try to find my laptop, to try to
16 find my phone. I ended up finding my GPS and
17 used it as a flashlight, found one of my -- a
18 snack man apple and an orange and whatnot. But
19 then I went back and just kind of drifted back
20 off to sleep.

21 At about 1:30, the phone chirped.
22 The phone just let out a chirp and it was above
23 my head and it was -- as I was positioned
24 sideways, driver's side down, the phone was
25 inside the springs of the vehicle's passenger

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1 seat. Well, there was a lot of dirt and
2 debris. There was a limb that had come
3 through. So I went and felt my way around and
4 did find, after digging through, found the
5 phone. That chirp was its dying breath, but
6 nicely I plugged it in. Nothing else was
7 working in the car, but the car charger worked
8 and it powered it up. I was able to call 911
9 County and Burke County EMS answered that call.

10 Q. They eventually located you and got
11 you off the mountain?

12 A. Right.

13 Q. And you were seen by -- the
14 ambulance came, but you declined to go to the
15 hospital; is that right?

16 A. I did.

17 Q. Tell me why.

18 A. At that time Grace Hospital would
19 have been the closest hospital. It's two hours
20 away from home. I knew potentially I would be
21 admitted. I didn't want to be that far away
22 from home. I wanted to be -- I wanted to get
23 back home. And I -- and I knew once I did -- I
24 knew that I didn't have -- I didn't feel -- I
25 could wiggle my toes and I could wiggle my

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1 ~~feet. I couldn't raise my arms above my head.~~

2 I just wanted to go home.

3 Q. Did your wife come get you?

4 A. She did.

5 Q. And took you for medical attention
6 when you got home?

7 A. Correct.

8 Q. I just want to get you to identify
9 this for me. This is Exhibit A in the
10 Claimant's APA package, Pages 219 through 224.
11 Are those photos of the vehicle that you were
12 driving at the time of the accident?

13 A. Yes.

14 Q. And is that the damage from the
15 accident?

16 A. Yes.

17 Q. And I just showed you one page, but
18 are those pages the vehicle?

19 A. That was the Philips car that I
20 drove, Philips Dodge.

21 Q. Now, what all was injured in the
22 accident, what all parts of your body?

23 A. At the time when I became aware of
24 what had just happened, my left shoulder was
25 causing the pain. And just from basic first

1 aid, I know how to put a shoulder -- I know how
2 to put my own shoulder back into joint, but I
3 did raise it up and was able to roll it like
4 that and it rolled right back into place.
5 (Witness indicates.) And after that, that was
6 most of the pain that was going on right there.
7 I just had an immediate release of, I guess,
8 endorphins because I felt -- after that, that
9 pain went away and I wasn't -- I had some
10 scrapes. I felt maybe I had broken my finger;
11 but that turned out not to be. My right
12 shoulder was not responding real well, even
13 worse than my left. Once I got my left back
14 into joint, I actually could move it a little
15 bit. But I assessed any critical issues I may
16 have had, determined that I was going to live,
17 I was all right, and just kind of fell back to
18 sleep after that.

19 Q. Let me interrupt you. And I'm not
20 so much focusing on that night now, but what
21 all parts of your body did you have injuries to
22 from the accident?

23 A. Neck, shoulders, head, my leg.
24 Lower extremities were very solid and strong.
25 It was the cervical injuries and right shoulder

1 ~~became more of an issue. Left shoulder~~
2 recovered well. I ended up having surgery
3 October -- I guess that would be six, seven
4 months after the accident. I had surgery
5 repair on my right shoulder.

6 Q. Now, for this injury you have
7 been -- who has been your primary physicians
8 for each particular body part?

9 A. That day when we got back into
10 town --

11 Q. I mean over time?

12 A. Dr. Mandell, Howard Mandell, Jay
13 Rentz repaired my right shoulder.
14 Dr. Welshofer in Charlotte is who with the
15 cervical issues ultimately recommended Dr. Park
16 for -- to see if some type of therapy would
17 maybe give me relief in the cervical area.

18 Q. Let's start there. The treatments
19 that you have had for your neck, you've had --
20 well, most recently you've had ablations?

21 A. There's RFA -- radiofrequency
22 ablation actually is -- provides an incredibly
23 immediate relief because it disconnects the
24 nerve. It actually touches the nerve,
25 disconnects the nerve in my facet joint or

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1 around the facet joint which immediately just
2 cuts off the signal to the pain that radiates
3 from neck down to -- down towards my right
4 shoulder. It's a nice procedure. At that time
5 Dr. Park said it could last six months, it
6 could last eight months, it could last 18
7 months depending on how fast the nerves
8 regenerates.

9 Q. And what has been your experience?

10 A. Six months seems to be at this
11 point -- and maybe that will change, but at
12 this point it seems to regenerate pretty
13 quickly. So I had a second one done June or
14 July -- July of this year. June or July of
15 2014.

16 Q. And are you about to have another
17 one done?

18 A. I have a February 11th procedure
19 scheduled for another RFA.

20 Q. How can you tell when you need one?

21 A. It's -- it happens upon waking. In
22 the two instances since the first that I wake
23 with the immediate sensation of a radiating
24 pain from my neck to my right shoulder and then
25 a numbness in my right hand. It's not a

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1 ~~gradual thing. It's like as soon as that~~
2 connection is remade, it begins the process of
3 sending those signals.

4 Q. And do you currently have pain in
5 your neck?

6 A. I've got the same issue. It's a
7 rolling-type. If I -- it's a limitation of
8 motion in my neck that will bring pain if I
9 exert -- bring it to one certain angle. Just
10 kind of a radiation of pain.

11 Q. You also had surgery done on your
12 right shoulder?

13 A. Yes.

14 Q. Do you continue to have problems
15 with your right shoulder?

16 A. There is issues and there's an
17 impingement that I was telling -- that I could
18 feel. Just from doing some homework, I know
19 about the impinged area of the shoulder when it
20 occurs and it's from a compression, which
21 compression injury apparently is what I had
22 along with a bicep tendon that was torn loose
23 from my leg, but that was repaired. And
24 apparently from -- there's an MRI that was
25 requested before this -- before this hearing --

1 Q. Do you --

2 A. -- for us to --

3 Q. I'm sorry. Tell me what your
4 current pain and problems are with your
5 shoulder.

6 A. I am not able to raise my right
7 shoulder without pain any further than this.
8 (Witness indicates.) I'm not able to do
9 chin-ups.

10 THE COURT: What is "this," sir?

11 THE WITNESS: I'm sorry. I would
12 say it's a 50 percent -- I mean, I can't go
13 beyond a certain point in this area without
14 having that impingement rub up against inside
15 of my --

16 THE COURT: You can't raise your --
17 I'm doing this for the record because "this"
18 means nothing in the record. You can't lift
19 it -- your arm shoulder height? Well, you can
20 if you do that, but --

21 THE WITNESS: Without discomfort and
22 pain, I am not able to reach it above shoulder
23 height. I'm sorry.

24 THE COURT: Not a problem.

25

1 BY MR. SMITH:

2 Q. Now, you have also had issues with
3 your head injury; is that correct?

4 A. Headaches are the new norm and
5 that's -- I think I've adjusted fairly well
6 with that, but yeah.

7 Q. Tell me what your headaches are
8 like.

9 A. Once a headache begins -- and that
10 is a gradual thing. And I know some triggers
11 and I've become aware of some things that I can
12 avoid. But once the particular headache
13 reaches to a point where I realize that that
14 one particular medicine won't work, an
15 inflammatory -- anti-inflammatory, then I have
16 to disengage from what I'm doing and go with an
17 Imitrex treatment..

18 Q. Do you take medication daily for
19 your headaches?

20 A. I do.

21 Q. What is that medication?

22 A. It's call Nadolol.

23 Q. And then what happens when you feel
24 a headache coming on? Medication-wise, what do
25 you do?

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1 A. There's an Imitrex injection that I
2 will take. That injection has a fairly good
3 effect. It does -- it requires a little bit of
4 settling down, lying down. And then after two
5 hours, I can follow up with a second injection.

6 Q. Do you have another medication
7 called Frova?

8 A. Frova is the follow-through the
9 following day. This seems to be the regiment
10 that works on the onset of a severe headache,
11 the two Imitrex injections the next morning. I
12 initially thought that maybe this was the
13 hangover from the medicine because the medicine
14 has kind of an oddish -- but the next morning
15 Dr. Mandell suggested that I do begin to take
16 Frova the following morning to prevent the
17 rebound and to continue to knock it out so
18 within generally a 24- to 48-hour period I can
19 get back to where I can function and work.

20 Q. How often do you experience these
21 aches?

22 A. It's not as bad as it was. The
23 first year was a challenge. It's six to eight
24 weeks, maybe. Every six to eight weeks.

25 Q. When you have a headache like that,

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1 ~~how long does it keep you down?~~

2 A. Couple days.

3 Q. Now, Dr. Mandell's deposition has
4 been offered as evidence, and in that
5 deposition he talks about your wife keeping a
6 calendar or a journal of your headaches. Does
7 she do that?

8 A. She does.

9 Q. Is she the one that actually keeps
10 up with how long you go between headaches?

11 A. She's much better than I at putting
12 things together like that. She keeps a very
13 good calendar with all activities, but she
14 specifically notes, yes, those occurrences.

15 Q. When those headaches come on, how do
16 you manage your work?

17 A. I'm not sure exactly what you mean
18 by, "manage my work."

19 Q. When you're down with those
20 headaches for two days, are you able to work
21 during that period of time?

22 A. Certainly not the first -- after
23 taking Imitrex, I'm out, I'm down. Generally
24 within the following 24 hours after the
25 injection, Frova doesn't -- though it does

1 ~~caution about dizziness or drowsiness or~~
2 whatnot, it doesn't have the same type of
3 collapsing effect as Imitrex does. For me, it
4 doesn't. And normally within that period
5 after -- 24 hours is a good -- I really am not
6 supposed to open up a laptop or look at a
7 computer screen because that can kind of drag
8 it on if I continue to do that visually, things
9 like that.

10 Q. So if you're not able to do it
11 during that time, what do you do to catch up?

12 A. What do I do to catch up?

13 Q. What do you do --

14 A. Like anyone would do who has
15 distractions within work, you work, you know.
16 You get back on schedule.

17 Q. Now, along with the headaches, have
18 you had other brain-type issues?

19 A. I would say in 2012, I began to
20 attribute some issues that I was having being
21 forgetful, slow. I was attributing it to a
22 particular medicine I was on. Jeanie will tell
23 you differently, but I just -- I've begun to --
24 I have accepted the realities of the new norm
25 for me in regards to not being quite as fast

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1 ~~formulating my thoughts or an e-mail. If I'm~~
2 in denial, I'm in denial. But I don't think
3 I'm impaired to the point where I'm no longer
4 able to work. I do continue to get the job
5 done. I just am not as quick to accomplish,
6 maybe, certain things. It may take -- it may
7 take an hour to conduct what previously might
8 have been 10 or 15 minutes to conduct an e-mail
9 or e-mail correspondence or anything like that.

10 Q. Did you have any difficulties like
11 that before this injury?

12 A. No.

13 Q. Did you have any difficulties doing
14 your job before this injury?

15 A. No.

16 Q. After the injury and you had all
17 these problems, did you return to work with
18 Philips?

19 A. Yes. I was -- from March 22nd -- I
20 do believe the first day written back in was
21 May 1. I believe I went back May 1.

22 Q. What type difficulties did you
23 experience on your job on the road?

24 A. I was fairly fortunate that I
25 never -- there was a time where we had some

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1 ~~training in Atlanta that I had a headache at~~
2 the end of the day. I think a lot of people
3 did because it was -- we were in front of our
4 laptops learning a new -- a new sales force
5 contact management and action thing. That was
6 really one of the other times that I actually
7 had one that I had to go in and not make it to
8 dinner that night and take the medication. I
9 didn't have the injections at that time. I'm
10 not sure exactly what the question was, Bill.

11 Q. I was asking you what difficulties
12 you had performing your job duties,
13 concentration issues, and that sort of thing?

14 A. I'm just only believing that some of
15 the issues that I had were staying quickly on
16 top of certain things. I never envisioned -- I
17 never really put myself in the category of
18 having difficulty continuing to do my job. I
19 had certain deficits that I began to do my best
20 to manage.

21 Q. Did you miss days because of your
22 headaches?

23 A. There were days off the road, yes.

24 Q. Did you make complaints about this
25 to your supervisors?

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1 A. I don't -- not often. Mark would
2 ask occasionally how's it going. It's a very
3 competitive -- you want to be a positive member
4 of the team and the idea, yeah, you want to
5 say, "No sweat. Everything is good." But Mark
6 would ask how are things going and I would
7 mention the medications. My concern -- my
8 concern began to be the medications that I
9 ultimately had to be on and some of that would
10 be, say, drowsiness or dizziness, which wasn't
11 necessarily the case with me every time, but
12 that would begin to affect my ability to do my
13 job particularly in travel.

14 Q. I asked you earlier about your W2
15 form from the year before your injury and your
16 W2 forms have been offered as evidence by the
17 defense. In the years following starting with
18 2011 following your injury, did you ever earn
19 as much money as you did in 2010?

20 A. If you're asking was 2010 better
21 than the next three years, yeah. 2010 was a
22 better year than '11, '12, and '13.

23 Q. You earned \$124,000 -- excuse me,
24 \$128,000 in 2010 and then you earned \$24,000
25 less than that in 2011?

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1 A. Right.

2 Q. And then in 2012, you earned \$16,000

3 less than that?

4 A. Uh-huh. Sounds right.

5 Q. Sound correct?

6 A. Yes.

7 Q. And then 2013, you would have earned

8 \$17,000 less than that. Does that sound right?

9 A. Yes.

10 Q. Now, did your employment end at

11 Philips?

12 A. Yes.

13 Q. And when did your employment end at

14 Philips?

15 A. January 14th, 15th. Whatever it is

16 on record. I'm not recalling.

17 Q. January of 2014?

18 A. Yes.

19 Q. Does January 17 sound correct to

20 you?

21 A. Sure.

22 Q. Tell me what happened.

23 A. Got a phone call from Mark and --

24 Q. You're referring to Mark Johnson?

25 A. Mark Johnson.

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1 Q. Who is present in the courtroom

2 today?

3 A. Yes. Mark called.

4 Q. Was he your supervisor?

5 A. Yes. Sorry. So Mark called and I
6 think I immediately started like I do on
7 something that's going on, bring him up. And
8 then immediately Mark said, "Barry, I want to
9 tell you, I have someone here." And he likely
10 said the name from HR. Well, as soon as he
11 said that, I stopped talking and then just my
12 heart kind of sank. No one gets a call from
13 their boss with a representative from HR with
14 good news. And Mark proceeded to tell me that
15 with what was beginning -- at the beginning of
16 the year there were some changes to take place
17 and, unfortunately, I was affected by those
18 changes.

19 Q. Did he tell you you were being
20 terminated?

21 A. Right.

22 Q. Did he tell you the reason you were
23 being terminated?

24 A. Well, I asked and Mark -- this is
25 how -- and the reason why I recall it vividly

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1 ~~is because the follow-up question. I said -- I~~
2 asked in regards to -- I said, "Is this" -- and
3 I'm sorry. I'm just trying to remember.
4 Mark's response to my asking about the reason
5 for the termination was pretty simple. It was
6 performance related.

7 I said in a follow-up question,
8 "Normally there's -- normally there's a period
9 of time -- a probational period of time."
10 Mark's response was, "Not under these
11 circumstances."

12 Now, I know this is one of our
13 points of contention. I remember that -- those
14 words from Mark and he had to make a lot of
15 phone calls that day. So I'm not going to make
16 excuses for him in that regard, but I remember
17 it was performance related and my response, "So
18 no probation period would apply?"

19 "Not under these circumstances."

20 Q. Now, were you also told it was part
21 of a reduction of force?

22 A. Every year -- I don't remember the
23 terms, "reduction of force." We do know rift
24 means that. But every year we do have
25 reduction of force. I think for the last three

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1 or four years, Mark could testify to that,
2 where we did have -- January was -- was a time
3 where we assessed where things were and, in
4 fact, 150 people did get terminated.

5 Q. Were you the only person on your
6 level on Mr. Johnson's staff that was --

7 A. I really don't -- I don't -- I don't
8 know if I was. I don't -- I do know from
9 conversations with my colleagues afterwards
10 that, perhaps, I was the only one within our
11 southern region that got terminated.

12 Q. After your termination, did you
13 search for work?

14 A. Oh, yeah, within an hour. In fact,
15 the way things are with me, I mean, I was upset
16 for five minutes and then I started making
17 phone calls. Within an hour I had a call back
18 from a previous acquaintance, a boss I've known
19 for 20 years.

20 Q. How many places back then do you
21 think you sent resumes to, contacted, whatever
22 it was?

23 A. Fifteen or more.

24 Q. Did you eventually locate
25 employment?

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1 A. Yeah.

2 Q. And where did you locate employment?

3 A. ERI. I think my official date was
4 May 22nd or 23rd of 2014.

5 Q. So you were unemployed from January
6 17 until May 23?

7 A. Correct.

8 Q. How much did that job pay?

9 A. \$55,000 was the base salary which is
10 what the salary -- and I know Ms. Payne
11 mentioned this in her opening statement. Rob
12 McDonald is an acquaintance of mine for 18
13 years. I know him with Philips' lifeline. Rob
14 was someone that contacted me early in the
15 process. I wasn't -- I was sorting things out.
16 I was looking at different opportunities. He
17 said at that time, he said, "Look" --

18 MS. PAYNE: Objection. Hearsay.

19 THE COURT: You can't tell me what
20 someone told you, sir. They're not here for
21 Ms. Payne to cross-examine.

22 THE WITNESS: I apologize.

23 THE COURT: Not a problem.

24 BY MR. SMITH:

25 Q. Why did you put down \$55,000?

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1 A. Because Rob told me that's what --

2 MS. PAYNE: Objection.

3 THE COURT: You can't tell me that,
4 sir. Help him out, Bill.

5 BY MR. SMITH:

6 Q. Did you know how much the job paid?

7 A. The job paid \$55,000.

8 Q. Is that why you put down \$55,000?

9 A. That's exactly why I put down
10 \$55,000. It's not what I wanted. It's what
11 the job paid.

12 Q. And was that the highest paying and
13 only job you were offered during your job
14 search?

15 A. Yes, ultimately that was the case.

16 Q. Now, you went to work in May and
17 were you paid at a rate that would have come
18 out to \$55,000 if you had worked the entire
19 year?

20 A. Yes.

21 Q. And defense also offered those
22 records as evidence as an exhibit. Did you
23 ever earn any commissions, bonuses, anything of
24 that nature while working at ERI?

25 A. No.

1 Q. So that is the extent of what you
2 earned during that year?

3 A. It is.

4 Q. Now, has that -- has your employment
5 with ERI come to an end?

6 A. It has.

7 Q. And when did that occur?

8 A. Well, I officially was on the
9 payroll until January 16th.

10 Q. What is your understanding of why
11 you no longer work there?

12 A. Things weren't moving fast enough,
13 is Rob's words.

14 MS. PAYNE: Objection. Hearsay.

15 THE COURT: Can't do that.

16 THE WITNESS: How should I answer
17 the question? I mean, I was told...

18 MS. PAYNE: Objection. Hearsay.

19 MR. SMITH: Your Honor, it's
20 actually not hearsay. It's not being offered
21 for the truth of the matter asserted. It's
22 being offered as words of legal significance as
23 to why he no longer works there.

24 THE COURT: I think he can speak to
25 what his understanding is. He can't tell me

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1 what someone told him.

2 BY MR. SMITH:

3 Q. What's your understanding of why you
4 don't work there anymore?

5 A. I wasn't bringing the business in
6 quick enough.

7 Q. Are you looking for work now?

8 A. I am, very actively.

9 Q. Sending out resumes?

10 A. A bunch.

11 Q. Any job offers yet?

12 A. No.

13 Q. All right, sir. Going back just a
14 second to your shoulder. Is it your
15 understanding you will eventually have to have
16 surgery?

17 A. Yes.

18 Q. Do you want that surgery right now?

19 A. At this time -- in fact, it was
20 fairly definitive back earlier in the year
21 starting the new job that I was going to have
22 to have another procedure. With a new job, it
23 wasn't the thing to do. It just wasn't
24 conducive to the schedule of getting things
25 done with the new job. At this particular time

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1 as I'm searching for a job, I don't anticipate
2 having one these ultra slings being in an
3 interview.

4 Q. And when we're talking about the
5 surgery, we're talking about your right
6 shoulder; is that correct?

7 A. Correct.

8 Q. Both shoulders were injured in the
9 accident. How is your left shoulder?

10 A. It's fine. It's better. It's
11 limited, but I've accepted the new norm of
12 several things in my life.

13 Q. All right, sir. You had a
14 neuropsychological evaluation done by Dr. Waid?

15 A. Yes.

16 Q. Did you do your best on that?

17 A. I did. I did everything, yes.

18 Q. You had a vocational evaluation done
19 with Joel Leonard?

20 A. Yes.

21 Q. Were you up front and honest with
22 Mr. Leonard?

23 A. Yes.

24 MR. SMITH: Thank you, sir. No
25 further questions.

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1 THE COURT: All right. Ms. Payne;

2 CROSS-EXAMINATION

3 BY MS. PAYNE:

4 Q. Mr. Adickes, nice to meet you in
5 person. Last time we chatted over the phone.
6 So you guys have discussed the accident that
7 you sustained at Philips Healthcare when you
8 drove over the cliff?

9 A. (Witness nods head.)

10 Q. Is that yes?

11 A. Yes.

12 Q. Make sure to say yes or no because
13 the court reporter is taking everything down.

14 A. I'm sorry.

15 Q. Now, initially when you reported it
16 to Philips, you had a different rendition of
17 what had occurred that evening, right? Didn't
18 you report initially that you had driven from
19 the hotel to go on a job and then got back in
20 your car and fell asleep at the wheel?

21 A. No.

22 Q. You never reported that to Philips?

23 A. No.

24 Q. So if the first injury report from
25 the -- Philips first injury report noted,

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1 "Barry was traveling on company business. That
2 evening he went for a jog in the park. Upon
3 returning, he had his accident," you would
4 dispute that?

5 A. I would absolutely dispute that. I
6 never mentioned that.

7 Q. Now, when you had that incident, you
8 had actually just began working for Mark
9 Johnson?

10 A. Correct.

11 Q. And you were a product sales
12 specialist?

13 A. Right.

14 Q. And you had changed into the channel
15 manager position?

16 A. Yes.

17 Q. When you began working for
18 Mr. Johnson, isn't it true that you actually
19 requested a larger vehicle due to your
20 pre-existing football injuries?

21 A. No, not exactly. I had a larger
22 vehicle. During the transition to the channel
23 manager's position, it was said to me that I
24 needed to swap vehicles with the person taking
25 over my territory and I -- I did not want to do

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1 that. I had -- I mean, the idea -- in the
2 product sales position, you do carry around a
3 little bit more equipment.

4 Q. That was your prior position?

5 A. Yes. The car itself is higher up
6 off the ground and with a previous injury of a
7 hip from football, climbing from a lower
8 position was more difficult after particularly
9 a long drive than a higher up vehicle where you
10 could slide out.

11 Q. So you're admitting today that you
12 actually asked Mr. Johnson if you could keep
13 your vehicle because of your pre-existing
14 injury?

15 A. I did say that, but I already had
16 the vehicle is what I was disputing.

17 Q. Right. Do you remember when I took
18 your deposition most recently?

19 A. I do.

20 Q. And I specifically asked you about
21 why you requested that car -- why you requested
22 to keep your car?

23 A. I really don't, Ms. Payne. I'm
24 sorry. I do remember this came up and I
25 thought also that we addressed this.

1 Q. Let me refresh your memory.

2 A. Thank you.

3 MR. SMITH: Your Honor, I'm going to
4 interpose an objection to the relevance of what
5 vehicle he was driving --

6 MS. PAYNE: The claimant's
7 credibility is at issue.

8 MR. SMITH: -- prior to the
9 accident.

10 MS. PAYNE: It's a credibility
11 issue.

12 THE COURT: Overruled.

13 BY MS. PAYNE:

14 Q. My question to you was -- I'm on
15 Page 22 of the second deposition. "And when
16 you began working at Philips Healthcare and was
17 traveling through your territory, isn't it true
18 that you requested a SUV based on physical
19 injuries from your past?"

20 A. And I said no because Mark -- at the
21 time I had the vehicle. The vehicle came -- go
22 ahead.

23 Q. Finish your answer.

24 A. The vehicle -- it was an approved
25 vehicle for Philips' field people. Earlier

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1 when Paul Stoddard transitioned from my
2 previous boss, my previous boss did not want
3 any of the product sales specialists to request
4 larger vehicles at the time because it
5 wasn't -- times were tough. We don't want to
6 request a larger vehicle.

7 When Paul Stoddard took over our
8 region, and I want to say that was
9 January 2010, I asked Paul at one of our team
10 meetings could product sales specialists
11 because we haul around three to four MRx's, our
12 luggage, literature pamphlets. We had a full
13 vehicle and smaller vehicle. We couldn't even
14 fit people in if we were going to take somebody
15 or entertain a guest for dinner. Paul said
16 that sounds reasonable. I'll take it up with
17 Julie and just fill out the form. So I filled
18 out the form. It became then standard practice
19 for all product sales specialists to have the
20 Dodge Journey if they chose to have it.

21 Q. I'm not referring to product sales
22 specialists. I'm referring to the position you
23 were in under Mark Johnson which was the
24 channel manager where your devices were
25 actually much smaller than what you were

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1 selling in the product sales specialist which
2 is why you were asked to go to a smaller
3 vehicle?

4 A. Sure. Yes, ma'am. And the way I
5 understood your question at the deposition, did
6 you request from Mark a larger vehicle and I
7 said no. I already had the larger vehicle. I
8 had requested that through Paul Stoddard.

9 Q. My question to you was, "And when
10 you began working at Philips Healthcare and
11 were traveling through your territory, isn't it
12 true that you requested an SUV based on
13 physical injuries from your past?" Can you
14 read your response starting with "A?"

15 A. "Wow, this must have come from Mark
16 too. I'm in the changing of -- so the answer
17 would be no. I requested an SUV per Philips'
18 policies because product sales specialists had
19 to carry around a lot of stuff. There were --
20 there was equipment needs and particularly if
21 we were taking other folks, we were traveling
22 with other people. Either regional managers
23 are taking folks with us off-site to lunch."
24 And I stand by exactly that. That's exactly
25 what I said. The response to your question was

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1 did I request from Mark a larger vehicle
2 because of disabilities. That was no. I
3 already had the larger vehicle from that very
4 statement there.

5 Q. You never said those words in the
6 deposition, is my point.

7 A. I'm sorry I wasn't clear.

8 Q. And you'll agree that when Mark
9 allowed you to keep the larger vehicle, it
10 was -- it was done under medical accommodation
11 due to your pre-existing injuries?

12 A. I'm sorry. Say that --

13 Q. He was able -- Mark was able to help
14 you keep that vehicle under -- he obtained a
15 medical accommodation due to your pre-existing
16 injuries? That's why you kept it?

17 A. Okay.

18 Q. Would you agree?

19 A. I don't even know how Mark approved
20 or disapproved. It turned out that I was able
21 to and I don't know if I...

22 Q. Do you remember receiving an e-mail
23 from Mark Johnson on January 31, 2011 that
24 said, "Barry, per our discussion last week, the
25 company is making an exception to the

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1 automobile policy to accommodate your request.
2 You'll be keeping your existing Dodge Journey.
3 At that time you may utilize the medical
4 accommodation process to request a vehicle that
5 meets your needs." Do you recall that?

6 MR. SMITH: Your Honor, I'm going to
7 object to that e-mail coming into evidence. I
8 subpoenaed their entire personnel file. That's
9 not been provided to me prior to today.

10 MS. PAYNE: Your Honor, I wasn't
11 entering it into evidence. I was using it for
12 impeachment purposes. It doesn't need to come
13 in.

14 MR. SMITH: You're reading the
15 e-mail. It gets read into the record. That's
16 in evidence.

17 MS. PAYNE: It's used for
18 impeachment purposes. Not for evidentiary
19 purposes.

20 MR. SMITH: Same objection, Your
21 Honor.

22 THE COURT: So noted. Go ahead.

23 BY MS. PAYNE:

24 Q. Do you recall receiving that e-mail?

25 A. I do not. I do recall our

1 conversation and I will say that in regards to
2 the vehicle I had already been driving for over
3 a year that I mentioned to Mark, I said, you
4 know, aside from carrying around equipment and
5 people, it's just for me due to a left hip
6 injury easier to get in and out of a vehicle.
7 It's difficult to sit down particularly if
8 you're driving 400 miles or somewhere you get
9 kind of --

10 Q. Now, when you had this vocational
11 evaluation with Mr. Joel Leonard recently,
12 isn't it true that you told him that you had
13 never had any performance issues at Philips
14 Healthcare prior to the date of accident?

15 A. I'm not even -- if -- in 2009 during
16 the months that I was on PIP, it just didn't
17 stick in my mind that that was even a
18 performance issue. It was something that I
19 was -- that several of my colleagues had to
20 manage and deal with and continue to do your
21 job and try to work your way to making a
22 number.

23 Q. So you were under a performance
24 improvement plan in 2009 which involves going
25 through a process, a meeting. There's a memo.

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1 It's titled "Performance Improvement Plan."
2 You continue to follow up with your supervisors
3 about how you're doing in that plan and how
4 you're trying to get off of that plan, but you
5 failed to tell Mr. Leonard that part, correct?

6 A. And I don't recall exactly the
7 wording. I guess it would potentially be there
8 in the documents. I just don't even remember
9 the question, but truly that PIPPIP
10 was something that I -- that truly did not
11 inhibit or influence my feelings of how I was
12 doing my job. I was continuing to do my job.

13 Q. When you were evaluated by
14 Mr. Leonard, you'll agree that you painted a
15 picture stating that, you know, prior to this
16 date of accident, I never had any performance
17 issues and then I had the date of accident and
18 I was fired and I was fired because of my work
19 injury; is that right?

20 A. I don't ever recall saying anything
21 those exact words, so I would say no.

22 Q. Wouldn't you agree that you informed
23 him that you had never had any performance
24 issues prior to your accident, but you had them
25 after date of accident and it was your opinion

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1 that you were terminated because of your
2 performance issues which you related to the
3 work injury?

4 A. I just don't recall exactly how any
5 of that -- those questions came up during that
6 interview that it was black and white and this
7 is the way it was and then after the accident,
8 this is the way it was. I answered his
9 questions fully and truthfully, but I just --
10 there was never a position that I stated
11 anything exactly the way you just stated it.

12 Q. Would you agree that you informed
13 Mr. Leonard that your termination from Philips
14 Healthcare was due at least in part to
15 performance-based deficits arising from your
16 work injury?

17 A. I felt so.

18 Q. You did feel so. Right. And in
19 order to prove to him that that was the case,
20 you told him that before the date of accident
21 you had no performance issues, but after the
22 date of accident you were found to have
23 performance issues?

24 A. I just don't recall it coming up
25 exactly like that, like you're wording it.

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1 Q. If that information was contained in
2 his report, would you dispute it?

3 A. No.

4 Q. So in 2009 you were on a performance
5 improvement plan and you didn't inform
6 Mr. Leonard, correct?

7 A. I was on a performance improvement
8 plan in 2009.

9 Q. You did not informed Mr. Leonard of
10 being on the performance improvement plan prior
11 to the date of accident?

12 A. I don't recall that coming up or the
13 question specifically being asked. I can tell
14 you it was never deliberately not discussed. I
15 don't ever remember the question specifically.
16 When I answered thoughts in regards to that it
17 was because that 2009 PIP was a distant memory
18 for me and not even something that was in my
19 consciousness.

20 Q. And not only were you receiving
21 correspondence between -- from your boss in
22 2009 about your performance plan and how you
23 were doing on it, in 2010 you also received an
24 e-mail regarding the first five months of 2010
25 and your poor performance in those months as

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1 well, correct?

2 A. I saw the e-mail. I don't recall
3 all e-mails that come through, but, yeah, I do
4 remember seeing that e-mail.

5 Q. So you had these performance issues
6 in 2009 and 2010?

7 A. I'm not going to -- being on the
8 plan and having to document numbers is the way
9 that it works with Philips in regards to
10 keeping track of records in regards to
11 performance. So it wasn't --

12 Q. You would agree that in May 2010,
13 you were aware that the company was unhappy
14 with your inability to meet your quota in the
15 first months of 2010?

16 A. I don't categorize it as they were
17 unhappy and ready to cut the cord. It was
18 documenting where we were in the -- where my
19 territory was in Queue One.

20 Q. So as a salesperson, isn't it your
21 understanding that all they look at is your
22 quota? If you're not meeting your quota,
23 you're just not doing your job?

24 A. Exactly.

25 Q. So if they're not happy with you not

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1 meeting your quota, does that not indicate to
2 you that they are unhappy with your
3 performance?

4 A. I gauged the level of my performance
5 and happiness within my performance on how my
6 boss would discuss issues with me or
7 opportunities with me. Paul Stoddard at that
8 time was encouraging like some of his comments
9 when he reflects back on that 2010 year that we
10 pulled -- we pulled a great year out
11 considering all things and we actually
12 performed a plan. Paul was encouraging
13 throughout the process. I told him, hey, we'll
14 get through this, I'll get through this.

15 Q. Okay. What about Paul's e-mail to
16 you in May of 2010 wherein -- this is Exhibit
17 D, Page 21 of the exhibits where he stated to
18 you, "As you can see you've achieved only --
19 over 65 percent only once in the last six
20 months. Please call me at your earliest
21 convenience to discuss these results." Do you
22 recall receiving that e-mail?

23 A. I do. I'm familiar exactly with it.
24 And I'll say this how this is managed because I
25 know this is keeping HR in the loop on

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1. everything that's going on with this. When I
2. called Paul -- it's not -- it's going to be
3. hearsay.

4. Q. In May of 2010, you are aware that
5. Paul Stoddard wasn't happy with your
6. performance?

7. A. No, I won't agree with that. I
8. won't agree with that because though it's
9. hearsay, our verbal conversations were all
10. encouraging.

11. Q. That's hearsay.

12. MR. SMITH: Objection, Your Honor.
13. It's not hearsay. He's management employee.
14. In fact, he's Mr. Johnson's boss.

15. MS. PAYNE: He's not been
16. subpoenaed.

17. MR. SMITH: He doesn't have to be.
18. He's a management employee of Philips.

19. THE COURT: He's exactly correct.
20. You may answer that or you may continue.

21. THE WITNESS: Paul was very
22. encouraging as his words were in the
23. performance appraisal at the end of the year --
24. at the end of the 2010 period. He knew that we
25. were going to get through the PIP. He made a

1 funny comment. He said, "In our managers
2 meeting yesterday, everybody said Adickes is
3 still on PIP. He just had a month that led the
4 nation." And that's when he said, "I knew we
5 would get through it and you came through with
6 a good performance," which is generally how he
7 managed his employees and that's how he --
8 anyway in 2010, the performance appraisal for
9 that year spoke to how I maintained positive
10 attitude through everything, that he was
11 pleased and proud of how the year went. That's
12 why I said no, it was not in admittance to me
13 that he was displeased.

14 BY MS. PAYNE:

15 Q. Would you agree that if you don't
16 meet your quota, you are essentially falling
17 short of your production goals?

18 A. Yes, absolutely.

19 Q. Mr. Leonard has in his report that
20 you fell short of your production goals for the
21 years after the date of accident. I'm on Page
22 39 of your exhibits. "Prior to such he had
23 always met or exceeded his production goals.

24 A. 2010, I did. We had a -- we had a
25 very good year in 2010.

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1 Q. You would agree I just showed you
2 the e-mail wherein the first five months of
3 2010 you didn't?

4 A. What counts as 12 months, Ms. Payne,
5 in this business, if you get 12 months, if
6 you're 70 percent to plan in June and 120
7 percent to plan in July, you've done your job.

8 Q. Be you will agree that you didn't
9 meet your production goals in 2009, did you?

10 A. I'm not sure what you're saying.
11 That I did what?

12 Q. You will agree that you didn't meet
13 your production goals in 2009?

14 A. 2009, we were short of plan.
15 Correct.

16 Q. You were short of plan?

17 A. Correct. Right.

18 Q. And you just didn't inform
19 Mr. Leonard of that, correct?

20 A. (No response.)

21 Q. Is that a yes?

22 A. I just don't remember that ever
23 coming up as a specific question, "Did you do
24 well in 2009?" No, I do not recall ever
25 discussing with Mr. Leonard 2009 specifics.

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1 Q. So would you dispute that part of
2 his report?

3 A. No. I'm saying I do not -- I do not
4 recall us talking specifically about 2009's
5 performance.

6 Q. If that was obtained in his report,
7 would you want it struck?

8 A. No..

9 Q. Less than two months after your
10 accident, you returned to Philips working in
11 your regular duty capacity?

12 A. Yes.

13 Q. And during the years after your
14 accident, you continued to work for two and a
15 half months earning at least -- I'm sorry, two
16 and a half years earning at least \$120,000
17 every year which includes your base salary of
18 85 and your commission and your bonus, correct?

19 MR. SMITH: Objection, Your Honor.
20 That misstates the W2 form.

21 THE WITNESS: I think I was short of
22 that.

23 THE COURT: Hold on. What's your
24 objection?

25 MR. SMITH: That that misstates the

1 W2 forms that they offered as evidence.

2 BY MS. PAYNE:

3 Q. Okay. You'll agree that in 2011,
4 you earned \$114,000?

5 A. Yes.

6 Q. In the 2012, you earned \$120,000?

7 MR. SMITH: I'm sorry. What year
8 did you say?

9 MS. PAYNE: 2012.

10 THE WITNESS: I don't -- I need to
11 know the number on our paper. If it's on my
12 W2, then that would --

13 BY MS. PAYNE:

14 Q. In 2013, you earned \$110,000. Does
15 that sound about right? Do you have any reason
16 to dispute that?

17 A. No.

18 Q. You still were making good money?

19 A. I wasn't -- I wasn't satisfied with
20 it. I was ready to make more.

21 Q. Okay. Now, in the two and half
22 years that you continued working for Philips
23 underneath Mr. Johnson, only around 10 to 12
24 days were you affected by your headaches,
25 correct?

1 A. You'll have to forgive me. Restate
2 that.

3 Q. Wouldn't you agree that in those two
4 and a half years that you continued working for
5 Philips, you were only impacted by your
6 headaches or your job was only impacted by your
7 headaches 10 to 12 days?

8 A. During the total of two and a half
9 years?

10 Q. Correct.

11 A. I'm not sure of your math, but I
12 would say no.

13 Q. Wouldn't you agree that when you had
14 headaches while working with Philips, you would
15 just stay home for that day and work from home?

16 A. Right.

17 Q. You would tell Mr. Johnson you were
18 working from home?

19 A. Right.

20 Q. But you continued to work?

21 A. In most cases I have. The first
22 part of recovering, I would be able to do some
23 work from home, particularly on the telephone.

24 Q. Excuse me?

25 A. On the telephone primarily the day

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1 after I was able to.

2 Q. So you never had to miss actual days
3 due to the headaches because you were still
4 able to work?

5 A. I missed a few days, I did, with
6 headaches. I'm not sure exactly what the
7 question was there.

8 Q. The question was, we've taken your
9 deposition twice in this case and you --
10 wouldn't you agree you testified that you did
11 have to miss days from work, but you would just
12 tell Mark you were working from home on those
13 days and you were able to work from home?

14 A. I'd say correct in those cases.

15 Q. Now, after the date of accident in
16 2011, even though you missed two months because
17 you were out of work due to the injury, you
18 still almost made your quota?

19 A. What, 86 percent?

20 Q. Eighty-seven.

21 A. Prorated to that. You stream a
22 couple of 87 percents in a row, you're on PIP.
23 So no, 87 is not almost making quota.
24 Eighty-seven gets you on PIP.

25 Q. But the 87 wasn't prorated for just

1 those months?

2 A. I'm not sure exactly how it came out
3 at the end, but I did not meet quota that year.

4 Q. And you'll agree that in 2012, you
5 received an e-mail from your supervisors about
6 performance issues and it was specifically
7 referenced that your performance issues that
8 you had in 2010 were resurfacing; is that
9 right?

10 A. The e-mail stated that --
11 resurfacing was the word used, yes.

12 Q. So in 2012, they thought that
13 whatever performance issues you had in 2010
14 were still there and were coming back?

15 A. "They" who?

16 Q. The report that you received from
17 Philips?

18 A. From Mark.

19 Q. Correct. So Mark was acknowledging
20 that some issues you had in 2010 were
21 resurfacing in 2012, correct?

22 A. As stated in his e-mail.

23 Q. So you're agreeing that you remember
24 receiving that e-mail?

25 A. Yes. I remembered after seeing the

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1 e-mail being reminded, yes. It was not
2 something that I recalled from memory.

3 Q. Okay. And then you were terminated
4 from Philips in January of 2014. I'm a little
5 confused about your testimony earlier because
6 you testified that on the phone call with Mark,
7 that he specifically told you that your
8 termination was a result of poor work
9 performance?

10 A. The term was it was work-related. I
11 mean, it was performance related was the --
12 because at that time I said no probation period
13 and he said not under these circumstances.
14 That was the terminology that I recall Mark
15 using.

16 Q. Now, when I deposed you in September
17 of 2014 and you told me the same thing, that
18 Mr. Johnson had told you on the phone that it
19 was performance related, you -- when you got
20 home that night, you started texting
21 Mr. Johnson, didn't you?

22 A. No, I actually did it from the
23 parking lot afterwards. Mark and I have a
24 friendship even after, I guess, the termination
25 and my texts to Mark was ultimately saying,

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1 "Hey, I know this was -- you made a few phone
2 calls that day and I know, perhaps, you don't
3 recall, but the reason why I recalled it that
4 way because of the follow-up question," is what
5 I was texting Mark. And what I was saying was
6 I wasn't saying, "Mark, you're not being
7 truthful," in that instance because I remember
8 saying something in the deposition that I felt
9 bad about later about suggesting that he or
10 someone else was being untruthful. I was
11 thinking that, perhaps, they just did not with
12 all the things they were doing that day recall
13 because it was very brief.

14 Q. Let me remind you of what your text
15 message stated. "Hey, Mark. Hope all is well
16 with you and your gals. I'm going to call you
17 tomorrow and if I can't reach you, I will leave
18 a message. I was deposed again today by
19 Philips' attorney. I wish more than ever that
20 I had ignored legal input and called you three
21 weeks ago. Just know that I never said a
22 disparaging word about you as a manager or a
23 friend before or after my termination. I'm
24 hoping that a recording was made and can be
25 found of that phone call. I don't expect that

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1: you could recall exactly the dialogue. I
2: cannot. But I remember my question of how I
3: was selected in my follow-up question about the
4: protocol of probationary period. With the
5: reduction in force, RIF, I was, perhaps, a
6: natural selection for those making the call who
7: did not know me. Like I said, I'll call you
8: tomorrow."

9: So wouldn't you agree that within
10: that text message, you're actually telling Mark
11: Johnson that you don't remember the
12: conversation either? All you remember is that
13: you asked the question about a probationary
14: period, right?

15: A. No, it would not suggest that I
16: don't remember anything about it. It was
17: suggesting that verbatim -- I would not be able
18: to recreate it verbatim. But what I was saying
19: to him, maybe you don't recall this. But the
20: reason I recall it being performance related
21: was because of my follow-up question was, "No
22: probationary period?"

23: "Not under these circumstances."

24: Q. And then you --

25: A. My main reason for texting Mark was

1 on a personal level. It was not -- and then I
2 realized and then you contacted Bill and Bill
3 contacted me that it was inappropriate to do
4 that with an open case and I realized it
5 wasn't.

6 Q. But then you texted him again?

7 A. No, I did. I texted him actually
8 twice before getting Bill -- I didn't text him
9 back after Bill contacted me. It just was
10 coincidental that I sent one and I actually
11 sent it -- I didn't want to send it. But as
12 I'm typing it, I send it. You can see -- well,
13 you can chuckle if you like, Ms. Payne, but you
14 can see the time line. You match up your time
15 line with that time line, you will see I never
16 heard from Bill until after those two text
17 messages were sent. So the answer is no, I did
18 not send text messages after Bill told me not
19 to.

20 Q. So you contacted him at 6:30 that
21 evening after the deposition, had a
22 conversation about the termination discussion?

23 A. Uh-huh.

24 Q. And then following that he was then
25 contacted at 1:57 p.m. the following day

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1 wherein stated, "Mark, perhaps making contact
2 with you at this point is not appropriate" --

3 A. You may want to check --

4 Q. I've not finished my question. "I
5 apologize. I just wanted you to hear from me
6 how this whole ordeal has been mismanaged into
7 and ugly -- has been mismanaged." Did you send
8 that text message?

9 A. I did, but please check and see if
10 that was maybe when Mark forwarded it to you
11 because my recollection -- and I we can -- if
12 this is actually --

13 Q. He took screen shots of it. My
14 question to you is, do you recall sending the
15 second text message?

16 A. Yeah. I sent it virtually
17 simultaneously as the second -- as the first.
18 It wasn't Bill -- after Bill said don't do
19 that, I didn't do it.

20 Q. So you sent one text message and
21 then immediately realized it was inappropriate
22 to send any so you sent another right after?

23 A. What I did -- and if you'll see my
24 last statement, "I'll call you tomorrow." Did
25 you read that part? That would suggest it was

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1 the day before. And I wouldn't be saying,
2 "Hey, I'll call you tomorrow even though Bill
3 says not to." I wouldn't have done that.

4 Q. It says, "Hey, I'll call you
5 tomorrow." And then the next text message was
6 sent the next day after you were advised not to
7 do so. This is meaningless.

8 A. I would say it would be too. You're
9 pursuing it.

10 Q. Excuse me?

11 A. I said you're saying it's
12 meaningless and I say it would be too. You're
13 pursuing

14 THE COURT: Let's move on.

15 BY MS. PAYNE:

16 Q. Let's move on. Following your
17 termination, you provided your resume to many
18 places, correct?

19 A. Yes..

20 Q. And the only three that you informed
21 me of in the deposition were McKesson, D-E-X, I
22 believe, ZOLL, correct?

23 A. Those were interviews and
24 opportunities.

25 Q. You had interviews at those places?

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1 A. Those were opportunities that had
2 developed beyond my just sending out the
3 e-mails of resumes.

4 Q. Were you surprised when we
5 subpoenaed ZOLL Medical Supplies and they
6 responded that they had no applications on file
7 or resumes on file from you?

8 A. I'm surprised, no, that they didn't
9 have any because I didn't go through an
10 application process. It was a phone
11 conversation after sending into Jamie Sultsman
12 with ZOLL through one of our -- one of my
13 channel partners that's still a very big
14 customer of Philips, DXE, who wrote a nice
15 referral letter. I sent the referral letter
16 and a resume to Jamie and followed up with a
17 phone call.

18 Q. And these resumes that you were
19 providing to all these potential employers, you
20 held yourself out as an impactful public
21 communicator with comfortable ease and
22 delivery, correct?

23 A. Yes.

24 Q. Doesn't sound like there's any
25 cognitive deficits there?

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1 MR. SMITH: Objection.

2 Argumentative.

3 BY MS. PAYNE:

4 Q. Wouldn't you agree?

5 THE COURT: Sustained.

6 THE WITNESS: I would not. I would
7 not agree.

8 BY MS. PAYNE:

9 Q. You also held yourself out as an
10 extensively trained practitioner of consultive
11 sales methods, correct?

12 A. Correct.

13 Q. And you informed them that you were
14 expertly organized and focused when moving
15 opportunities through the sales cycle?

16 A. That is a bullet point that I've
17 amended in my -- in my resume, but on that
18 resume I would say correct.

19 Q. And you informed potential employers
20 that you're diligent, trustworthy, and you've
21 got integrity?

22 A. Correct.

23 Q. So these are obviously qualities
24 that you feel about yourself, correct?

25 A. Correct.

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1 Q. So you were confident going in the
2 job market that, you know, showing those
3 qualities that you would hopefully find a job
4 similar to the one you had at Philips, if not
5 better?

6 A. I was hopeful.

7 Q. In fact, when you applied at
8 McKesson, you were applying for like a director
9 position which would have been a step up from
10 where you were at Philips?

11 A. The salary -- base salary was about
12 the same.

13 Q. The position was direct which would
14 be a step up from where you were at Philips,
15 correct?

16 A. It was.

17 Q. It's more complicated: And you
18 underwent a telephone interview with McKesson,
19 didn't you?

20 A. Six total phone interviews.

21 Q. Do you remember the telephone
22 interview you underwent on March 4, 2014?

23 A. No. I don't remember the dates
24 exactly of all those.

25 Q. But you've seen the documents I

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1 provided your counsel, the subpoena responses?

2 A. I'm just not -- that one I may not
3 have remembered exactly the dates.

4 Q. Within that application, the
5 question was asked if you were interviewing
6 with other companies and you informed them that
7 you were and that you had offers pending, but
8 you were strongly considering this position.
9 What offers were pending?

10 A. I don't recall saying that I had
11 offers pending. In fact, I don't think that's
12 very appropriate on an interview to say I have
13 offers pending. I think the question may have
14 been, "Are you actively pursuing other
15 opportunities?" And I said yes. I never used
16 a pending opportunity phrase.

17 Q. So you dispute what's contained in
18 the telephone interview?

19 A. I haven't seen it. I haven't seen
20 it, so...

21 Q. Do you remember when I took your
22 deposition we discussed this?

23 A. No, ma'am. I don't remember all.

24 Q. I said -- I'm on Page 34 of the
25 second deposition. "Now, the note from your

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1. phone interview at McKesson indicates that you
2. were interviewing with other companies and have
3. pending offers. What offers were pending at
4. that time?" Can you read your response?

5. A. "VRI had extended an offer and I
6. don't remember ever saying that I had other
7. than if they asked the question, 'Do you have
8. other opportunities available?' That, to me,
9. is not professional to tell somebody on an
10. interview. A strike quick, I'm about to be
11. hired with someone else. The question may have
12. been posed to me, 'Do you have any other
13. opportunities you're pursuing?' or whatever."

14. Q. But your first sentence was, "VRI
15. had extended an offer."

16. A. And that -- okay. That, in
17. particular, was, yes, one from Ron McDonald
18. that did say, "Hey, come see me."

19. Q. But you didn't even apply at VRI
20. until the next month?

21. A. Right. He as an acquaintance knew
22. of my departure, knew my track record when he
23. was with me, knew previously I was an
24. eight-time presence achievement award with
25. Lifeline and said this is the business now

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1 we're in. I'm the VP of this company. I would
2 love for you to come work for me. We pay
3 \$55,000 a year starting, but you can begin to
4 make some money. I know that's less than --
5 that's basically, again, we're talking hearsay.

6 Q. And when I deposed you back in
7 September, you testified that you had actually
8 had an offer from VRI in January which is the
9 same month you stopped working -- or were
10 terminated from Philips?

11 A. Okay. I'm not certain of the dates.
12 I did talk to Rob early in the process,
13 early --

14 Q. So you just chose not to accept it
15 for a few months?

16 A. Correct.

17 Q. Okay. And also in your phone
18 interview with McKesson, you informed them that
19 you were no longer working at Philips because
20 your position was eliminated, correct?

21 A. Okay.

22 Q. So you told them that you were
23 eliminated as part of a RIF?

24 A. I just don't even recall the
25 conversation exactly how that was positioned,

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1 but that is based on what -- testimony.

2 Q. So if that is contained within the
3 summary of the telephone interview, would you
4 contest it?

5 A. The summary of what telephone?

6 Q. The telephone interview that you had
7 with McKesson?

8 A. I just -- if it's -- no, but I do
9 not recall saying to them even the discussion
10 of my leaving Philips.

11 Q. And when I deposed you back in
12 September, you testified that you were of the
13 opinion that you didn't get the job at McKesson
14 because you filled out some sort of medical
15 questionnaire and the medications you were on
16 were related to a work injury and that's why
17 they didn't hire you?

18 A. I felt strongly because of how it
19 was progressing. McKesson's, the Los Angeles
20 base where ZEE Medical, a subsidiary of
21 McKesson, was where the director's position
22 was. My contacts there suggested that you're a
23 front runner. Things were looking good after
24 that last interview.

25 San Francisco is where McKesson's

1 headquarters and their HR department. The last
2 two interviews -- or I should say the third and
3 the sixth interview were from folks from the
4 San Francisco office. That last one was
5 answering questions on the medical
6 questionnaire, "Why are you on Nadolol every
7 day? Why do you" --

8 MS. PAYNE: I'm just going to object
9 to this testimony because there is no evidence
10 a medical questionnaire was ever performed -- I
11 mean, received as full subpoena response from
12 McKesson which doesn't contain one. So I think
13 it's hearsay.

14 MR. SMITH: She opened the door,
15 Your Honor.

16 THE COURT: She did, indeed. He may
17 answer those questions, but you need to refrain
18 yourself to answering questions and not just
19 pontificating. Okay?

20 THE WITNESS: I'm sorry. Yes, sir.

21 BY MS. PAYNE:

22 Q. You don't have that medical
23 questionnaire with you, do you?

24 A. No.

25 Q. You don't have any applications you

1 submitted to ZOLL or McKesson with you?

2 A. No.

3 Q. And were you surprised when you saw
4 the subpoena response from McKesson stating
5 that there was never a medical questionnaire
6 done?

7 A. I'm sorry. What?

8 Q. Were you surprised when you saw the
9 subpoena response from McKesson without any
10 sort of medical questionnaire contained?

11 A. No, I'm not surprised one way or the
12 other with what you have there. I just don't
13 know how to respond to that as far as being
14 surprised with what you have and don't have.

15 Q. You haven't subpoenaed anyone from
16 McKesson to testify today about why you didn't
17 get the job, have you?

18 A. No.

19 Q. So you actually don't have or you
20 haven't brought with you any proof that you
21 didn't receive the job at McKesson because of
22 your work injury at Philips?

23 A. I would say there's no proof of
24 that. I would agree with you there.

25 Q. So then you became hired at VRI.

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1 Looks like you applied in April 2014, correct?

2 A. I believe that's when I filled out
3 the application.

4 Q. And on that application there was a
5 specific square that said "desired salary"
6 which you indicated \$55,000 base, correct?

7 A. Per the understanding that that was
8 what the sales folks made.

9 Q. Even though it said the word
10 "desired?"

11 A. I put in what I knew what the salary
12 was.

13 Q. Now, the position that you had at
14 VRI was a very flexible position where, you
15 know, there weren't any specific days allocated
16 off for vacation, you know. You could kind of
17 take two days off or two months off, correct?

18 A. Correct.

19 Q. So you never had to miss any time
20 due to your headaches, right?

21 A. I never had to report any time that
22 I was down with a headache. Rob and I would
23 have conversations about how things were going.
24 Every week we talked at 1:00 p.m. on Mondays.

25 Q. So \$55,000 is what you -- it was

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1 your understanding that \$55,000 was the base
2 salary for the position you held at VRI as
3 territory manager, right?

4 A. I learned that early in the process
5 and you asked the question earlier about why I
6 did not take that right away. I was hoping
7 to -- I was still hopeful that another position
8 would be available.

9 Q. So you just -- your earnings at VRI
10 are reflective of the base salary of all of the
11 territory managers which is \$55,000?

12 A. Yes.

13 Q. Has nothing to do with the fact that
14 you may be slower at doing things or anything
15 of that nature, correct?

16 A. That's correct.

17 Q. So all the other territory managers
18 make a base salary of \$55,000?

19 A. Yes.

20 Q. Now, when you applied to VRI and
21 spoke with the HR department, you never
22 notified them of your prior injuries or any
23 accommodations due to your work injury, did
24 you?

25 A. I did discuss with my boss. He knew

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1 because he knew me from earlier that I was in
2 the accident in 2011, yes.

3 Q. The HR department was never made
4 aware?

5 A. Yes, Laura Schmitt would have been
6 aware. She was aware of this particular case
7 specifically because she was subpoenaed to
8 provide records and I wanted to share with her
9 why she was being subpoenaed for my records.

10 Q. So you talked to her?

11 A. Laura Schmitt would be the person I
12 talked to. This would have been back in May.
13 Whenever you subpoenaed the record, I called
14 her and let her know why.

15 Q. Would you be surprised if the
16 current HR position or current person that
17 holds the HR position who responded to our
18 subpoena said that the HR department is unaware
19 of any reasonable accommodations or --

20 A. Laura would know --

21 MR. SMITH: Objection. First of
22 all, there's been no records submitted into the
23 record to say that. So whatever she's talking
24 about is hearsay and it had not been provided
25 to me.

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1 MS. PAYNE: I'll provide this to
2 Mr. Smith. We just got a response since we
3 were just provided with her name.

4 MR. SMITH: I still object to it as
5 hearsay if there is nobody here to testify to
6 it's authenticity.

7 MS. PAYNE: Well, Commissioner, we
8 just got the name of his supervisor. We asked
9 it on Tuesday and Thursday the supervisor said
10 we're going to have to send a subpoena to this
11 specific person within the HR department. We
12 had already subpoenaed all the records from VRI
13 and have never been provided with anything with
14 regard to his termination because that's what
15 we needed. And so on this past Tuesday -- just
16 this Tuesday, she responded with regard to the
17 subpoena that we sent for termination evidence.

18 THE COURT: And did you provide that
19 to Mr. Smith on Tuesday?

20 MR. OXFORD: This was just
21 yesterday.

22 THE COURT: Did you provide it to
23 Mr. Smith yesterday?

24 MR. SMITH: I haven't gotten it.
25 They sent a subpoena out of state which is not

1. a proper subpoena.

2. MS. PAYNE: It's not an -- we didn't
3. subpoena -- we didn't -- we were subpoenaing
4. the termination documents. We realized we
5. couldn't bring those. It's not our burden to
6. prove this, but we wanted to see why he was
7. terminated and we requested additional
8. documents that we thought would be contained in
9. the record that weren't provided the first
10. time. This was the first time we got her name
11. was last week, and then we just got this
12. response from her yesterday.

13. THE COURT: Mr. Smith hasn't seen it
14. prior to right now?

15. MR. OXFORD: It was mailed
16. yesterday.

17. THE COURT: If it was mailed
18. yesterday, how can he possibly have received it
19. if it went out in the mail yesterday?

20. MR. OXFORD: The subpoena was sent
21. to him yesterday.

22. MS. PAYNE: I'm not trying to tender
23. this in evidence. I'm using it for impeachment
24. purposes.

25. MR. SMITH: When you question him

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1 about it, it's in evidence.

2 MS. PAYNE: It's not in evidence.

3 THE COURT: It's not going to come
4 in. I mean, if it was so critical to your
5 case, you should have asked for a postponement,
6 which you did not.

7 BY MS. PAYNE:

8 Q. You haven't brought with you any
9 documentation or any witnesses from VRI to
10 prove that you were terminated due to your
11 work-related injury, have you?

12 A. No.

13 Q. Now, with regard to the injuries
14 that you sustained in the incident, your
15 headaches have gotten better, correct?

16 A. Better than they were the year of
17 the accident. Less frequent.

18 Q. And you underwent an MRI scan of
19 your brain and CT scan of your head both of
20 which were normal?

21 A. The day of the accident I did have
22 an MRI, correct. There was no bleeding or
23 crack or broken skull, I guess.

24 Q. Now, with regard to the cognitive
25 issues that you are claiming, you'll agree that

1 when your deposition was taken back in April of
2 2013, that the only cognitive issues you
3 sustained were memory loss and difficulty
4 putting words together?

5 A. I do not recall categorizing -- you
6 showed me information I could say yea or nay.
7 I just don't -- I don't recall what you're --

8 Q. Do you recall in April of 2013
9 feeling like you had any other cognitive issues
10 resulting from the accident?

11 A. Just the ones that we've stated.

12 Q. And you also testified that your
13 memory loss hasn't impacted your ability to do
14 your job back at the time in April 2013?

15 A. I didn't feel like it had
16 significantly.

17 Q. And, in fact, when you were deposed
18 in April of 2013, you testified that you had
19 performed your job at Philips adequately since
20 returning to work?

21 A. Yes.

22 Q. And in some of your medical records,
23 specifically of Dr. Waddle, you related your
24 forgetfulness to your age?

25 A. I'm not sure what doctor.

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1 Q. Do you recall informing any of the
2 doctors that you thought that your
3 forgetfulness was due to your age as opposed to
4 your work-related injury?

5 A. Is this from Dialogue Commentary
6 with Dr. Mandell? I'm not familiar with
7 Dr. Waddell.

8 Q. Mandell. I'm sorry.

9 A. If you can state the question again.

10 Q. Isn't it true that you have reported
11 to some of your doctors that your forgetfulness
12 is due to your age?

13 A. I felt that I was experiencing
14 things that a lot of 53-year-old men might
15 experience.

16 Q. And you reported that to your
17 doctors?

18 A. To Dr. Mandell.

19 Q. Do you recall undergoing a
20 neuropsychological evaluation with Dr. Randy
21 Waid?

22 A. I do.

23 Q. Have you reviewed the report?

24 A. I reviewed the summary of some of
25 the scoring which I really wasn't familiar with

1 and I'm trying to determine which test was
2 which. I just kind of reviewed the summary,
3 but not in detail.

4 Q. And you remember going through a lot
5 of tests?

6 A. A lot of tests. All day. Nine
7 hours' worth.

8 Q. And in reading the summary, I'm sure
9 you saw that Dr. Waid came to the conclusion
10 that you made a good recovery from your
11 injuries and you had a high range of
12 intellectual abilities, correct?

13 A. Correct.

14 Q. And that the neuropsychological exam
15 provided favorable results. Did they tell you
16 the results as you were getting tested?

17 A. No. I was really excited and
18 enthusiastic to get the report because I kind
19 of wanted to know what was going on as well
20 with my brain.

21 Q. And you also injured your right
22 shoulder and you initially underwent surgery in
23 October of 2011?

24 A. Yes.

25 Q. And you continued to treat with

1 Dr. Rentz thereafter, correct?

2 A. Yes.

3 Q. And Dr. Rentz is your neighbor?

4 A. Yes.

5 Q. And you went to his house after your
6 accident and got injections from him at his or
7 your house?

8 A. No. The day of the accident I went
9 to his office. He took x-rays, perhaps, a
10 couple weeks or maybe a couple months
11 afterwards. He gave me a cortisone injection
12 in my right shoulder.

13 Q. At your house?

14 A. Yes.

15 Q. So you underwent the surgery
16 October 21, 2011 and you treated with him seven
17 days thereafter and he stated that you were
18 having a good recovery; is that right?

19 A. Yeah, I was working it back in
20 shape.

21 Q. And the next month he reported that
22 you had full extension of your right -- full
23 extension of your right arm. Do you recall
24 that?

25 A. No, I don't recall having an

1 extension test with him.

2 Q. You don't recall --

3 MR. SMITH: May I interpose an
4 objection? The medical records speak for
5 themselves. I don't know what is the purpose
6 of these questions.

7 MS. PAYNE: Your Honor, I'm not
8 going through all of the medicals. I just
9 wanted to hit on a few involving the right
10 shoulder.

11 THE COURT: All right.

12 BY MS. PAYNE:

13 Q. So you don't recall doing any sort
14 of physical exams where he --

15 A. I don't remember a range test or --

16 Q. So if his medical records showed
17 that he did flexion tests, range of motion
18 tests, strength tests, you would dispute all
19 those?

20 A. I just don't recall doing that, no.
21 I wasn't -- I just don't even recall after
22 surgery and going through physical therapy
23 going through range of motions tests.

24 Q. It says in this medical note of June
25 25, 2012, it indicates that your range of

1 motion was back to full. So do you recall
2 doing a range of motion test on that date?

3 A. I do not. I do not recall seeing
4 him -- we're talking June of 2012, you say?

5 Q. Yes.

6 A. And this was an office visit?

7 Q. Yes.

8 A. I don't recall that, but I just -- I
9 don't dispute it. I don't recall it.

10 Q. Okay. Well, shortly after that it
11 looks like that was an issue in the case
12 whether your right shoulder was a compensable
13 injury or not and you guys went before the
14 Commissioner and had a situation something like
15 this and it was settled at pre-hearing. But
16 regardless, from that point forward it was
17 determined or it was found that your right
18 shoulder was a compensable injury and that you
19 were entitled to medical treatment in relation
20 to your right shoulder, correct?

21 A. Correct.

22 Q. And that was right around May 13th
23 of 2013, correct?

24 A. Correct. That sounds right.

25 Q. Now, your last office visit before

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1 that hearing with Dr. Rentz was June 25, 2012,
2 almost a year prior to the hearing. Does that
3 sound about right?

4 A. That I went for an office visit?

5 Q. With Dr. Rentz?

6 A. Okay. Again, I don't recall the
7 dates of every appointment.

8 Q. Based on my time frame, June 25,
9 2012, Dr. Rentz stated that your shoulder was
10 back to full extension and the case was heard
11 and there was a decision in May 2013 where your
12 right shoulder was deemed compensable. Shortly
13 thereafter, wouldn't you agree that a month
14 later, June 16, 2013, you returned to
15 Dr. Rentz's office, but this time you were
16 complaining of your knee which you had injured
17 while playing baseball with your son; is that
18 right?

19 A. Correct.

20 Q. And you would agree that at that
21 visit you didn't have any complaints of right
22 shoulder pain?

23 A. Correct.

24 Q. So in between the dates that you --
25 in between May -- actually, sorry, June 25,

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1 2012 was your last visit with Dr. Rentz in
2 relation to your shoulder. When we recently
3 were getting ready for this hearing, we sent
4 you back to Dr. Rentz because we wanted to see
5 if there was a rating and you went back to him
6 on December 16, 2014, right?

7 A. Yes.

8 Q. And that was in relation to your
9 right shoulder?

10 A. Yes.

11 Q. Okay. And you had seen him -- just
12 to clarify, you had seen him in between that
13 time, but it was for your knee and you had knee
14 surgery and all those kind of things?

15 A. That's right.

16 Q. There was no mention of your right
17 shoulder being in any pain during those visits?

18 A. Right.

19 Q. Okay. So you went back to him
20 September 16, 2014 and he sent you for an MRI
21 scan?

22 A. Yes.

23 Q. And you went to the MRI scan and it
24 was taken October 10, 2014?

25 A. Correct.

1 Q. That was a right shoulder MRI scan?

2 A. Yes.

3 Q. Okay. And then you returned to
4 Dr. Rentz's office six days later, October 16,
5 2014, but only reported pain in your low back,
6 correct?

7 A. This was not Jamie. This was not
8 Dr. Rentz. This was Dr. Heinig.

9 Q. It's Dr. Rentz's office, correct?

10 A. It wasn't Dr. Rentz. It was a lower
11 back spasm that wouldn't go away and he just
12 gave me some Prednisone.

13 Q. And you had been having low back
14 spasms for months due to doing yard work in
15 your yard?

16 A. There's different things in my lower
17 back that get exacerbated for compensation
18 because I can't do well with my shoulders and
19 my right knee and, therefore, I bent
20 inappropriately and put my back in a spasm. It
21 lasted several weeks. So normally a back spasm
22 for me will last four days and this was going
23 on four weeks. So I went to get Prednisone.

24 Q. But you would agree you had an MRI
25 done when you returned to Dr. Rentz's facility

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1 and just treated with the other physician in
2 relation to your low back and didn't see
3 Dr. Rentz, correct?

4 A. That's correct.

5 Q. In fact, you haven't seen Dr. Rentz
6 since then? You've never returned after the
7 MRI?

8 A. I called to schedule an appointment
9 and at that time they said it needed to be
10 scheduled through --

11 MS. PAYNE: I object to hearsay.

12 BY MS. PAYNE:

13 Q. You haven't returned to Dr. Rentz
14 after the MRI exam?

15 A. I attempted to, but was told I
16 needed to go through the process.

17 Q. And you didn't tell your counsel
18 about that?

19 A. We've attempted to get either a
20 follow-through appointment, but they sent the
21 report on the MRI to Bill and not to me and
22 Bill is the one that shared with me the report
23 of the MRI.

24 Q. Actually, instead of going back to
25 Dr. Rentz, you wanted to return to the IME

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1 physician that performed your IME back in 2012,
2 Dr. Barron, right?

3 A. He was always in the picture.

4 Dr. Barron was a second opinion.

5 Q. And he's the only one that provided
6 a PPD rating in relation to your right
7 shoulder?

8 A. I would say.

9 Q. And you haven't taken that rating to
10 Dr. Rentz to see if he had any opinions?

11 A. I haven't.

12 Q. And he gave you a zero percent
13 rating on your left shoulder?

14 A. Yes.

15 Q. You've actually —

16 A. Fifteen percent on the right, if I
17 recall.

18 Q. Right. From Dr. Barron who you've
19 only seen on one occasion?

20 A. Correct.

21 Q. And the questionnaire that he just
22 filled out within this past month was just a
23 questionnaire response. You never returned to
24 visit him this past month?

25 A. No.

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1 Q. You haven't seen him in two years?

2 A. I've tried, but I have not.

3 Q. You've tried to see Dr. Barron?

4 A. Yes.

5 Q. You've never sent your prescriptions
6 under workers' compensation, have you?

7 A. I have them here, receipts that I
8 brought Bill this morning from the last year or
9 so.

10 Q. When you've been previously deposed,
11 you testified that you actually spoke with your
12 Blue Cross Blue Shield adjuster about it and
13 she said she would just take care of them and
14 you should submit them to Blue Cross Blue
15 Shield because Philips ~~was~~

16 A. When I was employed by Philips, I
17 managed my prescriptions through the Blue Cross
18 Blue Shield plan.

19 Q. That was your personal choice?

20 A. That's what I was told to do by a
21 case manager with Blue Cross Blue Shield.

22 Q. Okay. Blue Cross Blue Shield.
23 Maybe I misheard you earlier, but I thought you
24 testified that you had never been involved in a
25 prior work-related accident?

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1 A. I've never been involved in a
2 previous work-related accident.

3 Q. Isn't it true that you treated with
4 Dr. Rentz back in 2003 for a right wrist injury
5 due to a work-related accident?

6 A. It wasn't -- it was an accident, but
7 it wasn't a workers' comp accident. It was a
8 car accident.

9 Q. So if his notes indicate that you
10 were involved in a motor vehicle accident which
11 is a possible workplace injury, would you
12 contest that?

13 MR. SMITH: Your Honor, I would
14 object. Those records are not in evidence and
15 have not been provided to us.

16 MS. PAYNE: I'm using them for
17 impeachment purposes. I'm not offering them as
18 evidence.

19 THE WITNESS: I had a broken --

20 THE COURT: I will allow her to use
21 them for impeachment purpose.

22 THE WITNESS: It was not a workers'
23 compensation case.

24 BY MS. PAYNE:

25 Q. So you were involved in a car wreck?

1 A. In Rock Hill, my hometown.

2 Q. And were you working when it
3 happened?

4 A. No. I was going to be traveling
5 that afternoon, but that prevented me from
6 doing that.

7 Q. You hired an attorney as a result of
8 that?

9 A. I did not.

10 Q. So if Dr. Rentz's notes state on
11 January of 2004, that you returned complaining
12 of a work injury from a motor vehicle accident
13 and now lists that you have an attorney, you
14 would dispute that?

15 A. I would dispute that. That case
16 never involved an attorney.

17 Q. Now, you testified earlier that when
18 you were switched from the product sales
19 position to channel manager is when you became
20 under Mark Johnson and that it wasn't a
21 demotion. It was just a change of position; is
22 that right?

23 A. That's right.

24 Q. Have you had the opportunity to read
25 Mr. Joel Leonard's report from his deposition?

1 A. Yes. And I realized that in there
2 he stated that -- and there's also the use of
3 general manager. I think as I was saying
4 channel manager, maybe it was coming out. I
5 noticed that on a couple of depositions,
6 general manager. And I mentioned that to Bill
7 last week. I said it wasn't general manager.
8 It was channel manager.

9 Q. And did you realize that put
10 Mr. Leonard under the impression that you were
11 promoted to a higher position right before your
12 accident?

13 A. And I'm -- when I mentioned to Joel
14 that I went from product sales specialist to a
15 channel manager position, I stated there that
16 it was with my aspiration to be potentially the
17 management position with Philips later as a
18 regional manager and this was a good transition
19 to take.

20 Q. So you think Mr. Leonard just
21 misunderstood you?

22 A. I think, perhaps.

23 MS. PAYNE: That's all I have.

24 THE COURT: Let's go off the record.

25 (Off the record.)

1 THE COURT: All right. We are ready
2 to go back on the record. Mr. Adickes, I will
3 remind you that you are still under oath.

4 THE WITNESS: Yes, sir.

5 THE COURT: Mr. Smith.

6 MR. SMITH: Thank you, sir.

7 REDIRECT EXAMINATION

8 BY MR. SMITH:

9 Q. Mr. Adickes, when you applied for
10 the job at McKesson, how many interviews did
11 you go through?

12 A. Six.

13 Q. And just because this has been a
14 while, that was after your termination at
15 Philips?

16 A. Yes.

17 Q. At what point were you notified that
18 you did not get that job?

19 A. I really don't remember the day. It
20 was, I believe, April.

21 Q. Let me rephrase my question. Had
22 you sent them in the drug information?

23 A. The questionnaire, yes.

24 Q. What drugs did you notify them that
25 you were taking?

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1 A. The ones that I mentioned before as
2 a preventative, the daily Nadolol, the Imitrex
3 injections as needed, and Frova as needed, and
4 Maxalt which is occasional.

5 Q. And are those the same drugs you're
6 taking now?

7 A. And Naprosyn was the other for minor
8 maintenance.

9 Q. Are those the same drugs you're
10 taking now?

11 A. Yes..

12 Q. Now, you were also questioned
13 regarding your employment with VRI and you had
14 a base salary of \$55,000?

15 A. Yes.

16 Q. Did you say all the sales executives
17 had the base salary of \$55,000?

18 A. Right.

19 Q. Did those -- all the sales
20 executives have the opportunity to make
21 commissions on top of that?

22 A. Yes.

23 Q. Did you make any commissions on top
24 of the \$55,000?

25 A. No.

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1 MR. SMITH: Thank you, sir. No
2 further questions.

3 THE COURT: All right. Ms. Payne.

4 MS. PAYNE: Nothing further.

5 THE COURT: All right. You may step
6 down.

7 MR. SMITH: I call Ms. Jeanie
8 Adickes.

9 THE COURT: Ma'am, I have two
10 requests for you. The first is speak up. That
11 mic is on. So if you feel like you need to use
12 it, you can. It's imperative that the
13 attorneys hear and I hear you, but most
14 importantly that this young lady who is making
15 the record hear you.

16 The second is if you are asked a yes
17 or no question, please give us a yes or no
18 answer. If you nod your head like you're doing
19 now and I do all the time, she actually has to
20 put that in the record and it slows her down.

21 THE WITNESS: Yes, sir.

22 THE COURT: So try to remember to
23 give us an audible yes or no. Okay?

24 THE WITNESS: Okay.

25 (JEANIE ADICKES, being duly sworn to

1 tell the whole truth, testified as follows:)

2 THE COURT: Please state and spell
3 your full name for the record.

4 THE WITNESS: Jeanie Adickes.
5 J-E-A-N-I-E, A-D-I-C-K-E-S.

6 THE COURT: Thank you, ma'am.
7 Mr. Smith, your witness.

8 MR. SMITH: Thank you.

9 DIRECT EXAMINATION

10 BY MR. SMITH:

11 Q. Ms. Adickes, how are you related to
12 Barry Adickes?

13 A. I'm his wife.

14 Q. How long have you been married?

15 A. Twenty-eight years.

16 Q. Have you had an opportunity to
17 observe him on a daily basis over that period
18 of time?

19 A. Yes, sir.

20 Q. Tell me how he was before this
21 injury.

22 A. He's always been efficient. He's
23 always been focused, able to do his job,
24 multitask, never had headaches. And when I say
25 never, I guess that's an exaggeration. But in

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1 28 years, I can count probably on one -- well,
2 20 years I can probably count on one hand how
3 many times he had complained of a headache
4 prior to this accident.

5 Q. Did that change after this accident?

6 A. It did.

7 Q. Tell me how it changed.

8 A. He has headaches on a regular basis.

9 We've dealt with that with Dr. Mandell, his
10 neurologist. He takes medication which he
11 never had to take prior. As far as his focus,
12 memory, multitasking, all of that has declined.
13 He does -- he takes longer to do things.
14 E-mails, processing thoughts, verbalizing those
15 thoughts. Everything takes more effort and a
16 little longer.

17 Q. Does he eventually get things done?

18 A. He does.

19 Q. Is Barry the type of guy to
20 complain?

21 A. He's the opposite. It's one thing I
22 love about him and it's the other thing that's
23 frustrating. He minimizes things. He -- I
24 think it's just his makeup. It's who he is.
25 He's never going to complain even prior to

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1 this. Maybe he did have a headache more often
2 than I ever knew, but I never knew it if he
3 did. He's not a complainer. Never has been.

4 Q. Have you gone to doctor appointments
5 with him?

6 A. Yes.

7 Q. Why did you do that?

8 A. Because I knew his clarity in the
9 beginning wasn't there. He was having
10 headaches. I needed to know more about how we
11 were going to treat them because I'm his
12 partner.

13 Q. Did you go to Dr. Mandell's
14 appointments with him?

15 A. That's probably the one I've been to
16 the most with him.

17 Q. How often does Barry experience
18 these headaches?

19 A. It varies. Of course, when he first
20 had the accident, it was an ongoing headache
21 for many weeks and then we were just excited to
22 have a few days that we wouldn't have a
23 headache before he would have another one. Now
24 it's -- it ranges anywhere from four to eight
25 weeks, usually depending on what his medicine

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1 is at that point in time. Once he's been on a
2 medicine for a certain period of time,
3 sometimes it will need to be tweaked. Those
4 headaches will become closer together, maybe
5 like every four weeks. But right now I would
6 say on average six to seven weeks that he has
7 one.

8 Q. How do you know that?

9 A. Well, I usually can look at him and
10 tell. And a lot of times I'll say, "Is your
11 head hurting?" And he will actually look at me
12 and say no and it is hurting.

13 Q. When I said how do you know, what I
14 meant by that is how do you know how often his
15 headaches are?

16 A. Oh, I keep a -- I'm not going to say
17 it's every single time, but 98 percent of the
18 time as soon as I know he has a headache, I
19 write it on my calendar.

20 Q. Is that something Dr. Mandell wanted
21 you to do?

22 A. It's something I started doing.
23 But, yes, Dr. Mandell said it was a very good
24 process of keeping up with a log.

25 Q. And did you share that with

1 Dr. Mandell --

2 A. I have.

3 Q. -- the results of your keeping track
4 of those records?

5 A. Uh-huh. When we go, I'm able to
6 tell him what date he had the last one, how
7 long it lasted, what he took, and it's just
8 become a process that I do.

9 Q. When he has these bad headaches,
10 tell me what you observe? How long does it
11 last, what the duration is, what's going on
12 with him?

13 A. Well, usually I can just tell
14 because he just has a little scowl in his head
15 and I'll ask him, "Do you have a headache?"
16 Typically when he decides that it's definitely
17 one that needs an injection, he'll do an
18 injection. Those usually make him kind of
19 drowsy and kind of needs to lay down and he'll
20 go to sleep, and then he usually repeats the
21 injection. It's normal that he needs two
22 injections, and he'll take that one and then
23 usually go to bed.

24 If it's the evening, even if it's
25 not, lay down on the couch, usually takes a

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1 good long nap. It's followed up by the next
2 day by Frova, sometimes Maxalt, but that Maxalt
3 has taken a backseat to the Frova at this point
4 in time, one of those little medical --
5 medicine tweaks that Dr. Mandell has done and
6 it seems to be working for him.

7 Q. When these come on, how many days is
8 he out of commission?

9 A. That varies too. Always that first
10 day. Then the second day he's -- I've always
11 called it a hangover, but it's like he's just
12 kind of foggy and sluggish. Sometimes if he
13 has a rebound headache, which that happens, not
14 every time, but often enough to say it happens
15 enough, at least half of the time, he'll have
16 to sometimes take another injection that third
17 day. So it's kind of two to four on average
18 and you just never know.

19 Q. Now, aside from the headaches, what,
20 if anything, have you noticed from a memory
21 concentration standpoint? Can you give me
22 examples of problems you've seen?

23 A. Yeah. Well, we have four children
24 and we'll all be talking at the supper table
25 when they're home or whatever and things will

1 be told and said and he'll actually partake in
2 that conversation. So it's like we know he
3 knew what we were saying, but then there will
4 be times a day later and we'll say, "We talked
5 about that last night. Do you not remember?"
6 And he'll say -- we call supper time, blah,
7 blah, blah. Then he'll come back to, "Oh,
8 yeah, I do remember." But he didn't remember
9 until we recalled it to him. That's just not
10 the Barry that was prior to the accident.

11 It's more short-term memory things.
12 Maybe that's just because we've been dealing --
13 we deal with that more in the household than
14 what happened ten years ago. But it seems to
15 be that's what I notice the most because that's
16 daily life and that's what we're doing.

17 Focus, he just seems to be
18 distracted a little bit more than he used to
19 be. He's gotten better at this, but still not
20 as good as he was and it was excruciating that
21 first year to watch him put an e-mail together.
22 He would sit at that computer and compose an
23 e-mail that would have normally taken him 15
24 minutes, maybe 20, and it would take him an
25 hour and 15 minutes. Now it's probably a good

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1 30 to 40 minutes when he is preparing an e-mail
2 that he wants to send to a client or a church
3 member or whoever. It just takes him longer.
4 Multitasking, he doesn't do that quite as well.

5 Q. How about mood, temper, that sort of
6 thing?

7 A. Barry has always been the patient
8 one in our household. I don't have quite as
9 much patience as he has. He doesn't have the
10 patience that he used to have. I don't want to
11 make it sound like he has no patience because
12 he does. But compared to what he had, there is
13 definitely a difference.

14 Q. Have you discussed all these things
15 with Dr. Mandell?

16 A. I have.

17 Q. I don't want you to tell me what
18 anybody said to you, okay, but have Barry's
19 co-workers and that sort of thing reported
20 issues to you with memory and forgetfulness?

21 A. Not co-workers..

22 Q. Excuse me?

23 A. Not co-workers..

24 Q. Have others?

25 A. Our kids always -- they'll look at

1 me and give me a look like, really, did he just
2 not remember that from three hours ago,
3 yesterday?

4 MS. PAYNE: Objection. Hearsay.

5 THE COURT: We're getting awful
6 close. You can't tell me what someone else
7 said.

8 BY MR. SMITH:

9 Q. Don't tell me what they told you.
10 Just tell me --

11 A. Yes.

12 Q. With regard to Barry's neck and
13 shoulder issues, what, if anything, have you
14 noticed there?

15 A. Well, after the accident, of course
16 his shoulder hurt, but we couldn't deal with
17 the shoulder before we got the headaches under
18 control. We were dealing with two things and
19 one was the bigger evil than the other at that
20 moment.

21 So we got the headaches under
22 control and then he had the shoulder surgery.
23 Shoulder surgery has never been 100 percent.
24 He said from the time that he has been, I
25 guess, healed, that it -- that it didn't feel

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1 right. And the shoulder and neck kind of
2 sometimes I feel like are one in the same. But
3 once we started going to Dr. Park and he
4 started having the radiofrequency ablation,
5 that was huge. We would drive in a car and he
6 was constantly rubbing his neck and shoulder
7 while we were driving. I don't even know that
8 he knows he did it as much as he did it.

9 Once we went to Dr. Park and they
10 went through the whole process and finally came
11 to the conclusion that, yes, this would help
12 him, it was a slight miracle that,
13 unfortunately, only lasted about six to six and
14 a half months and we have to have it done
15 again. But it's just been a relief, a complete
16 relief, and it's made him a much happier person
17 to not have that constant pain going down his
18 arm and his fingers.

19 Q. Have you assisted Barry at all in
20 his job search and sending out resumes and that
21 sort of thing?

22 A. I have not.

23 Q. Have you witnessed him doing it?

24 A. I have.

25 MR. SMITH: Thank you, ma'am. No

1 further questions.

2 THE COURT: Ms. Payne.

3 MS. PAYNE: Just a few.

4 CROSS-EXAMINATION

5 BY MS. PAYNE:

6 Q. Hi, Ms. Adickes.

7 A. Hello.

8 Q. Now, you're the one that actually
9 first reported the injury and told Mr. Johnson
10 about what occurred, right?

11 A. I don't really recall that. It's
12 been four years ago, but I think that's
13 correct. I don't know if I called him or maybe
14 left him a voice mail. I don't think I talked
15 to him personally, but maybe I did.

16 Q. Do you remember sending him an
17 e-mail telling him about the accident?

18 A. Yeah, I think I do remember that.

19 Q. And you told him about how Barry had
20 been at his hotel, then he drove somewhere to a
21 park and he went for a jog, and then he got
22 back in his car and went back to the hotel?

23 A. I don't remember all that. It was
24 four years ago.

25 Q. Let me show you an e-mail real

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1 quick. This was provided in the personnel
2 responses. This is the e-mail that starts
3 there and then goes to the next page. It's
4 dated. Can you tell the Court when it's dated?

5 A. March 24, 2011.

6 Q. Your e-mail?

7 A. Oh, March 23, 2011.

8 Q. Can you look at the body of your
9 e-mail that you sent and tell the Court who you
10 sent the e-mail to?

11 A. Well, it says that I sent it to Mark
12 Johnson.

13 Q. Okay.. And in the body of the
14 e-mail, I just want you to look at the third
15 paragraph where it talks about how he was
16 injured.

17 A. "As best he can piece together" --
18 do you want me to read this?

19 Q. Yes.

20 A. "Barry says he completed his day
21 Tuesday afternoon in Marion, North Carolina,
22 took a scenic route to his hotel in Morganton
23 via Blue Ridge Parkway and went for a jog near
24 Mt. Mitchell State Park. Afterwards he
25 continued 20 miles or so on the parkway before

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1 veering south down the mountain, Highway 181,
2 and ten miles above Morganton. It was around
3 8:00 p.m., he believes, when he approached a
4 sharp curve and realized he was going into it
5 too fast."

6 Q. That's all. Thank you. So do you
7 now remember sending that e-mail to
8 Mr. Johnson?

9 A. I do remember, you know. I was --
10 yes.

11 Q. Okay. And you guys share bank
12 accounts, right?

13 A. We do.

14 Q. And since Mr. Adickes' termination
15 from Philips, you have had financial
16 difficulties?

17 A. I don't wouldn't call it financial
18 difficulties.

19 Q. Remember when I deposed you and you
20 informed me about financial difficulties right
21 around the time of his termination requiring
22 you guys to take out a loan?

23 A. I didn't say financial difficulties.
24 You did.

25 Q. And you responded yes, that you had

1 to take out loans?

2 A. I said we took out a loan. I didn't
3 say that we had financial difficulties.

4 MR. SMITH: Your Honor, I object to
5 this line of questioning. Relevance.

6 MS. PAYNE: Relevance is bias, Your
7 Honor. It's a witness testifying on behalf of
8 her husband who, depending on how this case
9 turns out, is going to benefit from it
10 financially.

11 THE COURT: I'll allow it, but let's
12 don't go too far down this road.

13 MS. PAYNE: I won't.

14 BY MS. PAYNE:

15 Q. My question to you was, "And he just
16 testified earlier that you recently had to take
17 out a financial loan because of suffering
18 financially after the termination?"

19 A. I think I remember -- excuse me. I
20 think I remember saying no more than anybody
21 with four kids normally or something to that
22 effect. If I said we're having financial
23 difficulties, I didn't -- I don't think I said
24 that.

25 Q. Okay. That's why I was reading it

1 to you. So I said, "And he testified earlier
2 that you recently had to take out a financial
3 loan because of suffering financially after the
4 termination?" And your response was? Read it
5 into the record.

6 A. "Correct." And I said, "Correct."
7 I guess I was saying correct for the loan.

8 Q. Let me ask my question. And my
9 question is, "Is that right?" And you said?

10 A. "Correct."

11 Q. And then I said, "So how long did
12 you guys go before you needed financial
13 assistance?" And your response?

14 A. "I don't know the actual date we
15 took that out."

16 Q. And that was even in light of the
17 fact that he received a significant severance
18 package from Philips, correct?

19 A. We did.

20 MS. PAYNE: Thank you. Nothing
21 further.

22 THE COURT: Mr. Smith.

23 MR. SMITH: No redirect, Your Honor.

24 THE COURT: All right. Thank you,
25 ma'am. You may step down.

1 MR. SMITH: Your Honor, that along
2 with our APA submissions and the deposition of
3 Dr. Mandell that we have offered, that
4 concludes the claimant's case.

5 THE COURT: All right. Very well.
6 Thank you.

7 MR. SMITH: And our exhibits, of
8 course.

9 THE COURT: Thank you. Ms. Payne,
10 witnesses?

11 MR. OXFORD: We have one, Your
12 Honor. We call Mark Johnson.

13 THE COURT: All right. Thank you,
14 Mr. Oxford. You've been here twice for my
15 please speak up and answer yes or no. So we're
16 not going to plow that ground again.

17 (MARK JOHNSON, being duly sworn to
18 tell the whole truth, testified as follows:)

19 THE COURT: Please state and spell
20 your full name for the record, sir.

21 THE WITNESS: Mark Kevin Johnson.
22 M-A-R-K, K-E-V-I-N, J-O-H-N-S-O-N.

23 THE COURT: All right. Thank you,
24 sir. Mr. Oxford, your witness.

25 DIRECT EXAMINATION

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1 BY MR. OXFORD:

2 Q. Hi, Mr. Johnson. Can you please
3 tell us who your current employer is?

4 A. Philips Healthcare.

5 Q. And how long have you worked at
6 Philips?

7 A. Eighteen years.

8 Q. What is your current position there?

9 A. Regional manager.

10 Q. Is that the same position you had
11 since around 2011 or so?

12 A. Yes. I've been a regional manager.
13 The title has stayed the same that period of
14 time. The actual direct reports have changed
15 from time to time as we change business models.

16 Q. And as regional manager, what are
17 your duties?

18 A. I supervise a team of field
19 salespeople that are represented in selling
20 Philips products.

21 Q. And Mr. Adickes was one of your
22 reports at one time?

23 A. Yes, sir.

24 Q. And during what time period did you
25 supervise Mr. Adickes?

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1 A. 2011, 2012, and 2013.

2 Q. What was the day in 2011 that you
3 first took over supervising him?

4 A. I believe it was January 1st.
5 That's typically when they make a model change
6 that I would have picked up new people.

7 Q. How many people do you supervise?

8 A. Well, it varies from time to time.
9 I've managed as many as, I believe, 14 years
10 ago and now I'm currently managing nine. We've
11 gone through business model changes over the
12 course of the years, and we've had reduction of
13 force across the board at Philips. Not just my
14 team, but everywhere.

15 Q. Did you know Mr. Adickes before you
16 became his supervisor?

17 A. I knew who Barry was. I did not
18 know him well. I met him at one of our
19 distributor meetings. He was in a different
20 role with the company, but in the same
21 division. So I knew of him.

22 Q. So you had heard of him?

23 A. Yes, sir.

24 Q. And what had you heard about him?

25 MR. SMITH: Objection. Hearsay,

1 Your Honor.

2 THE COURT: Sustained.

3 THE WITNESS: Does that mean I'm
4 supposed to answer?

5 BY MR. OXFORD:

6 Q. No. Prior to you supervising
7 Mr. Adickes, what was your general opinion on
8 his work product?

9 MR. SMITH: Objection. No basis for
10 that question, Your Honor. He testified he did
11 not know him prior.

12 MS. PAYNE: He didn't testify to
13 that.

14 MR. SMITH: He said he met him one
15 time at a function.

16 THE COURT: He also said he knew of
17 him. I'm going to let him answer that
18 question.

19 THE WITNESS: Well, when I heard of
20 the model change and that I was picking up some
21 new team members, I reached out to former
22 managers and human resources to solicit
23 feedback of what was the person I'm going to be
24 managing now? Can you tell me more about them?
25 Barry had a reputation of being a good guy,

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1 someone you would love to have a beer with. He
2 had some performance issues that he had been
3 working through. The feedback from human
4 resources and his prior manager were that he
5 was difficult to coach at times. They were
6 coaching him through a performance improvement
7 plan, a PIP, and that was the feedback that
8 they gave me.

9 BY MR. OXFORD:

10 Q. Did they give you a specific year
11 that they were referring to as far as
12 performance issues?

13 A. No, I didn't receive that.

14 Q. Does Philips and somebody in your
15 role, do you have a standard review procedure
16 that you will review people that are your
17 direct reports?

18 A. We have an annual review process
19 called the PPM, people performance management,
20 which is their annual review that you do as a
21 manager. You critique people, give them some
22 direction for the next year, develop a
23 development plan for the next year. That's the
24 formal process.

25 Q. So how did Barry come to work for

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1 you and be under your supervision? How did
2 that process come about?

3 A. It was literally a change in the
4 business model. I was a regional manager
5 managing, you know, certain components of the
6 division's business. And for whatever reason
7 as we were responding to changes in healthcare,
8 they decided to realign that. And where I was
9 managing maybe half the country before with
10 fewer markets, now I was managing virtually the
11 same number of people, but more products, but
12 geographically located in the southeast.

13 Q. Did you get to put your team
14 together?

15 A. No. They were typically -- they're
16 assigned to you.

17 Q. And what position or what product
18 was Barry first assigned to your team? What
19 was his role at that time?

20 A. Well, when I was notified of the
21 change that was coming, I approached and I
22 solicited some feedback from the vice president
23 of sales and his former manager, Paul Stoddard,
24 and I got the feedback from human resources. I
25 came back to the vice president of sales and

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1 suggested that, perhaps, Barry would be better
2 suited for another role on my team.

3 He was working as a specialist on
4 fire and EMS and working with one of our
5 largest customers that was very demanding, and
6 I just felt that, you know, based on what I
7 heard in canvassing and interviewing his former
8 manager and the vice president of sales, that a
9 change might do well for Barry. So I proposed
10 to the vice president of sales that Barry be
11 allowed to swap roles with one of his
12 counterparts that was working with the indirect
13 channel at that time and that they flip roles.

14 The vice president of sales heartily
15 endorsed that. She felt that that would be a
16 good move. It was structured to benefit both
17 employees. The indirect channel manager's job
18 for the most part isn't as challenging and
19 demanding as the fire and EMS job and we felt
20 that that would go both well for Barry and the
21 other employee. I was told that I needed to
22 approach both employees, propose the change,
23 and only if they both agreed could we enact
24 that change. They agreed, the change was made,
25 and that's how he landed his indirect channel

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1 manager for me.

2 I think I heard him testify earlier,
3 I didn't remember this, that, you know, for the
4 first month or so there was a transition period
5 between he and the other employee as they
6 swapped out roles. The other employee lived in
7 the Charlotte area. So geographically, you
8 know, there was some compatibility there.

9 Q. Without getting into any specifics,
10 do you remember if anyone else on your team,
11 any of Barry's co-workers, I guess, had ever
12 complained about his work ethic, work product,
13 any of those types of things prior to the
14 accident?

15 A. Barry had a history of poor
16 follow-up with team members and just overall
17 lack of urgency. He was difficult to get ahold
18 of. If you ever called Barry, you could not
19 get him just by calling his cell phone. He
20 always called back and that was something that
21 was a little bit of a red flag for me. And
22 then I experienced it myself when he began to
23 work for me. I had, you know -- before his
24 accident and after his accident, I had several
25 complaints from employees and customers in his

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1 follow-up or lack thereof.

2 Q. After his accident, did you notice
3 any changes in Barry's behavior, work product,
4 work ethic, any of those things from before the
5 accident to after accident?

6 A. No, sir.

7 Q. Any changes in communicating with
8 him?

9 A. No, sir. I would say no.

10 Q. So over the entire time that you
11 supervised Barry from January 1, 2011 up until
12 2014, would you say that his work ethic, work
13 product, his behavior, communication, all those
14 things that you supervised, was that steady
15 throughout that entire time?

16 A. I would say so. Looking back at his
17 performance reviews, he got middle of the road
18 performance reviews that entire time. Barry
19 was not a top performer. He was in the bottom
20 third of the ranking, if you will, typically,
21 but he was doing an adequate job from my
22 perspective.

23 Q. Let's move on to Mr. Adickes'
24 termination. What was your involvement when
25 Mr. Adickes was terminated?

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1 A. I delivered the news. I did not
2 participate in who was involved in the
3 reduction of force. In fact, I was notified on
4 or about January 8th that I had to sign a
5 non-disclosure agreement that Philips was
6 rolling out a whole new business plan. So I
7 was informed that I would have a job and that
8 here were the changes and that roughly within a
9 week's time I would have to deliver a reduction
10 in force message to Barry.

11 These are things that I
12 unfortunately have grown accustomed to in the
13 healthcare industry. There's a lot of changes.
14 Almost every year we've had some type of
15 business model change where positions have been
16 eliminated.

17 So I did not participate in the
18 decision of who would be removed from their
19 position or what positions would be removed.

20 Q. Who does make that decision?

21 A. Well, in past reductions in force, a
22 manager -- frontline manager would participate
23 in that discussion. But the magnitude of this
24 particular RIF, is what we call it, reduction
25 in force, this came from very high levels. A

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1 senior executive.

2 Q. Was it regional, national?

3 A. National decisions.

4 Q. So, in general, when you give one of
5 these termination calls that you've grown
6 accustomed to, unfortunately, having to make,
7 is there a standard procedure that you follow?

8 A. Oh, yes, definitely. I've been
9 through the training three or four times. We
10 are asked to follow a script. When we have the
11 call, we have a human resources manager on that
12 call with us and we are instructed to read from
13 the script, to notify the employee that this is
14 a business decision, that it's not about
15 performance, that the company has made a
16 business decision and I regret to inform you
17 that your position has been eliminated. That's
18 almost verbatim from the script.

19 Q. And I think you may have touched on
20 this before, but has there been similar
21 reductions in force in the years prior to 2014
22 since then?

23 A. Yeah. The year 2013, I let two
24 people go. 2012, I believe I let one go. The
25 end of this month, I have the misfortune of

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1 informing an employee that I hired seven years
2 ago that their position is being eliminated.
3 There again, it's not for performance. It's
4 just as the company is retooling to take into
5 consideration the new world of healthcare, the
6 business models are changing.

7 Q. So you said in 2012 and 2013, those
8 were both times when Mr. Adickes worked for
9 Philips Healthcare; is that correct?

10 A. Yes, sir. He was not impacted by
11 those reductions in force, obviously.

12 Q. Now, specifically to the telephone
13 call made to Mr. Adickes, the termination phone
14 call, do you remember anything specific about
15 that call?

16 A. No, you know, it went pretty
17 smoothly. Barry received a pretty significant
18 severance check. That seems to make the calls
19 go a little bit better. I do remember Barry
20 asking something about, "Do I get a grace
21 period?" And I remember saying, "Barry, that's
22 not what this is about. This is about the
23 change in the business model. It's not about
24 performance." I specifically remember that.

25 On our script of do's and don'ts to

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1 say, the first don't is do not discuss
2 performance because it's a business model --
3 business decision.

4 Q. And did you read from that script on
5 that particular call?

6 A. Yes, sir.

7 Q. Do you recall if you deviated from
8 that script at all?

9 A. I recall not deviating from it.

10 Q. As far as your team, has Barry's
11 position been replaced, refilled, anything like
12 that? Is somebody now doing Barry's job?

13 A. We did not hire a new head count for
14 that position. I had to spread his territory
15 out over existing employees. So we have not
16 had incremental head count which supports the
17 company's position of we believe we can handle
18 that with fewer people.

19 Q. Did Barry ever have any disciplinary
20 issues while -- other than performance issues,
21 while he was under your supervision?

22 A. I think two come to mind. One is
23 challenging him on his follow-up with customers
24 and co-workers, and I discovered that, you
25 know, he did have some problems coaching. He

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1 was rather indignant that, hey, I have great
2 follow-up. Well, I've got customers calling me
3 saying to the contrary. And in our business,
4 you know, that's just not acceptable.

5 The other that I remember is he had
6 an issue with his American Express corporate
7 card. The card is only supposed to be used for
8 Philips' purposes, and he was using it for
9 personal uses and running up a pretty
10 significant bill. So we had to have a
11 discussion about that.

12 Q. Did you ever -- were you ever asked
13 to make any special accommodations for Barry
14 while he was under your supervision?

15 A. Well, it was discussed earlier today
16 when I first started to manage Barry, I
17 informed him that he needed to swap his SUV car
18 for the sedan. I think it was a Ford Fusion, a
19 car that his new position was slotted for
20 because they don't carry as much equipment.

21 And Barry, you know, really pushed
22 back on that. He didn't want to give up that
23 car despite the fact that most of his
24 co-workers didn't have that great of car. It's
25 kind of taking it back. Usually I don't get

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1 people to express that level of entitlement to
2 a car that, you know, they're being allowed to
3 use for purposes of doing their job. It's not
4 their personal property.

5 He indicated that, you know, I need
6 this because of, you know, a leg problem, a
7 back problem. I can't remember what the
8 specifics were. So I approached human
9 resources and, you know, we agreed that, okay,
10 you know, to get past this hurdle, let him have
11 his car, but in the future he would have to
12 submit some type of medical request to deviate
13 from the company policy.

14 Q. And was this a transition into this
15 different car, did everybody else on the team
16 eventually kind of get that car as they needed?

17 A. Over the years the company
18 definitely is moving in that direction, getting
19 away from four-wheel drives, cars so as people
20 come up they are rolling more and more into a
21 Ford Fusion. I believe everybody on my team
22 now, with the exception of one individual who
23 lives in Denver and goes into mountainous
24 areas, has been transitioned to the Ford
25 Fusion.

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1 Q. Smaller car?

2 A. Smaller car, yeah. For the most
3 part, the indirect channel managers, that's the
4 position that Barry was transitioning into,
5 they carry very little inventory. The products
6 we sell are very small. There's really not a
7 need to have a large car and the saving to the
8 company is pretty significant to go with the
9 sedans versus SUVs.

10 Q. There was some discussion earlier
11 and Mr. Adickes testified about some text
12 messages that had been sent from him to you.
13 Can you kind of explain the circumstances of
14 what was going on when you received those text
15 messages and the time frame?

16 A. Oh, gosh. It was sometime last
17 fall. I was in Florida working and seemed to
18 me, if I recall correctly, one evening I got
19 this text message from Barry. I immediately
20 forwarded it to Brooke because I didn't feel it
21 was, you know -- didn't feel appropriate, I was
22 uncomfortable with it, and then he followed up
23 with a second one. I don't believe I saw the
24 second one until the next day, but I couldn't
25 swear to that, the timing of the two.

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1 Q. We've already testified to -- or
2 Barry has already testified to the content of
3 the text messages, but do you agree what was
4 read into the record previously was accurate as
5 to what you received?

6 A. Yeah, that was right from the text
7 message.

8 Q. While he was working under your
9 supervision, did he ever complain of any
10 headaches?

11 A. Yes. Immediately after the
12 accident, you know, following up with him when
13 he came off of his medical leave, you know, he
14 said, "Yeah, I'm still having headaches from
15 time to time." I remember having a team
16 meeting in Alpharetta and he had a headache
17 and, you know, my response was, you know, "What
18 can we do for you and, you know, do what you
19 have to do."

20 And it seemed to me that over time,
21 you know, his comments -- it wasn't routine
22 that he would complain about the headaches and
23 that over time, you know, I don't recall
24 hearing about them. He seemed to be working
25 through the issue and that satisfied my

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1 curiosity and I felt I was doing what I was
2 supposed to do as a manager.

3 Q. Down the road after -- immediately
4 after his accident, but down the road from
5 there, would he ever call and say, "I need to
6 take a day? I've got a headache. I'm out of
7 commission today," or anything like that?

8 A. I don't recall that. I recall at
9 some point, I guess it was in 2013, you know,
10 he had some issues with, you know, other
11 operations, knees or something. There were
12 some other, you know, physical ailments that he
13 had. I don't recall that they specifically
14 were tied to his accident, you know.

15 It seemed to me, if memory serves me
16 correctly, he had issues with his knees and had
17 to take some time off for a couple of
18 operations, but I could be wrong about that.
19 It could have been shoulders. It could have
20 been neck. I wasn't that focused on it. I
21 vaguely remember, you know, again, do what you
22 need to do. And, you know, he probably took
23 PTO, you know, on days that he had to have
24 those procedures done, but he was not off, if
25 memory serves me correctly. He did not take

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1 any extended period of time off.

2 Q. Based on your prior experience with
3 Barry in supervising him both before the
4 accident and after the accident, would you say
5 that you noticed in change in him?

6 A. I didn't notice any change in him.
7 I never had any comments from his co-workers,
8 those that were closely -- you know, more
9 closely related working with him on a
10 day-to-day basis. There was a hospital rep and
11 then the person that Barry swapped positions
12 with. I never received any feedback of, hey,
13 there's an issue there, you know. His
14 performance is about the same. His, you know,
15 approach to business was about the same.

16 Q. And based on what you had heard
17 about Barry or your knowledge of him before he
18 came under your supervision, would you say that
19 your experience with him lined up with what
20 your expectations were based on your feedback?

21 A. Yeah. I found him a likable guy, a
22 guy you'd love to have a beer with, a guy that
23 I was concerned about performance with. My
24 income and my job security are tied to my
25 employees' ability to perform. I was concerned

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1 about lack of follow-up, that was before and
2 after the accident.

3 Frankly, when I ran into those
4 concerns after the accident, I didn't tie them
5 to the accident because I had experienced that
6 and had feedback, you know, prior to the
7 accident. And, yeah, I saw that there were
8 occasions where, you know, he was a bit chippy
9 when you provided coaching. If you were
10 critical and, you know, tried to provide him
11 direction, he was, at times, a little chippy.

12 MR. OXFORD: No further questions.

13 THE COURT: All right. Thank you,
14 Mr. Smith.

15 MR. SMITH: Thank you.

16 CROSS-EXAMINATION

17 BY MR. SMITH:

18 Q: Mr. Johnson, you have been at
19 Philips since 1997?

20 A. Yes, sir.

21 Q. So you've been there 18 years?

22 A. Yes, sir.

23 Q. And you've been the regional sales
24 manager there for nine years, since '06?

25 A. Since '06. Yes, sir.

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1 Q. Would you consider yourself a loyal
2 employee of Philips?

3 A. Yes.

4 Q. And you're the person that Philips
5 has here today representing them to testify
6 concerning Mr. Adickes; is that correct?

7 A. I was asked to testify on what I
8 knew about the situation.

9 Q. What do you earn at Philips? What's
10 your pay?

11 A. I would --

12 MS. PAYNE: Objection. Relevance.

13 THE WITNESS: -- rather not say.

14 MR. SMITH: Your Honor, it goes to
15 bias.

16 THE COURT: It does indeed.

17 Overruled.

18 BY MR. SMITH:

19 Q. What do you make at Philips?

20 A. My base salary is \$130,000, and then
21 I have incentive of \$55,000.

22 Q. Do you have any bonus structure on
23 top of that 55?

24 A. No, sir.

25 Q. So 135 plus 55, you make 190 a year?

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1 A. If my team performs 100 percent.

2 Yes, sir.

3 Q. Okay. Now, you started
4 supervising -- actually, let me back up.
5 Mr. Adickes was transferred to your team
6 effective January 1, 2011; is that correct?

7 A. Yes, sir.

8 Q. But as you -- as he testified to
9 earlier and as you now recall, there was a
10 transition period in there. So he didn't
11 actually come work full-time for you on --

12 A. No, he worked full-time for me.

13 Q. But there was a transition he was
14 working --

15 A. In between his EMS role which
16 reported to me and his new role which reported
17 to me. He did not report to another manager
18 after January 1st.

19 Q. And you recall me taking your
20 deposition a couple months ago?

21 A. Yes, sir.

22 Q. By telephone?

23 A. Yes, sir.

24 Q. And you told me in that deposition
25 that you had never met Mr. Adickes prior to him

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1 coming to work for you; is that correct?

2 A. I cannot recall.

3 Q. Would you like me for me to show it
4 to you in the deposition?

5 A. Sure.

6 Q. I'm referring to Page 9 of the
7 deposition, Line 4. I said, "Did you know
8 him" -- excuse me. Let me back up a couple of
9 lines. "You began managing him January 1,
10 2011?" And what was your answer?

11 A. Yes, sir.

12 Q. "And did you know him prior to that
13 time?"

14 A. I said, "I knew of him. I did not
15 know him closely. We may or may not have met.
16 I can't recall."

17 Q. So if you had ever met him, you're
18 not even sure you had met him prior to him
19 coming to work for you; is that right?

20 A. I had time to think about it since
21 and I met him at a Southeastern Emergency
22 Equipment meeting. He was there. He did not
23 participate in the meeting. He was there.

24 Q. It was, "Hi, I'm Barry Adickes:
25 Hello," and that's it?

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1 A. Basically, yes.

2 Q. Okay. So other than a chance
3 meeting at a meeting, you had never met him
4 till he came to work for you?

5 A. That would be correct.

6 Q. Now, Mr. Adickes was injured on
7 March 23, 2011; is that correct?

8 A. I believe so.

9 Q. So he had been under your
10 supervision for 11 weeks at the time of his
11 accident; is that right?

12 A. Yes, sir.

13 Q. Now, when I took your deposition, we
14 had not yet been provided performance
15 appraisals, and I think you told me you had not
16 reviewed any performance appraisals other than
17 the ones that you may have completed yourself
18 of Mr. Adickes; is that right?

19 A. Yes.

20 Q. I have since been provided with
21 those performance appraisals. Have you had an
22 opportunity to review those performance
23 appraisals since I took your deposition?

24 A. Yes, sir, I have.

25 Q. And did you review those performance

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1 appraise in preparation for your testimony
2 today?

3 A. I took a quick glance at them, yes.

4 Q. You also told me, I believe, that
5 you had never -- you had never seen the -- had
6 you seen the PIP before?

7 A. I had not seen his PIP.

8 Q. That's the performance improvement
9 plan?

10 A. Performance improvement plan, yeah.

11 Q. And that is the plan that he was
12 placed on in 2009 because his sales were
13 lagging; is that correct?

14 A. I'm assuming. I did not manage him
15 then.

16 Q. Have you reviewed that in
17 preparation for your testimony today?

18 A. No, sir.

19 Q. I'm looking at Page Exhibit D-17
20 from defendants' exhibit package, and this was
21 to Barry Adickes from James Hendricks, copy to
22 Tracy DeBruhl (phonetic). Tracy DeBruhl is in
23 HR, correct?

24 A. Yes, sir.

25 Q. Who is James Hendricks?

1 A. That would have been a former
2 regional manager.

3 Q. Okay. And did they state in there,
4 "Barry, I know that your sales territory has
5 been harshly affected by the economic downturn.
6 The State of North Carolina has been especially
7 hard hit with state and county employee layoffs
8 and furloughs."

9 A. That appears to be what's in that
10 memo.

11 Q. Now, you guys do a performance
12 evaluation at the end of each year, correct?

13 A. Yes.

14 Q. And 2009 was the year that
15 supposedly Barry's sales lagged, right?

16 A. Yes, sir.

17 Q. Now, this PPM or people performance
18 management form, is completed by Paul Stoddard.
19 Who is Mr. Stoddard?

20 A. He would have been the regional
21 manager that took the place of Jim Hendricks.

22 Q. He was Barry's direct supervisor at
23 that time?

24 A. At that time, yes.

25 Q. In fact, he's your boss now, I

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1 believe; is that right?

2 A. Yes, sir.

3 Q. All right. Now, let me get you to
4 look at this with me a little bit.

5 MR. SMITH: And, Your Honor, for the
6 record, this is Exhibit 2 in claimant's exhibit
7 package:

8 BY MR. SMITH:

9 Q. Now, this form is the performance
10 review for the year 2009, correct?

11 A. Yes, sir.

12 Q. It appears to have been completed on
13 January 2, 2010. Does that look correct?

14 A. Yeah, that would make sense.

15 Q. Okay. Now, at that time -- and
16 these -- on the right side of the page in the
17 shaded part -- you're familiar with these
18 forms?

19 A. Yes.

20 Q. That is the supervisor comments,
21 correct?

22 A. Yes, sir.

23 Q. And on that form he's stated, "I
24 started working with Barry in late November.
25 So far I've been impressed with all his key

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1 areas of responsibility." Is that what
2 Mr. Stoddard said?

3 A. It appears to be so.

4 Q. And, again, he's your boss, right?

5 A. Yes.

6 Q. Now, the next thing says, "Given the
7 economic conditions, I think Barry did a decent
8 job versus AOP. I've talked with Barry to
9 express how critical it is to obtain quota on a
10 more regular basis. Barry had a great December
11 2009 and I look forward to a great start in
12 2010;" is that correct?

13 A. It appears to be.

14 Q. 2009 was a pretty tough year
15 economically, wasn't it?

16 A. Every year is tough economically.

17 Q. Well, and I'm not speaking so much
18 of you guys. But from a national standpoint,
19 we were in the worst recession we had been in
20 since the depression of 1929?

21 A. I believe that started in 2008, but,
22 you know, these have been challenging years.

23 Q. And, in fact, that's exactly what
24 Mr. Stoddard said on here. He said -- well,
25 let me get you to review this one. He says,

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1 "Delighting customers is Barry's best strength.
2 His willingness to dive into the most difficult
3 customer-facing issues is impressive. While
4 doing this, he also finds time to be a great
5 team player, to help me develop the rest of the
6 region to the better, and is someone I can
7 always depend on. His passion for great sales
8 results is extremely strong and I could not ask
9 for more than he gives today. I know that with
10 the return of a stronger economy that Barry
11 will have many years of over-quota results;" is
12 that correct?

13 A. It appears to be what is written.

14 Q. Okay. Did you -- you were talking
15 about the things you heard about Mr. Adickes
16 before he came on your team. Did you hear any
17 of this stuff?

18 A. No, sir.

19 Q. And in the manager's reflections on
20 Page 202 --

21 MR. OXFORD: I'm just going to
22 object to best evidence of -- these are all
23 coming in as -- they are all being tendered
24 into evidence. I mean, reading them into the
25 record is just like reading a medical report

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1 into the record.

2 THE COURT: Which we did. Go ahead.

3 BY MR. SMITH:

4 Q. Manager's reflections. "Even though
5 Barry did not take any courses outside of his
6 territory due to the financial cutbacks at
7 Philips and the time-consuming customer-facing
8 issues, I believe there was great development
9 with Barry. This was possibly the toughest
10 year we have all faced due to the recession and
11 cutbacks. Everyone was doing the work of many
12 and this in itself produced an opportunity for
13 tremendous new knowledge and development.
14 We've all seen things and learned from them
15 this year and not happening in many years and
16 we have all furthered our knowledge base and
17 developed from this."

18 Would you characterize this as a
19 good performance review?

20 A. I would say that's pretty much a
21 boilerplate response.

22 Q. A boilerplate response?

23 A. Yeah.

24 Q. You would not characterize that as a
25 good performance review?

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1 A. I would say that's an acceptable
2 performance review.

3 Q. Okay. Well, let's keep going. But
4 he was on -- at this point in time when this
5 performance review was coming out with all of
6 this praise, he was on your PIP, correct? He
7 was supposed to be improving?

8 A. I was not part of the PIP, so I
9 don't know the timing of that plan, sir.

10 Q. All right. Let me get you now to
11 review Defendants' Exhibit D-22. And this,
12 again, is from Mr. Stoddard. This is a letter
13 to Barry from Mr. Stoddard dated January 15,
14 2010, and in this letter he's congratulating
15 him on a great December. He finished at 180
16 percent and number one in the region. That's
17 good, isn't it?

18 A. That would be good.

19 Q. "I see great improvement in your
20 skills and I'm confident you'll continue to
21 achieve and produce great results for Philips."
22 That's good too, isn't it?

23 A. That would be good.

24 Q. Now, let me also ask before I get
25 into more of this performance stuff, when you

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1 supervised Mr. Adickes, you would only see him
2 in person five to six days a year, correct?

3 A. Yeah, more or less. Yes.

4 Q. You were in Atlanta?

5 A. These are field-based employees. We
6 don't have a lot of face time.

7 Q. And most of your contact would be by
8 e-mail?

9 A. E-mail. Some phone. Probably
10 primarily e-mail.

11 Q. All right. Now, the next
12 performance appraisal that I have here is
13 Exhibit 3. This one is for the year 2010.
14 I'll show it to you. Is that correct, that's
15 for the year 2010?

16 A. Yes.

17 Q. But you completed it even though he
18 was not your employee in 2010, correct?

19 A. I would have delivered it because it
20 would have been delivered in 2011. So I would
21 have delivered, but I would not have written
22 it.

23 Q. When it says, "Manager, Mark
24 Johnson," you didn't write this stuff? Is that
25 what you're saying?

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1 A. No.

2 Q. All right. Would that have been
3 Mr. Stoddard that did it?

4 A. Yes.

5 Q. Goes through, Barry meets or exceeds
6 all of his key areas of responsibility?

7 A. Uh-huh.

8 Q. "Barry was on PIP for most of 2010
9 and I'm thrilled to mention he has been removed
10 completely and is on his way to great things in
11 2011."

12 A. Apparently so.

13 Q. Good comments?

14 A. They would be good.

15 Q. "Barry does a fantastic job with his
16 channel partners. His communication with them
17 is current and timely." Isn't that what you
18 were complaining about, that he wasn't
19 communicating with his clients?

20 A. I didn't write those comments, so I
21 stand by mine.

22 Q. But your comments or your
23 supervision of him did not occur until -- with
24 the exception of 11 weeks, all your supervision
25 of Mr. Adickes was after the injury; is that

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1 right?

2 A. Correct.

3 Q. Okay. But his supervisor before the
4 injury said that his contact with his clients
5 is current and timely; is that right?

6 A. In that document, yes. What he
7 conveyed to me was different.

8 Q. And that is the performance review
9 for 2010, the calendar year prior to his date
10 of injury?

11 A. Yes, sir.

12 Q. "Barry had an outstanding year in
13 2010. He's taken his territory to a great
14 consistent performance level. I would be
15 remiss if I did not state how professional and
16 upbeat Barry was throughout the entire PIP
17 process." Good comments?

18 A. Good comments.

19 Q. "Stayed focused all year and really
20 paid off for him. Great job, Barry." Good
21 comments?

22 A. Good comments.

23 Q. "Barry does a very nice job with
24 Philips' values. He works every day to embody
25 those values and I believe he comes across

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1 professional and is exactly the type person we
2 need here at Philips. His ability to deliver
3 great results this year was impressive and a
4 great comeback for him." Good comments?

5 A. I would consider those good
6 comments.,

7 Q. "I believe Barry will be well placed
8 in his role for 2011. If there's a desire to
9 go to the next level, Barry could do that
10 within the two to three years of consistent
11 performance." Good comments?

12 A. Good comments.

13 Q. And, again, this is a 2010 one, the
14 year prior to his injury?

15 A. Yes, sir.

16 Q. All right. Let's go to the next
17 performance appraisal. This one is for the
18 performance review of 2011, and this one you
19 actually did complete; is that right?

20 A. Yes, sir.

21 Q. Now, "For 2011, Barry fell short of
22 meeting his financial commitment to the
23 company. He finished the year at approximately
24 87 percent of AOP." So that's something you're
25 not happy about, I assume; is that right?

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1. A. No, sir.

2. Q. "Barry failed to manage his
3 inventory to the goal of no writeoffs. During
4 the year, Barry had a writeoff of \$652." But
5 that's equipment that was lost in his accident;
6 is that right?

7 A. That may or may not have been the
8 case. I don't know.

9 Q. Okay. I'm sorry. I should have
10 gone on for you. The next sentence says, "This
11 unit was lost as a result of Barry's accident."

12 A. (Witness shrugs shoulders.)

13 Q. "An area of concern is Barry's
14 timely territory status feedback. Barry is
15 routinely among the last to respond to requests
16 for input from his manager." These were things
17 you were not happy about; is that right?

18 A. Correct, sir.

19 Q. "2011 was a challenging year for
20 Barry. Shortly after he began his new role of
21 indirect channel manager, Barry went on
22 short-term disability." That was because of
23 his accident; is that right?

24 A. Yes, sir.

25 Q. "This no doubt showed his

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1 transition -- excuse me, slowed his transition
2 into his new role. Barry met several of her
3 personal objectives, but failed to meet all of
4 them, including his primary objective of
5 meeting the AOP commitment to the company."
6 Again, something you weren't happy about?

7 A. Correct, sir.

8 Q. "He fell short on delivering on his
9 AOP commitment by finishing the year at only
10 78 percent." So the year following his
11 accident, he did not meet his quota, correct?

12 A. Correct.

13 Q. "Barry has a wealth of experience
14 and should focus on sharing best practice ideas
15 for the team. As a result, I believe that
16 Barry needs to focus on improving his sense of
17 urgency and driving results of his territory.
18 Barry should focus more attention on providing
19 feedback that adds more substance and value."

20 Did you realize that you placed
21 three things in that performance appraisal on
22 your final comments about focus?

23 A. I didn't notice it until you pointed
24 it out. Focus is the nice way of saying you're
25 not getting the job done in this area. It's

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1 not a clinical diagnosis.

2 Q. Now, let me show you Page 199 of
3 Claimant's Exhibits, Exhibit 1. And explain
4 this to me because this says at the top Tracy
5 DeBruhl. That looks like who it's from. But
6 then it says it's addressed to Barry and at the
7 bottom it's signed by you. Did you write that
8 or did Tracy DeBruhl write that?

9 A. I probably wrote that with Tracy. I
10 had concerns and went to human resources and
11 they helped author that.

12 Q. This is March 9, 2012, almost
13 exactly a year from the time of Barry's
14 accident?

15 A. Uh-huh.

16 Q. And you say, "I believe your
17 performance is now suffering in areas,"
18 correct? Feel free to look at it.

19 A. I'll take your word for it.

20 Q. Okay. You go on to talk about, "in
21 the future, if you know you're going to be out
22 for the day or out of your territory for
23 personal business, you must enter into the one
24 portal under our leave request PTO." Were you
25 aware that Barry was missing days from time to

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1 time because of headaches?

2 A. I don't know what the nature was and
3 I don't recall the circumstances.

4 Q. All right. In the second paragraph
5 you say, "You are exhibiting a lack of focus on
6 time management in addition to your
7 year-to-date number;" is that right?

8 A. Yes, sir.

9 Q. "My concern about your" -- next
10 sentence says, "We have concerns about time
11 management and/or focus;" is that right?

12 A. Yes, sir.

13 Q. Down here under this bullet you
14 say -- you talk about poor or slow follow-up,
15 correct?

16 A. Correct.

17 Q. And then at the bottom,
18 "Collectively they point to a potential problem
19 in both focus as well as territory management,"
20 correct?

21 A. Yes, sir.

22 Q. So in this e-mail to him, on four
23 different occasions you made comments about his
24 focus, correct?

25 A. Yes, sir.

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1 Q. I'm assuming you haven't, but you
2 haven't reviewed the neuropsychological
3 evaluation from Dr. Waid or the deposition of
4 Dr. Mandell, have you?

5 A. No, sir.

6 Q. On Page 35 of Dr. Mandell's
7 deposition he says -- and I want to get you to
8 see if this is similar with what you saw.
9 "Where he did have difficulties were with
10 concentration, executive function, capacity to
11 sustain attention and concentration, difficulty
12 with attentional executive aspects of immediate
13 learning, or thought to be the complaints for
14 forgetfulness on daily pursuits. Mild
15 executive dysfunction, shorter fuse, easy to
16 frustration." The same things you were
17 commenting on here, wasn't it?

18 A. No, sir.

19 Q. Lack of focus, inability to
20 concentrate, those aren't the same things?

21 A. I said my comments are not clinical
22 in nature. They are a function of you're not
23 getting the job done in my opinion.

24 Q. Which is a manifestation of exactly
25 what this clinical information says?

1 A. I can't speak to that, sir.

2 Q. Likewise on Page 8 of Dr. Waid's
3 report he said, "Mr. Adickes did demonstrate
4 varied ability in his capacity to sustain
5 attention and concentration." Isn't that
6 similar to what you were finding right here on
7 these reports?

8 A. No, sir, not in my mind. Again, I'm
9 not a clinician.

10 Q. You can't comment one way or the
11 other?

12 A. No. I didn't exhibit -- or I did
13 not witness those issues. I witnessed output.

14 Q. And that's all you could see, was
15 the output, because you only saw him five or
16 six days a year, correct?

17 A. Correct.

18 Q. I hesitate to even go into this, but
19 you said there was a problem with personal
20 charges on his AmEx bill, correct?

21 A. Yes, sir.

22 Q. Those came about when Mr. Adickes'
23 son was in a hospital in Virginia having
24 surgery. They made him show a credit card and
25 that was the only card he had and he called and

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1: reported that to you, didn't he?

2: A. I don't recall that. I recall
3: numerous charges hitting his American Express
4: corporate card from over an extended period of
5: time, is how I remember it.

6: Q. Well, we can get into that, but what
7: you said in your performance appraisal was not
8: that it was personal charges, but that his
9: charges -- that he hadn't paid the bill on
10: time. Do you recall that?

11: A. Likely that would be the first
12: notification to me is employee is past due.
13: Then when you start to look in and you see
14: personal charges, you know, you have two
15: issues.

16: Q. Let me go to Claimant's Exhibit 5,
17: and this would be another performance appraisal
18: that you completed for the calendar year 2012;
19: is that correct?

20: A. Yes.

21: Q. So that would be for the year -- two
22: years post-accident, not the year of the
23: accident?

24: A. 2012.

25: Q. Okay. All right. Once again, for

1 that year he finished at 96 percent of his AOP.
2 So he didn't meet quota that year either,
3 correct?

4 A. Correct.

5 Q. And you note on here that you had
6 received complaints regarding being difficult
7 to get in touch with Barry?

8 A. Yes. That would be consistent with
9 my experience pre- and post-accident.

10 Q. That would be your experience for
11 those 11 weeks pre-accident?

12 A. Well, that was also the feedback
13 that I had received.

14 Q. But it's not showing up on any of
15 those performance appraisals, is it? In fact,
16 it says quite the opposite of that on those
17 performance appraisals?

18 A. I didn't write those, sir.

19 Q. But had you read those prior to, you
20 would have had that feedback, right?

21 A. If I had read them, yes, I would
22 have had that feedback.

23 Q. And you state again, "Barry needs to
24 continue to focus on making himself available
25 providing timely responses." So, again, you

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1 question his focus?

2 A. Yes, sir.

3 Q. And you said, "Barry needs to focus
4 attention on managing the situation more
5 closely moving forward. Barry will need to
6 keep focused and demonstrate that he can
7 deliver on the AOP commitment." So in your
8 final comments on his 2012 performance
9 appraisal, three more times you question his
10 focus?

11 A. Yes. And if I recall looking at
12 that final rating -- what was my final rating
13 for Barry? That would be valued player,
14 delivers solid results. So a good PPM provided
15 in the --

16 Q. Well placed is what I see on here.

17 A. Flip the page right there, valued
18 player.

19 Q. Now, you talked about the issues of
20 getting in touch with him from time to time?

21 A. Yes.

22 Q. Barry wasn't coming to you and
23 saying, "Hey, I've got a headache and I'm down
24 for two or three days," was he?

25 A. I don't recall that, no.

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1 Q. But it could certainly explain why
2 you had a hard time getting in touch with him
3 at times?

4 A. I wouldn't be able to address that.

5 Q. Just briefly on the phone call in
6 which you terminated him, you do recall him
7 asking you about if there was a probationary
8 period, correct?

9 A. I believe I stated that under oath
10 here today.

11 Q. And it is correct that since
12 January 17, 2014, Philips has not provided
13 Mr. Adickes with any employment, correct?

14 A. That's to the best of my knowledge,
15 no.

16 Q. And there's no offer for him to
17 return at this point in time, is there?

18 A. Not that I'm aware of. I believe he
19 was free to, like all employees that were RIF,
20 to apply for jobs that became open at Philips.
21 Whether he has done that, I wouldn't have
22 visibility to.

23 MR. SMITH: Thank you, sir. No
24 further questions.

25 THE COURT: Mr. Oxford.

1 MR. OXFORD: Just briefly.

2 REDIRECT EXAMINATION

3 BY MR. OXFORD:

4 Q. Prior to Barry coming under your
5 supervision as far as his personal record
6 something that was provided to you?

7 A. It was not provided to me, no.

8 Q. Is that something you could have
9 logged on a computer and pulled up?

10 A. No. I would have had to have made a
11 request to human resources.

12 Q. Go through some channels to get
13 that?

14 A. When we write these PPMs, it's all
15 done electronically. I sign off on it
16 electronically, the employee signs off
17 electronically, it goes into an archive.
18 Frankly, in sales most people are really
19 focused on where they finish to quota. And
20 once you're done with the PPM, it's -- you move
21 on pretty quickly.

22 Q. That was going to be my next
23 question. As far as your experience with --
24 you supervised plenty of these sales
25 specialists. In your experience are they more

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1 concerned about the raw data or commentary?

2 A. Commentary. They're interested in,
3 you know, first of all, did I hit AOP? And the
4 rest of it is kind of white noise still.

5 Q. So they care more about the numbers
6 than what's said?

7 A. Oh, absolutely.

8 Q. And you were shown an e-mail. I
9 believe it was an e-mail. You were shown
10 Exhibit D, Page 22. Is that correct, you were
11 just shown this e-mail by Mr. Smith?

12 A. Yes.

13 Q. I'm showing you "D," Page 21. As
14 far as his performance at the end of 2009,
15 beginning of 2010, what do these numbers down
16 here -- what do those tell you?

17 A. Poor performance. January,
18 28 percent. February, 56 percent. March,
19 54 percent. As you can see, he achieved over
20 65 percent only once in the last six months.

21 Q. And that would have been it says
22 here in November. So this e-mail was from May
23 2010, so November 2009?

24 A. Yes.

25 Q. Again, you were also shown an

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1 exhibit that was on Page 199. Let me get
2 there. Exhibit 12. I'm sorry. That's not
3 right. Claimant's Exhibit 1. I apologize.
4 This was the -- this was the letter from Tracy
5 DeBruhl that was written to Barry?

6 A. Uh-huh.

7 Q. Written by you; is that correct?

8 A. Yes.

9 Q. And Mr. Smith pointed out that you
10 wrote this line. Can you read the line that
11 starts right here, "In the future?"

12 A. "In the future if you know you're
13 going to be out for the day or out of your
14 territory for personal business, you must enter
15 in the one portal under leave request PTO
16 time."

17 Q. Does that say anything about why he
18 may have been out of the area during the time
19 that you were speaking of as far as the reason?

20 A. I really can't recall.

21 Q. It doesn't say that he was out of
22 the area for headaches?

23 A. No. I mean, it could have been for
24 any number of reasons, you know. Sometimes
25 sales reps, again, these are field-based

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1 employees. We're not with them all the time.
2 Sometimes they will take time off and they
3 forget to enter it into the system. It may
4 have been a reminder for that. I can't recall
5 anything at this point in time that
6 specifically triggered that response.

7 Q. Are you aware of -- this is an
8 e-mail that was sent to you July 25, 2013. Are
9 you aware of these times where he asked for PTO
10 for other reasons not related to headaches?

11 A. Yeah, I remember that. That seems
12 to be related to some of his other issues, yes,
13 the knee.

14 Q. Knee surgery, going to Alaska?

15 A. Yeah.

16 Q. And so after counseling him on
17 proper procedure for asking for time off, he
18 would request time off if needed, if he was
19 going to be out of the area or if he was going
20 to be off work?

21 A. Correct.

22 Q. And do you recall any times where he
23 asked for time off related to his headaches?

24 A. I do not.

25 MR. OXFORD: Nothing further from

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1 me.

2 THE COURT: Mr. Smith.

3 RECROSS-EXAMINATION

4 BY MR. SMITH:

5 Q. In your deposition you indicated you
6 didn't really -- correct me if I'm wrong. You
7 don't really care -- didn't really care when he
8 was there or when he wasn't there as long as he
9 got the work done; is that correct?

10 A. That's pretty much how field sales
11 is. It's a performance-oriented position.
12 You're focused on are they delivering on their
13 financial commitment to the company or aren't
14 they?

15 Q. So if Mr. Adickes was down for two
16 days with a headache, he wouldn't have had to
17 call you to report that so long as he made the
18 work up; is that right?

19 A. He should be loading it into the
20 system if he was taking a sick day or PTO day.

21 Q. You were asked about his sales
22 numbers in 2009 when he was on the PIP, and I
23 don't want to go into this very much. But by
24 the end of 2009, he finished at 180 percent and
25 number one in the region?

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1 A. Yes.

2 Q. And he was off the PIP?

3 A. Yes. And to me that would support
4 the claim that this was not a performance
5 decision that the company made. The company
6 changed their business model and --

7 Q. I'm talk about 2009.

8 A. No. But I'm talking about his
9 performance, you know, was not a factor in his
10 position being eliminated from the company.

11 MR. SMITH: Thank you, sir. No
12 further questions.

13 THE COURT: All right. Mr. Oxford.

14 MS. PAYNE: Nothing further.

15 MR. OXFORD: Nothing further.

16 THE COURT: All right, sir. You may
17 step down. Any other witnesses?

18 MS. PAYNE: No, Your Honor.

19 THE COURT: All right. That's your
20 case?

21 MS. PAYNE: Yes. We would like to
22 submit our APAs as an exhibit, but yes.

23 THE COURT: All right. Thank you
24 all very much. That concludes this hearing.

25 (The hearing concluded at 2:45 p.m.)

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1
2
3 CERTIFICATE OF REPORTER
4

5 I, Kimberly T. Power, Court Reporter
6 and Notary Public for the State of South
7 Carolina at Large, do hereby certify:

8 That the foregoing transcript of
9 proceedings was taken before me on the date and
10 at the time and location stated on Page 1 of
11 this transcript; that the witness was duly
12 sworn to testify to the truth; that the
13 testimony of the witness and all objections
14 made at the time of the proceeding were
15 recorded stenographically by me and were
16 thereafter transcribed; that the foregoing
17 transcript of proceedings as typed is a true,
18 accurate, and complete record of the
19 proceedings made at the time to the best of my
20 ability.

21 I further certify that I am neither
22 related to nor counsel for any party to the
23 cause pending or interested in the events
24 thereof.

25 Witness my hand, I have hereunto
affixed my official seal this 25th day of July,
2015, Lexington County, South Carolina.

Kimberly T. Power, Court Reporter
Notary Public State of South Carolina
My Commission Expires: 04/24/2025

KIMBERLY T. POWER, CCR (803) 622-9057

SOUTH CAROLINA WORKERS' COMPENSATION COMMISSION

W.C.C. FILE #1102937

BARRY ADICKES	)	
	)	
CLAIMANT,	)	
	)	SC WORKERS' COMPENSATION COMMISSION
VS..	)	
	)	FULL BOARD HEARING OF
PHILIPS HEALTHCARE	)	
	)	BARRY ADICKES
EMPLOYER,	)	
AND	)	VS
	)	
FIDELITY & GUARANTY	)	PHILIPS HEALTHCARE
	)	
CARRIER.	)	

This is the Transcript of the South Carolina Workers' Compensation Hearing of Barry Adickes versus Philips Healthcare, taken before Gloria Davis, a Court Reporter and Notary Public in and for the State of South Carolina, commencing at the hour of 2:6 P.M., Monday, December 14, 2015, at South Carolina Workers' Compensation Commission, 1333 Main Street Columbia, South Carolina.

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BY

GLORIA DAVIS

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COMMISSIONERS PRESENT:

Avery Wilkerson, Chair
T. Scott Beck
Aisha Taylor

*Reporter's Note: -- Indicates incomplete thought or sentence, trailing off or interruption by speakers.

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STIPULATIONS

Commissioner Wilkerson: Madame Court
Reporter if you'll call -- call the case.
Thank you.

Court Reporter: Today is December 14th,
2015. This is South Carolina Workers'
Compensation case number 1102937. This is
the case of Barry -- somebody help me with
the name ~~Mr.~~

Mr. Smith: Adickes.

Court Reporter: -- Adickes -- thank you
~~the~~ the Claimant versus Philips Healthcare,
Employer and Fidelity and Guaranty is the
Carrier. The Appellant is the Defendant,
represented by Brooke A. Payne. The
Respondent is represented by William L.
Smith. Each side is allowed ten (10) minutes
for oral argument and the Appellant three (3)
minutes in reply. You are requested to argue
the grounds of exception and stay within the
record. The Single Hearing Commissioner was
Commissioner McCaskill.

Commissioner Wilkerson: Ms. Payne.

Ms. Payne: Good afternoon,
Commissioners.

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1 Commissioner Wilkerson: Good afternoon.

2 Ms. Payne: May it please the Court.

3 Commissioner Wilkerson: Please.

4 ARGUMENT FOR THE APPELLANT

5 By Ms. Payne:

6 My name is Brooke Payne. I'm here on behalf of
7 the Defendants. Just to briefly recap the facts in
8 this claim, the Claimant was an employee of Philips
9 Healthcare; he was working in medical device sales when
10 he was injured in a car accident in March of 2011. He
11 sustained injuries to his head, neck and bilateral
12 shoulders. He returned to work within two (2) months
13 after the accident in his regular position and he
14 continued to work for our employer for two and a half
15 (2 ½) years earning similar wages. He was terminated
16 from Philips as a result of a reduction in force, which
17 had nothing to do with his performance. He
18 subsequently obtained a job with BRI, wherein he earned
19 fifty-five thousand dollars (\$55,000.00) a year, which
20 was a significant reduction from the wages he was
21 earning with our employer. The Claimant is seeking
22 wage loss benefits. As the Appellants we argue that
23 wage loss benefits are premature because the Claimant
24 is not at MMI for all of his compensable injuries,
25 specifically his right shoulder. However, if the

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1 Commission finds that he is at MMI, we argue that he is
2 not entitled to wage loss benefits because he is unable
3 to meet his burden in that regard and that the
4 calculation of wage loss benefits in the award is
5 incorrect. With regard to our first argument, the
6 Claimant is not at MMI; as the Full Commission is aware
7 MMI is a medical term used to indicate that a Claimant
8 has plateaued and that there is no additional medical
9 treatment or care that will lessen the degree of
10 impairment. In South Carolina many Courts have
11 analyzed what type of future medical care or treatment
12 amounts to care that will lessen the period of
13 impairment. Claimant argues that our position is
14 unsupported by case law but we have brought about quite
15 a few cases in support of our argument, which is mainly
16 because the Commissioner found that the Claimant was at
17 MMI based on a questionnaire response from an IME
18 physician, whereas he assigned him a PPD rating of
19 fifteen percent (15%) to the right shoulder but also
20 indicated that he is in need of future surgery to his
21 right shoulder. I'll -- I'll just briefly recap a few
22 of the cases. In the Gadson claim the Claimant had
23 been recommended for future injections, medications and
24 physical therapy; which the Court found was just for
25 further maintenance and the ATP specifically in that

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1 case said that no further surgery or invasive treatment
2 was required. So, they found that the Claimant was at
3 MMI because the only treatment that was required was
4 for further maintenance and care, as opposed to
5 something invasive, like surgery. Hall versus Reynolds
6 is the same sort of idea; the ATP rated and released
7 him and then the Claimant, because of additional pain,
8 sought further treatment with an IME physician who
9 subsequently performed surgery. So, the Court looked
10 back and said that he actually was not at MMI before
11 the surgery since it reduced his pain effectively.
12 Here, the Claimant's authorized treating physician is
13 Dr. Rentz; he performed a right shoulder surgery in
14 October of 2011. And the last time the Claimant
15 returned to Dr. Rentz was in September of 2014, and Dr.
16 Rentz noted at that time that the Claimant continued to
17 have pain, was complaining of it popping and catching
18 and at that time we had sent him there for a rating and
19 release but Dr. Rentz stated that he -- that it wasn't
20 time for a rating and release and rather than assigning
21 same, he sent the Claimant for an MMI of is shoulder
22 because of his complaints. Dr. Barron, the IME
23 physician that I had spoke of earlier, had evaluated
24 the Claimant back in December of 2012. At that --
25 during that evaluation he found that the Claimant

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1 continued to complain of his -- complain of pain in his
2 right shoulder and he noted that he, quote/unquote "Had
3 unfortunately not responded to right shoulder surgical
4 treatment." It was the same physician that in January
5 of 2014, opined -- or assigned a rating of fifteen
6 percent (15%) to the shoulder but also continued to
7 recommend the surgery and it's our contention that
8 since the -- Dr. Barron is recommending a surgery, the
9 Claimant is not at MMI and a finding of wage loss
10 benefits is premature at this time. And -- however,
11 alternative -- alternatively, if the Commission is to
12 find the Claimant is at MMI, it's our argument that he
13 is unable to meet his burden of proving a wage loss.
14 The -- per the Statute, this must be predicated upon
15 his showing of loss of earnings resulting from the work
16 injury. Here the Claimant focuses on the -- Dr. Wade's
17 neuropsychological report and argues that he has
18 suffered an extensive disability with regard to his
19 cognitive function. I urge Your Honors to please read
20 the report from Dr. Wade; it's -- it's about nine (9)
21 pages long. Claimant's counsel and I have a -- we --
22 we disagree about a -- I guess, the -- the summary and
23 the analysis of Dr. Wade's findings. He performed
24 about twenty-four (24) different tests on the Claimant.
25 Claimant's counsel focuses on three (3) sentences,

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1 which are contained on the last page and argues that
2 Dr. Wade opined that the Claimant experiences ongoing
3 problems with focus, attention, executive aspects of
4 immediate learning, extensive -- I'm sorry -- executive
5 dysfunction and forgetfulness. But if you read the
6 report you'll notice that with regard to focus and
7 attention Dr. Wade noted that although the Claimant
8 reported a decreased capacity for sustaining attention,
9 he was assessed as well-oriented, alert and able to
10 register information. I must say that I -- I've read
11 many of Dr. Wade's reports and I was -- I was pretty
12 shocked to see this Defense friendly report coming from
13 a Claimant IME. In summary, with regard to his focus
14 and attention, Dr. Wade noted that the Claimant did
15 demonstrate variability in his capacity to sustain
16 attention, otherwise his performance was suggestive of
17 intact brain behavior and functioning. When it came to
18 his executive abilities of higher reasoning, he
19 performed, again, I think eleven (11) tests in that
20 regard, most of which the Claimant demonstrated a
21 superior range, high average or average range in
22 relation to others of his age and education. Dr. Wade
23 found that Mr. Adickes was generally able to meet the
24 demands of higher reasoning and problem solving tests
25 and found that the evaluation revealed him to be

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1 functioning in the high average range of intellectual
2 abilities. With regard to forgetfulness, the Claimant
3 points to one sentence in the summary section that
4 notes that the Claimant continues to complain of
5 forgetfulness; however, the sentence right behind that
6 sentence states, yet, an assessment of anterior great
7 memory generally revealed intact immediate learning
8 memory, as well as an efficient ability to retain and
9 recall information. And the last line of Dr. Wade's
10 report states that this neuropsych evaluation generally
11 provided favorable results. So, it's our opinion that
12 he does not have any cognitive dysfunction; even if he
13 did there is no indication that he has had any loss of
14 earning capacity resulting from it. Claimant proffered
15 a vocational report from Dr. Joel Leonard, which we
16 argue should be granted no persuasive weight for many
17 reasons, one of which is that he placed the Claimant in
18 profile B, which is what he found assumed the Claimant
19 -- or he -- I'm sorry -- he came to that determination
20 because he assumed the Claimant's termination was
21 performance based and that his current employment
22 represents a reduction in earning capacity. And he
23 further noted that those were assumptions based only on
24 the Claimant's own statements to him and he was the one
25 that actually recommended that a neuropsych evaluation

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1 be completed. So, once we were provided with a
2 neuropsych evaluation from Dr. Wade, as well as we
3 obtained a lot of other documents from the employer,
4 which proved that the Claimant's termination was a
5 result of a reduction in force, which was -- which
6 resulted in the termination of a hundred and fifty
7 (150) employees nationwide of Philips on that same
8 date, we provided all these personnel documents to Mr.
9 Leonard, we also provided him testimony from the
10 Claimant's supervisor, which unequivocally showed that
11 the termination wasn't performance related and that
12 even if it was the Claimant had the -- had performance
13 issues dating back to before the date of accident; so,
14 there was no indication that that would have been a
15 reason for terminating him afterwards. We also
16 provided him with the neuropsych eval from Dr. Wade.
17 And during the deposition, after reviewing the
18 documents, Mr. Leonard actually agree that the Claimant
19 had documented performance issues before his work
20 injury, which he did not inform Mr. Leonard about. He
21 agreed that he had no evidence that Mr. Adickes had
22 difficulties securing a job due to his work injury and
23 he also agreed that Dr. Wade provided a favorable
24 neuropsych report. Having agreed to all that, he still
25 stuck to his opinion that even though the additional

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1 information gave him greater contemplation, and there
2 was certainly a possibility that the Claimant could
3 have fallen into profile A, which attributed his lower
4 wages to the labor market, he was going to maintain his
5 opinion. Aside from those, you -- you know, the -- the
6 49 -- oh, I'm sorry -- 42-9-20 analysis leans on the
7 decreased -- decrease in wages stemming from the work
8 injury and the preponderance of evidence in the record
9 just tends to indicate that there was no decrease in
10 earnings resulting from the work injury. You know, the
11 best evidence of the ability to earn post-injury wages
12 is earning those wages and if you continue to work for
13 an employer for two and a half (2 ½) years earning
14 similar, if not more, wages than he was working -- I'm
15 sorry -- earning pre-injury. Again, his position was
16 eliminated as a part of reduction in force; it had
17 nothing to do with his work injury. There was a short
18 period of time where he was unemployed between being
19 terminated with Philips and beginning to work at BRI;
20 he only applied at four (4) jobs in between that period
21 of time. When he applied to those jobs he submitted
22 resumes where he portrayed himself as a capable
23 individual, an impactful speaker, expertly organized --

24 Commissioner Wilkerson: Go ahead and
25 finish your thought and then you'll have

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1 three (3) minutes in reply.

2 Ms. Payne: -- in focus and comfortable with
3 issues and ease of delivery in the sales force.

4 Commissioner Wilkerson: Okay. Thank
5 you. You'll have three (3) minutes in reply.

6 Ms. Payne: I'll pick up later.

7 Commissioner Wilkerson: Sure. Mr.
8 Smith.

9 Mr. Smith: May it please the
10 Commission.

11 ARGUMENT FOR THE RESPONDENT

12 By Mr. Smith:

13 I'm going to, as always, give you all
14 some handouts. I apologize. If I may
15 approach?

16 Commissioner Wilkerson: Please.

17 Mr. Smith: There's three (3) sets of --

18 Commissioner Wilkerson: Okay. Just
19 pass them around.

20 Mr. Smith: -- what we're going to
21 discuss.

22 Commissioner Wilkerson: There we go.
23 Thank you.

24 Commissioner Taylor: Thank you.

25 Mr. Smith: I represent Barry Adickes. Barry is a

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1 fifty-three (53) year old -- he's a pretty smart
2 fellow; he's a college graduate. He worked for
3 twenty-two (22) years with Philips Healthcare and their
4 predecessor company. He was -- he made a lot of money.
5 He was in medical sales. He earned about a hundred and
6 twenty-four thousand dollars (\$124,000.00) a year and
7 that, in fact, was his earnings for the year prior to this
8 injury. In March of 2011, he suffered a terrible
9 injury where he -- he went too fast on a curvy road,
10 went off a mountain, while he was on the job, and
11 careened down the mountain about a hundred (100) feet
12 and had to be extricated. He had a brain injury, he
13 had bilateral shoulder injuries and he had a cervical
14 spine injury. As you can tell, when you review this
15 record, Commissioner McCaskill did a very detailed,
16 very insightful order in this case, I'd like to take
17 credit for it but he did it; those findings of fact are
18 his findings of fact. This case was tried for about a
19 whole day, the record on it is something like this
20 (demonstrating); it is enormous and he went through
21 every bit of it. Their first argument is, is that the
22 Claimant is not at MMI; I've never heard that argument
23 from the Defense before but that's the argument. The
24 Curiel test is a test for maximum medical improvement
25 and that test is -- MMI means no further medical care

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1 will lessen the period of impairment. This gentleman
2 has been treated for four (4) years. He's had a
3 shoulder surgery. They -- they don't contest MMI with
4 regard to the brain and with regard to the neck, only
5 with regard to the right shoulder. There is a
6 recommendation that he will eventually have to have
7 another surgery on his right shoulder; Dr. Barron
8 testified it is very -- it's certainly reasonable for
9 him to put that off as long as he can. If you take
10 their argument to -- to what they're saying here, that
11 means anytime you've got somebody with arthritis and
12 they're going to have to have a total knee, they're not
13 at MMI until they have that total knee somewhere down
14 the line. The other thing about that is his shoulder
15 is not what is causing his permanent wage loss; his
16 brain injury is what's causing his permanent wage loss,
17 along with his neck. It does not matter -- so -- so,
18 further medical care is not going to tend to lessen his
19 impairment because his impairment is not caused by his
20 shoulder. He has permanent impairment to his shoulder
21 but it's not causing his wage loss. So, we think
22 clearly he is at maximum medical improvement. With
23 regard to the loss of earning capacity, as I told you
24 he made a lot of money and he's actually -- and he is
25 -- and he -- and was a smart fellow. He was out of

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1 work for a period of time; then he returned to work.
2 He had difficulties once he returned to work. He was
3 -- he was terminated in January of 2014, they say
4 because of a RIF; my client says that they -- that,
5 yes, it was part of a RIF but they told me it was part
6 performance related. Frankly -- and we fought about
7 that for hours during this hearing but the truth of the
8 matter is, it does not matter. He has -- he is gone
9 from that job; they will not take him back and he
10 cannot obtain employment like that any further because
11 of his injury. With regard to -- to why he was fired
12 and all that -- just so I get to do it very quickly --
13 he had glowing performance reviews prior to this
14 hearing. They put up a witness that had been his
15 supervisor eleven (11) weeks prior to this injury, and
16 then for the two (2) years after his injury; he was
17 eviscerated on cross. His reviews of him after the
18 injury read like Dr. Wade's report and Dr. Mandell's
19 deposition testimony about his lack of focus and
20 inability to concentrate and focus; if you read those
21 reviews they -- they sound like you're reading Dr.
22 Wade's report. Now, let me briefly go through this
23 evidence with you. The first one here, page 96, that's
24 Dr. Welshofer. Dr. Mandell was the treating
25 Neurologist but Dr. Mandell does not rate; so, they

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1 sent him to Dr. Welshofer for a rating. Dr. Welshofer
2 rates him as having a fifteen percent (15%) impairment
3 to the brain. So, no question, he's got a brain
4 injury; their authorized treating physician finds that.
5 I put them out of order, I -- I apologize. Let me
6 start with the -- the second set here and this is Dr.
7 Wade's evaluation; this is -- the last two (2) pages
8 because it's a long report. Mr. Adickes did
9 demonstrate variability in his capacity to sustain
10 attention and concentration. It appears the compromise
11 from the intentional executive aspects of immediate
12 learning are causal for complaints of forgetfulness in
13 day-to-day pursuits. Mild executive dysfunction
14 appears to be present potentially affecting both
15 cognitive and emotional domains. Certainly in
16 day-to-day pursuits he likely experiences episodic
17 forgetfulness due to the interfering effects of
18 attention executive difficulties and headaches. Now,
19 that's good but they never once mention the report or
20 -- or the deposition of Dr. Mandell in their brief.
21 Dr. Mandell is the treating Neurologist that treated
22 him from the -- right after his injury all the way up.
23 Dr. Mandell's deposition is amazing. "You talked
24 earlier about Mr. Adickes being -- and I don't remember
25 exactly how you phrased it, but a highly functional --

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1 functioning individual prior to the injury? Yes. When
2 a highly functioning individual suffers a brain injury
3 are there different consequences for those that are for
4 someone who is maybe not as intelligent? They are,
5 because upon the job he has to do he's got much a much
6 more sophisticated job that requires a much more amount
7 of executive functioning and higher cortical
8 functioning than anybody -- than somebody whose just,
9 not in offense, but let's say bricklaying or something
10 like that. That verbal fluency, concentration and
11 focus probably wouldn't affect a bricklayer because
12 they don't have to use those skills but if you have a
13 higher level of functioning then those skills are very,
14 very important for something at that level." All
15 right. Then I asked him about the -- the neuropsych
16 eval. "Is this neuropsych eval, is it consistent with
17 what you've seen? It basically says exactly what I've
18 been saying word-for-word, practically, yes." And then
19 he goes on, "He did very well in most things, in fact,
20 he was in the superior range on many things; however,
21 what he did have difficulties with were concentration,
22 executive function, capacity to sustain attention with
23 concentration difficulty with intentional executive
24 aspects of immediate learning are thought to be the
25 complaints for forgetfulness on daily pursuits, mild

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1 dysfunction -- excuse me -- mild executive dysfunction,
2 shorter fuse, easier frustration." He goes on to talk
3 about how that's the CEO of the brain. "Do these
4 problems limit his performance in employment
5 opportunities? I think they could depending on which
6 type of employment but, yes, at a high level of
7 employment" -- which he did -- "With high skills it
8 would limit." He goes on to talk about that, "Limits
9 his ability to multitask. The headaches cause him to
10 miss days from work. People with -- with high
11 intellect actually mask some of the problems on
12 testing. His medication usage is a barrier to
13 employment." Then the -- "Was there any point during
14 your treatment of Mr. Adickes where you felt like he
15 was trying to pull the wool over your eyes? Exactly
16 the opposite, in my opinion; he is the type of guy who
17 would minimize and try to rationalize what's
18 happening." That's the authorized treating physician.
19 Then Joel Leonard was deposed. Joel testified -- Joel
20 first did his report and -- and found that he had
21 sustained wage loss and the wage loss he thought was --
22 what he -- when he went back and he found a job making
23 fifty-five thousand dollars (\$55,000.00) a year, he
24 thought that was about right what he could do, based on
25 his testing of him. We went into this thing about,

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1 okay, what -- whether he was terminated for cause or
2 not for cause and all that but when he issued his
3 report, he didn't have Dr. Mandell's deposition and Dr.
4 Wade's findings. So, he went back and said, based on
5 all that, absolutely, I think that that is exactly my
6 opinion in this case. In -- in their brief they accuse
7 Joel of intentionally misrepresenting Dr. Wade's
8 report. They accuse Commission McCaskill of not
9 reading Dr. Mandell's deposition. This is just a --
10 they didn't go get any evidence in this case. They
11 didn't get a voc eval, they didn't get a neuropsych
12 eval and now they don't like what that evidence says
13 and they're filing an appeal on that. And by the way,
14 he -- he did do his own job -- job search; he tried --
15 he went all over the place looking for jobs. He
16 applied for over fifteen (15) jobs. The fifty-five
17 thousand dollar (\$55,000.00) job was the only job he
18 could find and unfortunately he lost it right before
19 the time of this hearing. With regard to the 42-9-20
20 argument, they're arguing that you can only get
21 temporary -- excuse me -- permanent wage loss benefits
22 for the three hundred and forty (340) weeks
23 post-injury. Well, they forget the second sentence of
24 that Statute that says if there's -- if there's been
25 temporary total paid that doesn't apply. Secondly,

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1 what they're asking you to do here -- and by the way,
2 the Bass versus Kenco case says that. What they're
3 asking you to do here is to part from the way wage loss
4 awards have been done in South Carolina since 1935. As
5 far as I know, I've been doing this thirty-one (31)
6 years now and I've gotten plenty of wage loss awards
7 and I've never seen a wage loss award limited from
8 three hundred and forty weeks (340) from date of
9 injury. There's -- there's -- the only case on that
10 point that I'm aware of is the Bass v. Kenco case and
11 it says if there's temporary total paid you -- it
12 doesn't matter. So, I think the evidence is clear
13 here. There was absolutely -- that he is at MMI, the
14 wage loss was proved --

15 Commissioner Wilkerson: Finish your
16 thought.

17 Mr. Smith: -- and the -- the award as found by
18 Commissioner McCaskill was proper. Thank you.

19 Commissioner Wilkerson: Three (3)
20 minutes in reply, Ms. Payne.

21 Ms. Payne: Okay. To reply quickly.

22 RESPONSE FOR THE APPELLANT

23 By Ms. Payne:

24 Just to go back to the loss of earning capacity.
25 When he applied for the subsequent job at BRI, he noted

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1 on his -- on his application that he -- the base salary
2 he was requesting -- the desired base salary was
3 fifty-five thousand dollars (\$55,000.00). He also
4 testified that soon after his termination from Philips
5 he already had a job offer from BRI but he didn't
6 accept it for a few months later, for whatever reason.
7 I'm surprised at the -- the continued discussion about
8 how he applied for over fifteen (15) jobs because,
9 again, he -- he had only testified that he applied for
10 four (4) and didn't bring a single application or
11 anything -- any other witnesses -- to the hearing.
12 More importantly, with regard to the award of wage loss
13 benefits, it -- the Statute -- this isn't a statutory
14 interpretation issue; this is a plain language of the
15 Statute issue. 49 -- 42-9-20 is clear wherein it
16 states, in no case shall the period of such
17 compensation be greater than three hundred and forty
18 (340) weeks from the date of accident; in no case
19 shall, that's mandatory language. I -- I don't
20 understand the argument about if TT is paid beforehand
21 that extends the weeks. I -- I think that the language
22 actually states that if the partial disability occurs
23 after a period of temporary -- I'm sorry -- of total
24 disability that's paid, then there's -- there's no
25 offset in that regard; I think that is supported by the

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1 case law but I -- I've yet to read a case that says
2 that receipt of total disability benefits means that
3 there -- there is no maximum weeks that can be awarded
4 with regard to wage loss benefits. You know, based on
5 if -- if the award of wage loss benefits stands, we
6 argue that it -- those shouldn't commence until the
7 date of MMI, which is questionable regarding the facts
8 of this case since permanency -- permanent benefits,
9 you know, they -- they occur on a -- or benefits occur
10 on a continuum and permanency ones come after MMI. So,
11 it would be from the date of MMI until three hundred
12 and forty (340) weeks from the date of accident; in
13 that case three hundred and forty (340) weeks from the
14 date of accident is September 16th, 2017. So, it's our
15 argument that -- first of all that -- that the Claimant
16 is not at MMI, so permanency -- a permanency award is
17 premature at this time. If Your Honors do find the
18 Claimant at MMI, that he is not able to meet his burden
19 of loss of wages resulting from the work injury. If
20 Your Honors find that he is at MMI and is entitled to
21 wage loss benefits, that the award should only run from
22 the date of MMI until the date that is three hundred
23 and forty (340) weeks from the date of accident based
24 on the plain language of the Statute. Thank you.

25 Commissioner Wilkerson: Thank you all.

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1 Commissioner Beck: Thank you.

2 Commissioner Wilkerson: This concludes
3 the hearing. Thank you.

4 (THERE BEING NO FURTHER DISCUSSION, THE HEARING CONCLUDED

5 AT 2:42 P.M.)

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STATE OF SOUTH CAROLINA)
) CERTIFICATE
 COUNTY OF RICHLAND)

Be it known that I took the foregoing South Carolina Workers' Compensation Commission Full Board Hearing of Barry Adickes, vs. Philips Healthcare;

That I was then and there a Notary Public in and for the State of South Carolina-At-Large;

That by virtue thereof I was duly authorized to administer an oath;

That the witness was first duly sworn to testify the truth, the whole truth, and nothing but the truth, concerning the matter in controversy aforesaid;

The foregoing transcript of 24 typewritten pages represents a true, accurate and complete transcription of the testimony so given at the time and place aforesaid to the best of my skill and ability;

That I am not related to nor an employee of any of the parties hereto, nor a relative or employee of any attorney or counsel employed by the parties hereto, nor interested in the outcome of this action;

Witness my hand and seal this 18th Day of March, 2016.

Gloria G. Davis _____
 Gloria G. Davis
 Notary Public for South Carolina
 My Commission Expires 12/21/21

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BEFORE THE SOUTH CAROLINA
WORKERS' COMPENSATION COMMISSION

W.C.C. FILE NUMBER 1102937

BARRY SIMMONS ADICKES,

EMPLOYEE/CLAIMANT,

-VS-

PHILIPS HEALTHCARE AND
FIDELITY & GUARANTY COMPANY,

EMPLOYER/CARRIER,
DEFENDANTS.

DE BENE ESSE DEPOSITION OF HOWARD MANDELL, M.D.

INDIAN LAND, SOUTH CAROLINA

DECEMBER 9, 2014

COPY

REPORTED BY: CATHY L. YOUNG, CVR-M

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APPEARANCES:

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1 Pursuant to notice and/or agreement of the parties, the
2 de bene esse deposition of Howard Mandell, M.D., was
3 taken commencing at the hour of 4:16 p.m. on December 9,
4 2014, at the offices Metrolina Neurological Associates,
5 7666 Charlotte Highway, Suite 220, Indian Land, South
6 Carolina, in accordance with the South Carolina Rules of
7 Civil Procedure.

8 It was stipulated by Counsel for the Plaintiff and
9 Defendants that this deposition is taken for any purpose
10 allowed under the South Carolina Rules of Civil
11 Procedure;

12 That the signing of the transcript of deposition by
13 the witness is waived.

14 * * * * *

15 Howard Mandell, M.D., first being duly sworn, deposes and
16 says as follows:

17 EXAMINATION BY MR. SMITH:

18 Q. Dr. Mandell, my name is Bill Smith; and I'm here
19 today representing Barry Adickes in this workman's
20 compensation claim. I believe that you have treated
21 Mr. Adickes as a result of an injury. I'm going to
22 ask you several questions about that. If I ask you
23 anything you don't understand, please tell me, and
24 I'll try to rephrase my question, fair enough?

25 A. Fair enough.

1 Q. State your full name for me, please, sir.

2 A. Howard Mandell.

3 Q. What is your occupation?

4 A. Neurologist.

5 Q. Could you give me the benefit of your professional
6 education?

7 A. Sure. 1977 to '81 I went into medicine. I guess I
8 should go before that, I started off with a major in
9 psychology from '77 to '81. And then from '72 to
10 '77 I did a psychology major. From '77 to '81 I was
11 an M.D. at the University of Manitoba, Winnipeg,
12 Manitoba, Canada. '81 to '82 I did a internal
13 medicine and surgery internship. '82 and '84 I did
14 internal medicine residency. '84 to '87 I did a
15 neurology residency at the University of Minnesota.

16 '87 to '88 I did research in neuromuscular diseases
17 at Tufts New England Medical Center in Boston.

18 Q. Since 1987, where have you practiced?

19 A. '88 to '92 I practiced in Canada, Brandon, Manitoba,
20 Canada. And then '92 to current I practice at
21 Metrolina Neurological in Rock Hill and Pineville.

22 Q. What is your specialty?

23 A. Neurologist.

24 Q. Now, are you board certified?

25 A. Yes.

1 Q. You have privileges at the area hospitals?

2 A. Yes.

3 MR. SMITH:

4 I'd like to offer Dr. Mandell as an expert in
5 neurology.

6 MR. OXFORD:

7 No objection.

8 EXAMINATION CONTINUES BY MR. SMITH:

9 Q. Dr. Mandell, in the course of your practice, have
10 you had occasion to see and treat Mr. Barry Adickes?

11 A. Yes.

12 Q. The first note that I have, it appears that you saw
13 him for the first time on April 6th, 2011; is that
14 correct?

15 A. That's correct.

16 Q. Did you know Mr. Adickes prior to that time?

17 A. No.

18 Q. When Mr. Adickes came to see you, and I'm not going
19 to make you go through your reports line by line,
20 we're going to submit your reports as evidence in
21 this case, what was the history that he gave you?

22 A. Well, basically, he was a very good historian, and
23 he told me that he was in good health, worked out
24 regularly, and was -- really had no significant
25 medical illnesses until he was involved in an

1 accident on 3/22/11; when he was driving down a
2 winding mountain road, and there was a curve that he
3 didn't adjust for, it had came on quite quickly; and
4 he went off the side of the road, and into a ravine,
5 and the car flipped upside down. He estimates he
6 went about 100 feet down into the ravine. And he
7 thinks about 30 minutes later he sort of came to,
8 wasn't clear, it's hard to know for sure; and
9 realized that -- what had happened. The main focus
10 of his attention was to his shoulder at the
11 beginning because it was very severe. And I -- I
12 imagine it was dislocated, but he said he got it
13 back in place, and then the pain settled down. And
14 he sort of checked himself over, realized there was
15 no broken bones anywhere. And then sort of was in
16 and out for a while. He, eventually, had the
17 presence of mind to use his cell phone, and plug it
18 into his car charger, and call 911; and they got him
19 out of the car and was taken to a local hospital.

20 Q. I noted in your history that you indicated he had a
21 lot of headache, nausea, vomiting, and blurred
22 vision.

23 A. Yes.

24 Q. What's the significance of any of that?

25 A. Well, he was never a headache prone person, always

1 quite well. And I believe that that was related to
2 a concussion that he had during the car accident.

3 Q. Okay. It looks like he continued to have headaches,
4 even when he saw you for the first time; is that
5 correct?

6 A. Yes.

7 Q. He had light sensitivity and noise sensitivity?

8 A. Yes.

9 Q. Are those things consistent with concussion as well?

10 A. They're consistent with headache after a concussion.

11 A vascular headache.

12 Q. All right, and it looks like you had a conversation
13 with he and his wife about memory difficulties.

14 A. Yes.

15 Q. Okay. I assume you performed a neurological
16 examination, and what did you find, if anything?

17 A. I found his examination was normal, but I was really
18 impressed, that it was like a miracle that he didn't
19 get hurt more, based upon the circumstances that
20 happened. And that I felt he had the post-
21 concussion syndrome, manifested as headache,
22 impaired concentration, difficulty with focus,
23 difficulty with balance. And I felt that he had a
24 good prognosis, but, of course, no one can predict
25 the future; but I felt based upon previous patients

1 I'd seen in this situation that he should do well
2 with supportive care. We talked about the
3 physiology and path of physiology of a concussion,
4 and we talked about how to avoid complications, and
5 he understood it well. And we came up with a
6 conservative plan to help him through it, with some
7 medications to help with sleep, and some medications
8 to help with muscle spasms and headaches.

9 Q. I noticed in your report you mentioned that you
10 discussed with him second impact syndrome;

11 A. Yes.

12 Q. What is that?

13 A. Second impact syndrome is when a injury occurs to
14 the brain on the heels of a first injury. This is a
15 very vulnerable period of time where the second
16 impact gets magnified by a multitude of degrees,
17 because the brain is so vulnerable from the first
18 impact that you can get a major injury even if the
19 impact is not that significant. That would be both
20 physical and also mental taxing the brain. So he
21 needs sort of a total rest of the brain from
22 reading, writing, and physical activity, and just
23 getting a lot of sleep, good nutrition, good
24 hydration. You don't have to stay in bed and do
25 nothing, but you don't want to do something that's

1 taxing him.

2 Q. Okay.

3 A. Otherwise you will cause more brain injury and
4 reduce the ability to have a full recovery.

5 Q. Well, it looks like you took him out of work for a
6 period of time. Was that the reason for doing that?

7 A. That was the reason.

8 Q. Okay. All right, and it looks like you asked him to
9 come back again in a couple of months if his
10 symptoms persisted.

11 A. Yes.

12 Q. Did he come back?

13 A. Yes, he did.

14 Q. Again, I'm not going to make you go through every
15 report, but it looks like you saw him the next time
16 June 17th, 2011?

17 A. Yes.

18 Q. Was he continuing to have problems at that time?

19 A. He was. He was doing better, but it was slow. He
20 had several, what he called, debilitating headaches,
21 which I believe were vascular headaches, like a
22 migraine. And his wife was with him. You know,
23 over the course of time, the degree of symptoms
24 would depend upon whether he was by himself or with
25 his wife. He was the type of guy who didn't want to

1 complain very much, was hoping he was just going to
2 get over it. Wanted to sort of put it behind him
3 and not discuss it so much; but his wife was a good
4 observer. So sometimes you'll see over the records
5 here, I'll say, "His wife states," because she was a
6 very good observer, and she would keep a log. And
7 she would say things, and he would say, "Oh, oh,
8 yeah, I guess you're right. Oh, yeah, that did
9 happen, oh, yeah, that didn't happen." So he was
10 saying that he was doing okay except for some
11 debilitating headaches; but his wife added that he
12 was in bed for two days, that he had this intense
13 left parietal and vertex headache. Had to have an
14 icepack. She'd give a lot more details of what had
15 really happened. He couldn't even attend a wedding
16 on May the 14th, 2011. That all the noise was so
17 much that it triggered a severe headache, and he had
18 to -- to leave, he couldn't stay at the wedding as
19 long. He had a headache more days than not having a
20 headache, but not debilitating ones, but very
21 frequent headaches.

22 Q. I noticed in the second paragraph, that June 17th
23 note, you talk about a job change that he had had.
24 Can you tell me what he related to you?

25 A. Well, there was a new boss, and he felt that that

1 job change was difficult because he felt that his
2 boss was not as sensitive to trying to explain
3 things; but would rather just wanted him to do
4 things and would say what he should do without sort
5 of giving him any of the help that might be needed
6 to make him successful, or anybody else for that
7 matter. It's more of a struggle than it would have
8 been. It was bad timing for it to happen, but he
9 still was able to adjust. But it's when his boss's
10 personality seemed to go against him, and over the
11 course of time they seemed to iron it out to a
12 certain extent; but it was a change that affected
13 him.

14 Q. When you say it was more of a struggle than it would
15 have been, you mean that it would have been had he
16 not had this injury?

17 A. No, that, you know, with the boss, having a new
18 boss. It was more of a struggle than if he would
19 have had his old boss. His old boss was more
20 compassionate, was able to give instructions better,
21 would do things to help to make sure that he would
22 be supported and make him more successful. With the
23 new boss, then it was much harder to do that. Of
24 course, having the difficulty with headaches, the
25 difficulty with memory, the difficulty with

1 concentration, of course, it made him a lot harder
2 to handle that change. That was not good timing to
3 have the change just after you got a concussion.

4 Q. Okay. All right, what was your impression and plan
5 as of June 17th, 2011?

6 A. I felt he was struggling better than he was at his
7 worst, but he still had significant headaches, and
8 he was never a headache prone person. He also was
9 having word finding difficulties and difficulty with
10 verbal fluency, which his wife really pointed out.
11 Mild, but definitely present, he just couldn't bring
12 those words back up into his thought process as
13 quickly as he would have before. That made me want
14 to get an MRI scan, to be sure we weren't missing
15 anything. And I felt that he was developing
16 migraines, and I started him on a medication to help
17 reduce his post-concussion headaches and that is
18 called Zonisamide.

19 Q. To what did you attribute the word finding
20 difficulties and verbal fluency difficulties?

21 A. To the concussion, the head injury that he had.

22 Q. Okay. You recommended an MRI scan?

23 A. Yes.

24 Q. Now, it looks like he came back to see you on July
25 29 -- I'm sorry, it looks like an MRI was done on

1 July 14th; is that correct?

2 A. Yes.

3 Q. If you don't have that, I can show it to you.

4 A. Sure. I don't have it at my fingertips. Oh, yes, I
5 do. I remember seeing it, here -- it's right here.

6 Q. Okay. It looks like that MRI was done, according to
7 the notes on here, the workers' comp carrier
8 scheduled it at South Carolina Diagnostic Imaging.

9 A. (Reviews document.) Yes.

10 Q. You made some comments about that. What was your
11 issue, if any, with the MRI being done there?

12 A. Well, not all MRI scans are created equal, so you
13 have to have the proper magnet strength. I mean we
14 measure magnets in teslas. And the magnet that I
15 would like it to be was a 1.5 tesla. The one at the
16 Carowinds was a .3 tesla, so it's one-fifth the
17 strength. And it didn't have any of the software
18 that we do for all the bells and whistles to really
19 take a good look at the brain. So it was an older,
20 out-of-date MRI scan. The good thing about it
21 though is that it's an open one. So he was able to
22 tolerate it because he was quite claustrophobic, and
23 I think that's the why -- I think that's one --
24 that's one of the reasons why he chose that, I
25 believe. But I didn't like the MRI scan, but on the

1 other hand, I thought it was enough to rule out most
2 things. But it doesn't have a lot of the sequences
3 that we would do to really take a look to see about
4 blood and scar tissue; but I felt it was enough he
5 just had it, I didn't want to -- I was trying to be
6 cost effective for his healthcare dollars too.

7 Q. Okay. I don't believe any other MRI has been done
8 since that time. Do you need any other MRI?

9 A. I don't believe so. I don't think so.

10 Q. All right, so you saw him on July 29. He was still
11 having problems with headache?

12 A. Yes.

13 Q. Okay.

14 A. He was doing better, but still having problems. We
15 felt that the Zonisamide was helpful. His headache
16 frequency dropped down, but they were still
17 frequent, ten a month, but that had been better.
18 Everything, of course, is on a relative scale. And
19 only three of them required Maxalt, which is really
20 for a vascular headache, more of a migraine. The
21 other ones he would take either nothing, or he would
22 take some Naproxen, which is an anti-inflammatory.
23 And the Maxalt, when he took it, it did knock it
24 out, so that was good. And he went a few weeks
25 without having a debilitating headache, though he

1 was having fairly frequent headaches, and he'd never
2 been a headache prone person; but I took that as
3 improvement.

4 Q. Okay.

5 A. Then he also had hit his head. He was picking
6 blueberries, and somehow there was a rod, and he
7 lifted, and hit his head up, and hit his left
8 parietal region just where he banged his head
9 before, and he saw stars. Had a knot and a bruise
10 for about ten days, but it didn't seem to worsen
11 anything, which was fortunate. And it didn't seem
12 to make any change in his headache frequency, or
13 even cause a worsening exacerbation of -- even for a
14 temporary period, so that was good, but it's
15 certainly nothing he needed.

16 Q. Okay. It looks like you saw him the next time
17 November 1, 2011.

18 A. One other thing I'd mention, his wife had mentioned
19 mood swings.

20 Q. Oh.

21 A. That's something she mentioned. He never mentioned
22 it. And she felt the mood swings were better, too.
23 At times, she felt that he -- and he never was a
24 moody guy, apparently. I never knew him before, but
25 this is what his wife said, and that he was getting

1 more moody, and a little more frustrated, and a
2 little more easily frustrated. Nothing extreme, but
3 a change.

4 Q. Is that consistent with the brain injury and post
5 concussion syndrome?

6 A. I think it is, and the -- the frustration of still
7 not doing as well as he wanted to do.

8 Q. November 1, 2011, is, I believe, the next time you
9 saw him?

10 A. (Reviews document.) Yes.

11 Q. How was he doing at that time?

12 A. I thought he was progressing well. Headaches were
13 much better in October, though in September he had
14 seven. For most of them, he just took the Naprosyn,
15 which is a mild medication, anti-inflammatory, and
16 you can get that over the counter. For a few he
17 took the Maxalt, which is for more significant
18 headaches. And that always helped to knock out the
19 headaches, so that was good. We were looking for
20 some triggers that might bring out headache, you
21 know, I was just sort of going over the basic
22 headache hygiene, non-medication ways to try to
23 reduce headache frequency with him, just sleep and
24 barometric pressure, and keeping up with fluids, and
25 not going long periods without eating, and stuff

1 like that. He still had minor -- some minor
2 difficulties with multi-tasking. A little
3 difficulty with concentration and focus. But both
4 he and his wife said that it was not very much and
5 seemed to be getting better.

6 Q. Okay. I note at varying times during your treatment
7 of him you changed medications as his symptoms waxed
8 and waned; is --

9 A. Exactly.

10 Q. -- that correct?

11 A. Yes, exactly.

12 Q. All right. The next report I have is May 8th, 2012.

13 A. (Reviews document.) Yes.

14 Q. He's continuing to have some intermittent migraines?

15 A. Yes. They were all due to frequent headaches, in
16 general. I'm separating migraine from just regular
17 a headache. So he had frequent minor headaches and
18 a few intermittent major headaches.

19 Q. You basically commented in your impression that he
20 was continuing to have leftover migraines triggered
21 by the head injury, and commented that it's not
22 uncommon for a concussion to trigger these post-
23 traumatic headaches?

24 A. Yes. And I felt he had a genetic disposition
25 likely, a speculation because he had a family

1 history. It's in the family, so I felt that that
2 might have made him more likely to have more
3 continued headaches after a head trauma than
4 somebody else, but that's speculation.

5 Q. Okay. All right, it looks like you saw him the next
6 time September 10, 2012?

7 A. (Reviews document.) Yes.

8 Q. How was he doing then?

9 A. The headaches come in clusters, meaning, you know,
10 there are periods of time where they're very
11 frequent, other periods of time where he can go, you
12 know, a week or two without. The headaches would
13 last anywhere from two to seven days, which is a
14 long time. You know, that flying seem to trigger
15 them. And Maxalt was helpful for certain ones, but
16 he would have headaches that would linger. And at
17 this point, it really became more persistent about
18 cognitive stuff. His wife, again, you know, this
19 time he's with his wife. She would come with him to
20 many of them, but not all of them. And she would
21 point out that he was not as cognitively sharp.
22 This is not something he initially recognized; but
23 as she kept pointing it out, and showing examples,
24 and discussing it, it became clearer and clearer
25 that, in fact, he wasn't as sharp as he was before.

1 It's something he didn't want to admit. Not
2 because he was in denial, but he just wanted this to
3 be behind him, he's that type of guy. He's the type
4 of guy that just wanted it behind him, and go
5 forward, and forget about what happened before.
6 That's what his attitude the whole time until this
7 took a toll on him. And she would point out things
8 that he was more forgetful about, and misplace
9 things, things he didn't do before. And she'd give
10 me a lot of examples. She kept a diary of many
11 instances that he'd forget. Going to a football
12 game, forgetting the tickets. Go back to his house
13 to get his sunglasses. And -- and she gave a long
14 list of -- of many things that he was more
15 forgetful, that he had never been before. Now, some
16 of these, anybody could do, but these were very
17 frequent, that happened all the time. And his
18 children were pointing it out to him as well. And,
19 "Dad, I told you this. Do you remember that?" That
20 type of stuff. Little things, but nonetheless, the
21 change. And that would -- and they were
22 frustrating, and that would kind of anger him to a
23 sense that he wanted to get better. And then there
24 was ongoing shoulder problems. And he was having
25 difficulty with the workman's comp covering it. And

1 they wanted him to go to certain doctors. He wanted
2 to go to other doctors. And then they wanted to do
3 -- one doctor wanted to do certain tests, workman's
4 comp denied the test. And it was ongoing things
5 like that that were aggravating him as well. And
6 then he was having stress at work. Had to fly a lot
7 with his work, and flying a lot also aggravated his
8 headaches, and it affected his sleep. And so, you
9 know, there were other things going on as well.

10 Q. Let me stop you for just a second. You know, you're
11 aware that he had shoulder difficulties as well as
12 neck problems --

13 A. Yes.

14 Q. -- with this accident? Did you treat him at all for
15 any of those issues?

16 A. No.

17 Q. Okay. He was treated by an orthopedic for the
18 shoulder.

19 A. Yes.

20 Q. By pain management for the neck?

21 A. Yes.

22 Q. All right, sir. I noticed that you mentioned in the
23 September 10 note about keeping a diary; is that
24 something that his wife did for you --

25 A. Yes.

1 Q. -- about his headaches?

2 A. Yes.

3 Q. Okay.

4 A. Because we wanted to try to pin down just the
5 frequency, and all the details about it, so I could
6 try to help him better; and kept a good diary, as I
7 had requested.

8 Q. All right.

9 A. His wife is very good at that;

10 Q. It looks like your next on January 21, 2013?

11 A. (Reviews document.) Yes. There was also, you know,
12 it was, you know, I had him on medications, and
13 there was a question as where my medications causing
14 some of this -- kind of problems he was having?
15 And, you know, all medications are a double-edged
16 sword, there's the good part and the bad part as we
17 all know; but even a good medication can sometimes
18 sneak up on you and give a side effect. So I was
19 worried maybe some of the medications I was giving
20 him was causing him the cognitive issues, because I
21 was perplexed as to why he was having such a long
22 period of time here. I thought he was going to do
23 better than he did. Even though he did well on a
24 relative scale, there were these stubborn issues
25 that were still there. So I said, well, maybe it

1 could be the medication. And Zonisamide, which is a
2 medication that is an anti-seizure medication, and
3 is also used for a migraine, can have cognitive
4 effects. And we talked about that. We, initially,
5 chose, well, let's go up a little further on it to
6 get rid of the headaches, and maybe the headaches --
7 hard to know which was the chicken and which was the
8 egg. We talked about other medications that I could
9 use if going up on the Zonisamide didn't help. We
10 talked about, you know, beta blockers, another
11 appropriate medication to use in this situation. We
12 talked about other anti-inflammatories, and we
13 talked about not getting rebound headaches. I just
14 wanted to be sure some of the treatment plan didn't
15 also affect a side effect profile. And then he was
16 going to keep a good diary, and were going to see
17 what adjusting the Zonisamide upward was going to
18 do.

19 Q. In your neurological examination, what did you find?

20 A. On his neuro exam?

21 Q. Yes.

22 A. His neuro exam was normal, but the -- the issues of
23 headache, which of course you don't find on a neuro
24 exam, the issues of decreased concentration, which I
25 don't get on my neuro exam. And the many instances

1 of forgetfulness aren't seen at the bedside, but are
2 typical symptoms of post-concussion headache or a
3 post-concussion injury rather.

4 Q. Specifically looking at your January 21 note, you
5 indicated he does seem a little slow to respond.

6 A. (Reviews document.) Yeah.

7 Q. Does have some mild short-term memory loss. Speech
8 also has some difficulty with verbal retrieval. Is
9 that things you were, for lack of a better word,
10 testing him on?

11 A. Yes. And during conversation, and during the mental
12 status exam, and he would turn to his wife, and she
13 would add because he couldn't get it as quickly, and
14 he had to be reminded about things. So a lot of
15 times that's the verbal fluency and the short-term
16 memory that I was talking about, it would come up in
17 conversation, and he would try to get the word and
18 couldn't get it as quickly. He'd have to bring --
19 say what the word was. And he was more slower than
20 I thought should be. For a guy whose level of
21 education and his level of job skill, he was not as
22 sharp. He'd get it, but it took a little slower, a
23 little more time to organize his thoughts, a little
24 more time to get the right word. But his strength,
25 coordination, and all that stuff was normal.

1 Q. All right. You mentioned that on that visit was
2 doing better regarding his headaches, but it's come
3 with a price, and that's more forgetfulness?

4 A. Yes.

5 Q. Is that --

6 A. That's because I increased -- sorry, I didn't mean
7 to interrupt you, pardon me.

8 Q. No, that's fine.

9 A. I guess because I increased the medication on the
10 last time, I was -- as we increased the medication
11 to Zonisamide to 200, that seemed to help the
12 headaches; but I thought at the time that maybe it
13 came with a price of reducing his ability for verbal
14 fluency and concentration of that. Because that's a
15 not uncommon side effect of Zonisamide.

16 Q. Okay. All right, now, getting closer to where we
17 are now, you saw him on April 9th, 2013. Your first
18 sentence says you saw him in follow-up for his
19 traumatic brain injury and post-concussion syndrome.

20 A. (Reviews document.) Yes.

21 Q. Was that your diagnosis at that time?

22 A. Yes.

23 Q. Is that still your diagnosis today?

24 A. Yes.

25 Q. Is that based upon a reasonable degree of medical

1 certainty?

2 A. Yes.

3 Q. What was going on with him on April 9th, 2013?

4 A. Again, I thought he had a good improvement with
5 headaches, again, everything on a relative scale;
6 but we still had intermittent headaches. In fact,
7 he had a three-day headache, according to his wife,
8 and I mentioned, again, she's a good observer. He
9 did reduce and stop the Zonisamide, which I asked
10 him to, because I was worried that that might be
11 causing cognitive difficulties. And we put him on
12 Nadolol, which is a different medication that'd have
13 less of a side effect from a cognitive. And he
14 tolerated it well, and it helped with his headaches,
15 and it helped with blood pressure, but,
16 unfortunately, his cognitive effects did not go away
17 with Zonisamide, and they were therefore in
18 retrospect not related to the Zonisamide. They were
19 related to the traumatic brain injury.

20 Q. Okay. You saw him the next time October 8th, 2013?

21 A. (Reviews document.) Yes.

22 Q. It looks like you're seeing him every six months or
23 so; is that correct?

24 A. I see him sort of as, you know, depending on, you
25 know, -- I reduced it to six months, at that point,

1 yes.

2 Q. Okay.

3 A. Sometimes three, four, six, but let me see.

4 Q. Well --

5 A. Depending on how he does.

6 Q. As soon as I said that, it looks like the next time
7 you saw him was February 5, so it wasn't six months.

8 A. Yeah, it was flexible, depending on how he was
9 doing.

10 Q. All right, and how was he doing in October of 2013?

11 A. Again, I thought things were improving, but
12 continued to have some headaches and some would last
13 three days. The treatment plan would knock the
14 headache out for the most part. He did find out
15 about his neck, which I think, you know, was a
16 contributor to pain, and headache, and mood, and
17 everything. And he got the nerve blocks, which was
18 very helpful, and that helped his pain as well. He
19 finally got that. And so things were looking better
20 from that point of view. And I thought he was doing
21 better, but still continued to have, and struggled
22 with headaches, and concentration, and focus, and
23 short-term memory. We made some changes in
24 medications because it would seem that, even though
25 the Maxalt would knock out the headache, it

1 sometimes would come back the next day; and I
2 suggested that he might take Frova, which is a
3 longer acting anti-migraine medication, so it has a
4 longer half life, so it might prevent reoccurrence
5 of headache the next day.

6 Q. Okay. Then you saw him next on February 5, 2014.

7 A. (Reviews document.) Yes, yeah.

8 Q. How was he then?

9 A. The headaches were getting under control. Still
10 persistent headaches, but relatively less frequent,
11 and under control when they came on. And the radio
12 frequency ablation was very helpful on the neck, and
13 that also helped with headaches, and helped with
14 pain, and helped with sleep. Still had some minor
15 issues with memory. And he would also say, "Well,
16 you know, I'm getting older, I'm 52." He -- he
17 tried to minimize, and his wife tried to explain it
18 in more detail. And so the combination between the
19 two of them was how the history is obtained. But he
20 would go into a room and wonder why he went into the
21 room. He'd have to backtrack his steps in order to
22 figure it out. He had to keep lists which he never
23 had to do before. Mild short-term memory
24 difficulties. But then he said he wasn't sure it
25 was any different than his friends. And they were

1 trying to be very honest as to relating to what was
2 going on. Neither of them would embellish or
3 exaggerate, and they tried to keep it as honest as
4 they could. On the other hand, they didn't want to
5 not tell me things because they felt it was
6 important, so --

7 Q. Okay.

8 A. Then the company was downsizing, and he was laid
9 off. He didn't really believe that was the cause,
10 but that's speculation on his part; but that was
11 also something. He'd been there, I think, 22 years,
12 or something like that, 21 years, and got laid off;
13 and that was a real slap in the face. But he, you
14 know, felt that, you know, he'd be okay, and he had
15 many options. And it wasn't like he was depressed
16 or anything over it, but it was, you know, hurt.

17 Q. Okay. You saw him, I believe what is the last time
18 so far, or the most recent time was August 29, 2014?

19 A. (Reviews document.) Yes.

20 Q. How was he then?

21 A. In general, doing well, much better than his worst,
22 but still continued with the same difficulties we
23 have talked about; intermittent headaches,
24 difficulty with concentration and focus. Headache
25 maybe now every six weeks. But then, again,

1 reviewing the record, it was every two weeks. You
2 know, he tried to minimize, but when he really
3 looked objectively, it was more often. He told me
4 how he got rid of the headaches, and some of them, I
5 think, were two or three days. And he was -- he was
6 more forgetful, more difficulty putting his words
7 together. Often delays when you need to give an
8 answer, not as sharp as he used to be. Less able to
9 formulate thoughts, less quickly to figure out a
10 complex task, though he still could do it. There
11 really isn't a drop-off in ability, it was just a
12 drop-off in the amount of time it took to do it.

13 Q. Okay. I see on that note, the medications that you
14 had him on, according to that, were Nadolol,
15 Imitrex, and Frova?

16 A. Yes.

17 Q. It also appears, when you get down to the
18 impression, that you added Adderall as well?

19 A. That was for concentration and focus. Because that
20 -- as time went on, it seemed to become a clearcut
21 persistent problem that wasn't going away.

22 Q. Okay.

23 A. So I felt we should target it, because I thought
24 that had a lot to do with his memory, had a lot to
25 do with his decreased ability to organize his

1 thoughts and decreased ability to get things
2 together quickly. I thought it was the reason why
3 he was slower, at least I hoped it was.

4 Q. It also appears that you increased the Nadolol from
5 40 milligrams to 60 milligrams?

6 A. Yes. Again, that is targeting the headaches.

7 Q. Are those his current medications?

8 A. As far as I know, yes.

9 Q. Describe for me how he is supposed to take those
10 medications.

11 A. The Nadolol he takes every day, that's preventative.
12 That helps reduce the frequency, and intensity of
13 headaches. We know it's not going to be perfect, so
14 there has to be a plan B when he gets the headache.
15 We call that aborta. So there's prophylaxis with
16 the Nadolol, and then there's aborta with either
17 Imitrex or Maxalt, or Frova, or Naprosyn, depending
18 upon what the headache was like.

19 Q. Okay. Depending on how strong the headache is
20 determines what he does; --

21 A. Yes.

22 Q. -- is that correct? I think one of those
23 medications you indicate that he injects?

24 A. Yes.

25 Q. Which medication is that?

1 A. Imitrex.

2 Q. Imitrex. When he --

3 A. A formulation that you can use very rapidly, so it's
4 for a certain type of headache -- people with
5 headaches get to know their headaches very well, and
6 the neurologist and them go over diaries, and then
7 you come up with a plan. So depending upon what
8 type of headache it is, a chronic headache sufferer
9 knows which medication is going to be most
10 effective. So certain ones you have to inject,
11 because the gastric motility is such that if a
12 headache has already developed, oral medication is
13 not going to work. So you use an injectable, so you
14 can get by the slow gastric mobility, and get the
15 medicine into you, and knock the headache out.
16 Pills won't work for certain headaches.

17 Q. Let me show you this. This is something that's been
18 submitted as evidence. This is a questionnaire that
19 I had sent you back in February of 2014 where you
20 indicated he was going to continue to need the
21 medications for the rest of his life; is that --

22 A. (Reviews document.) It certainly seems that way. I
23 can't predict the future any better than anybody
24 else can, but it's been going on for three plus
25 years. And the -- the symptoms that seem to be

1 stubborn and persistent are the headaches, and the
2 concentration, and the focus, and the short-term
3 memory, and the verbal fluency.

4 Q. Okay. It may be that you change medications to
5 something that if something stops working, you
6 change it to something else; but you anticipate that
7 he'll continue to need to see you and take
8 medications?

9 A. Yes, I anticipate that.

10 Q. Is it your opinion within a reasonable degree of
11 medical certainty that the need for these
12 medications is because of his on-the-job injury?

13 A. Yes.

14 Q. You talked earlier about Mr. Adickes being a, and I
15 don't remember exactly how you phrased it, but a
16 highly functioning individual prior to the injury?

17 A. Yes.

18 Q. Is that correct?

19 A. Yes.

20 Q. When a highly functioning individual suffers a brain
21 injury, are there different consequences for that
22 than there are for someone who is maybe not as
23 intelligent?

24 A. Well, they are, because, based upon the job he has
25 to do. He's got a much more sophisticated job that

1 requires a much more amount of executive
2 functioning, and higher cortical functioning than
3 somebody who is just -- not an offense to anybody,
4 but let's say bricklaying, or something like that.
5 That verbal fluency, concentration, and focus
6 probably wouldn't affect a bricklayer very much,
7 because they don't have to use those skills. But if
8 you have to have a higher level of functioning, than
9 those skills are very, very important for doing
10 something at the level of -- where you have to sort
11 of put things together, plan, come up with an idea,
12 and have a deadline to meet.

13 Q. I had a neuropsychological evaluation done on Mr.
14 Adickes, and I've think I sent --

15 A. Yeah.

16 Q. -- that to you. Have you had an opportunity to
17 review that?

18 A. I have.

19 MR. SMITH:

20 well, before I question him, I'll just make it an
21 exhibit to the deposition.

22 MR. OXFORD:

23 Sure.

24 MR. SMITH:

25 You've got a copy of it, right?

1 MR. OXFORD:

2 I do.

3 (Court Reporter marks Plaintiff's Exhibit Number 1,
4 Neuropsychological Evaluation, attached hereto.)

5 EXAMINATION CONTINUES BY MR. SMITH:

6 Q. Again, I'm not going to make you go through this
7 line-by-line, but is this neuropsychological
8 evaluation, is it consistent with what you have
9 seen?

10 A. It basically says exactly what I've been saying word
11 for word, practically, yes.

12 Q. Let me get you to refer specifically to a couple of
13 things in here. On page five of the
14 neuropsychological evaluation. --

15 A. (Reviews document.) Yes.

16 Q. -- are these -- let me back up, are
17 neuropsychological evaluations something that you
18 use in your practice and rely on?

19 A. Yes.

20 Q. Are you familiar with the test performed?

21 A. Yes.

22 Q. Looking at this, it talked about the Stroop divided
23 attention test --

24 A. Yes.

25 Q. -- and how Mr. Adickes did on that as well as the

1 Conner's Continuous Performance Test.

2 A. Yes.

3 Q. Can you comment on those a little bit, and tell me
4 kind of what was done, and what they show you?

5 A. Sure. I think the best thing would be though would
6 be to go to -- to the -- to the page eight, because
7 that's the summary. That -- see, all of that is
8 data.

9 Q. Okay.

10 A. And that is testing, and that is details that really
11 don't matter to us in the sense that what do they
12 mean. Then you see the summary, this is what they
13 mean. What those mean is that he did very well on
14 most things. In fact, was in the superior range on
15 many things. However, what he did have difficulties
16 with were concentration, executive function,
17 capacity to sustain attention and concentration,
18 difficulty with attentional executive aspects of
19 immediate learning, or thought to be the complaints
20 for forgetfulness on daily pursuits, mild executive
21 dysfunction, shorter fuse, easier frustration. It's
22 the summary and case discussion. That's what tells
23 you what those testing mean. So, basically, it says
24 exactly what I'm saying, executive functioning is
25 kind of like the CEO of the brain. What it does is,

1 starts off with an idea, and then it gets a plan,
2 and then it takes it all the way down to the
3 deadline. So you need to have planning skills. You
4 need to have memory skills. You need to have
5 organization skills. You need to have time
6 management. You need to have mental flexibility.
7 That's executive functioning. It's the higher
8 aspects -- that wouldn't be needed as a bricklayer,
9 for example, but is needed at his job. And that's
10 why there were deficits there, because at his level
11 of functioning, at your level of functioning, and my
12 level of functioning, these would impact us. So the
13 executive functioning, so that -- that's what
14 they're saying here. He did very well on everything
15 else, which is what my examination would say as
16 well. But those areas of concentration, focus and
17 short-term memory, executive function, are the
18 things that he showed his weakness in.

19 Q. Are the problems that you have just outlined from
20 this report caused by his traumatic brain injury and
21 post-concussion syndrome from his on-the-job injury?

22 A. Yes.

23 Q. Do those problems limit his performance and
24 employment opportunities?

25 A. I think they could depending upon which type of

1 employment; but, yes, at a high level of employment,
2 with high skills, it would limit. He'd have to have
3 the type of job where he'd have more time. He's
4 still able to do it, but he needs more time. He
5 needs the ability to perhaps somebody else helping
6 him with some of the concentration and focus things,
7 rather than him doing it by himself. Have some
8 support staff to help him out with some of the
9 things that he might be more forgetful with. Still
10 able to function at a high level, but it would
11 definitely interfere with a performance and
12 something had to be done quickly or spontaneously,
13 and new idea formation.

14 Q. Okay. Would it affect his ability to multi-task?

15 A. Yes.

16 Q. Do his headaches cause him to miss days from work?

17 A. Yes, yes, they can.

18 Q. You mentioned the problems that he encounters with
19 flying. Tell me about that.

20 A. He felt that flying really triggered his headaches.

21 It's, obviously, not due to the barometric
22 pressure, because everything's pressurized in a
23 cabin; but I guess it has to do with the ability of,
24 you know, with going on the plane itself, it's not a
25 very comfortable, and probably interferes with

1 sleep, and is probably a little stressful. And he
2 found that that was one of the things that triggered
3 his headaches; and, unfortunately, his job required
4 him to fly a lot.

5 Q. If you have a person of high intellect, does that
6 sometimes mask some of the problems that show up on
7 your psych testing?

8 A. You can compensate, absolutely. So if you have a
9 particularly high IQ, you might be able to
10 compensate for a lack of speed, or you may be able
11 to compensate for, you know, for difficulty with
12 organizational skills; because you're able to go
13 down the decision tree faster, and in a more
14 efficient way than somebody who would be less of an
15 IQ and have to go down the general systematic
16 approach. So you could bypass that with the IQ,
17 even though you're a lot slower than you would be
18 otherwise.

19 Q. Knowing that Mr. Adickes was a pretty smart fella --

20 A. Uh-huh.

21 Q. -- prior to this injury, would you say that the
22 neuropsychological testing results here would show
23 the minimum of his problems as opposed to the
24 maximum of his problems?

25 A. No, I think it's pretty accurate. I think it's

1 pretty accurate, because it really says exactly what
2 I felt as well. And I think it really sifted out
3 the areas that he's strong in. And it shows that he
4 was very compliant, and really tried well too
5 because in certain areas he scored very high. And
6 if he was faking it -- not that anybody's accusing
7 him, but I'm just telling you about validity, he
8 wouldn't have done so well in so many aspects. He
9 did well on whatever he could, and there are many
10 things he did very well in. And he didn't do well
11 in things he couldn't. And the things he couldn't
12 were the things we just talked about. So I think
13 this accurately states it. I don't think his IQ
14 makes it that this is less accurate or that he would
15 have done poorer. I think this is the way he is,
16 and this is the leftovers that happened from the
17 traumatic brain injury.

18 Q. I may have already asked you this, but can his
19 headaches be a barrier to employment?

20 A. Yes, he will have to have a flexible employer;
21 somebody who would allow him to miss work or lay
22 down with a bad headache.

23 Q. Can his cognitive function be a barrier to
24 employment?

25 A. Definitely.

1 Q. Can his medication usage be a barrier to employment?

2 A. Yes. You have to have an employer who allowed you
3 to take medications on the job. And, you know,
4 obviously, if it was a bad headache, you'd have to
5 lay down with it, so that -- that would be -- you'd
6 have to have some flexibility.

7 Q. Was there any point during your treatment of Mr.
8 Adickes where you have felt like he has tried to
9 pull the wool over your eyes?

10 A. Exactly the opposite in my opinion. He is the type
11 of guy who had minimized and tried to rationalize
12 what is happening. Would say, "Oh, that's because
13 I'm forget -- I'm 52, not because I've got a head
14 injury, or that's because, you know, some of my
15 friends do the same," and different things like
16 that. He -- he was somebody who was almost
17 embarrassed to be coming to the doctor for this, and
18 wanted it to go behind him; and just wanted to get
19 on with life, and wanted to forget about this as
20 soon as he could. But symptoms persisted, and his
21 wife was somebody who was not an embellisher, but
22 she was a good historian. And she pointed out to
23 him things he didn't realize himself. And then he
24 started to realize, well, you know, this is maybe
25 more serious than I thought, and I do have some

1 deficits there.

2 Q. Well, I think you anticipated my next question. Has
3 there been any point in this where you felt like his
4 wife was trying to pull the wool over your eyes?

5 A. No. No, I did not. I looked for it, because I --
6 I wondered about that. Again, no reflection on her,
7 but just because, you know, it's something that
8 could easily happen, and has happened many times in
9 my office, and other people; but she did not
10 embellish, she just accurately stated to the best of
11 her ability, and didn't want to miss anything. So
12 she was a good observer, didn't let anything pass
13 by; but did not embellish, and did not exaggerate,
14 and did not, you know, try to make anything more
15 than what it was. But she wanted to be clear on
16 what it was, and she also wanted to be clear on what
17 it wasn't. And she was also very willing to say
18 what things he was doing good in. She didn't always
19 only say what the things he was doing bad.

20 Q. Correct me if I'm wrong, but you don't do impairment
21 ratings?

22 A. No.

23 Q. I think because of that, he was sent to Dr.
24 Welshofer for an impairment rating?

25 A. I -- I presume so.

1 Q. Have you ever seen that?

2 A. No.

3 Q. Okay. Do you know Dr. Welshofer?

4 A. I do.

5 Q. Okay.

6 A. Not personally, but we share many patients together.

7 Q. I know I'm asking you to do something you don't want
8 to do, and if you don't want to, you don't have to,
9 he rated him as having a 15 percent impairment to
10 the brain for continuous post-concussive
11 symptomatology and headaches; do you endorse that,
12 or do you --

13 A. I -- I'm not a rater, but I do endorse that. But
14 I'm not a rater, so --

15 Q. Okay.

16 A. -- I don't -- I don't rate.

17 Q. I understand. You do anticipate you're going to
18 have to continue to see Mr. Adickes?

19 A. Yes, it appears that way.

20 Q. One last little topic, at one point I think you
21 indicated that he got some relief from the nerve
22 root ablation in his cervical spine?

23 A. Yes.

24 Q. But did his headaches continue after that?

25 A. Yes.

1 Q. Did that lead you to the conclusion that the
2 headaches stem from the head injury as opposed to
3 related pain from the neck?

4 A. Yes, yes. But the related pain from the neck -- and
5 we can't artificially separate things, because they
6 all contribute. If you have a lot of pain in your
7 neck, you're going to get more headaches; but the
8 headaches definitely persist. But I would say
9 treatment with that helped the headaches too.

10 Q. All right, sir.

11 MR. SMITH:

12 Thank you, sir, I don't have any further
13 questions.

14 EXAMINATION BY MR. OXFORD:

15 Q. Just briefly, and I believe that we touched on
16 this, but his current medication is Frova, Imitrex,
17 and --

18 A. Correct.

19 Q. -- and Nadolol?

20 A. Yes. And Adderall, I believe too.

21 Q. And Adderall, yes, sir. Is he still taking Naprosyn
22 or Maxalt?

23 A. Yes. Yes, and now -- yes. See -- the Frova -- he
24 was going to choose depending on headache, so the
25 Frova would be one that would occur when the

1 headache went away with the first treatment but
2 came back the next day because it had a longer half
3 life. So he's trying to pick which headache is
4 occurring as to which medicine to use. If it's a
5 rapid onset headache, he would use the injectable.
6 If it came back again the next day, he'd use Frova.
7 If it didn't, he wouldn't use Frova. If it a slow
8 onset headache that he could take the Maxalt pill
9 form, he would take the Maxalt pill form. So
10 depending on what the type of headache, he would
11 choose which medication to use.

12 Q. But it wouldn't be common for a patient to take
13 Maxalt and Frova together? Those are mutually
14 exclusive of each other?

15 A. Yeah, within 24 hours.

16 Q. Okay.

17 A. You can take it after 24 hours, but not within 24
18 hours.

19 Q. I understand. Then back in the September 10th
20 report, that's kind of where you mentioned that you
21 began to see a lot more of his cognitive issues
22 during that visit. But you also mentioned he was
23 having a lot of stress at work.

24 A. Yes.

25 Q. Flying a lot, long hours. Would you contribute any

1 of that stress to his headache, or tension, or any
2 of the issues that he might be having?

3 A. Definitely at the time. At the time, they would
4 contribute to the headaches and would increase
5 frequency and intensity; but not cause the headaches
6 to persist. But at the time of flare, during that
7 September, yes, I would expect his headaches to be
8 worse during that period of time contributed by
9 those triggers.

10 Q. All right. I know that you also mentioned that
11 flying exacerbated his headaches, or at least caused
12 them to flare-up more often; but earlier you had
13 mentioned that you believe the reason that he took
14 the open MRI was because he was claustrophobic.

15 A. Yes.

16 Q. Did he ever mention anything about the airplane and
17 his claustrophobia; and if that was causing any sort
18 of --

19 A. He mentioned this to me.

20 MR. OXFORD:

21 I don't think I have any more questions.

22 REEXAMINATION BY MR. SMITH:

23 Q. Bear with me for just one second. I just wanted to
24 show you a note regarding that MRI. I don't recall
25 anything in the notes about claustrophobia, it may

1 be in the notes, or maybe you just remember that
2 from talking to him; but does it appear that the
3 reason that it was done at this facility was because
4 that's the only place the workers' comp carrier
5 would authorize it?

6 A. You know, I'm -- I'm not sure. I'm not sure of the
7 answer to that. I -- I think I have it in my notes
8 somewhere, or may -- I don't know if I have it in my
9 note, or if it was from conversation that I remember
10 that.

11 Q. Okay.

12 A. But -- I'm not sure, you'd have to ask -- they would
13 not.

14 Q. That's fine. That's fine. No problem.

15 A. But it's not a place I would use. And I would much
16 have preferred to have a -- a better MRI scan. At
17 this point, did not think it was academic, but it
18 could potentially show damage that -- that MRI scan
19 do because there are various sequences imaging that
20 you can look for scar tissue, and you can look for
21 old blood that will not show in that MRI scan. But
22 I think it was going to not show but --

23 MR. SMITH:

24 All right, thank you, sir.

25 WITNESS:

1 Thank you.

2 (There being no further questions, the deposition was
3 concluded at approximately 5:07 p.m.)
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CERTIFICATE

I, the undersigned, Cathy L. Young, CVR, Notary Public in and for the State of South Carolina, do hereby certify that the foregoing deposition was taken on the 9th day of December, 2014;

That the within deponent was sworn to tell the truth and that the foregoing is an accurate transcription of the testimony taken under oath;

I further certify that I am neither Counsel nor Solicitor to any of the parties in said suit, nor interested in the event of the cause.

IN WITNESS WHEREOF, I have hereunto set my hand and seal this 22nd day of December, 2014.

CATHY L. YOUNG, CVR-M
NOTARY PUBLIC FOR SOUTH CAROLINA
MY COMMISSION EXPIRES FEBRUARY 19, 2019.

In The Matter Of:
Barry Adickes vs.
Phillips Healthcare and Fidelity & Guaranty Ins. Co.

Joel D. Leonard, M.Ed., CRC, CVE
December 30, 2014

LAW Services of SC
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BEFORE THE SOUTH CAROLINA
WORKERS' COMPENSATION COMMISSION
WCC File No. 1102937

BARRY ADICKES,

Employee/Claimant,

vs.

PHILLIPS HEALTHCARE AND FIDELITY &
GUARANTY INS. CO. c/o GALLAGHER
BASSETT SERVICES, INC.,

Employer/Carrier/Defendants.

DEPOSITION OF
JOEL DAVID LEONARD, M.Ed., CRC, CVE

DATE: December 30, 2014
TIME: 10:03 a.m. - 12:12 p.m.
LOCATION: Chappell, Smith & Arden
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Columbia, South Carolina
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6
7 A-P-P-E-A-R-A-N-C-E-S

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EXHIBITS

None proffered.

1 It is stipulated by and between the parties
2 that this deposition is taken pursuant to notice and that
3 all questions as to notice are waived; that all
4 objections, save as to the form of the question, are
5 reserved until the time of trial; that this deposition is
6 taken pursuant to the South Carolina Rules of Civil
7 Procedure for the purposes allowed therein; and that the
8 deponent was explained his right to read and sign the
9 transcript of the deposition and waived that right.

10 (JOEL D. LEONARD, M.ED., CRC, CVE, having been first
11 duly sworn, was examined and testified as follows:)

12 E-X-A-M-I-N-A-T-I-O-N

13 BY MS. PAYNE:

14 Q Mr. Leonard, I believe we met briefly before
15 we went on the record. My name is Brooke Payne and this
16 is my associate, Ryan Oxford. We're here today just to
17 discuss the Barry Adickes claim, which I believe you are
18 pretty familiar with.

19 A Yes.

20 Q Is that right? Okay. Let's see. You have
21 already been sworn in, so we're ready to go.

22 MS. PAYNE: This is going to be the deposition
23 of Mr. Joel Leonard taken on behalf of the
24 Employer/Insurer for use in this worker's compensation
25 proceeding. The deposition will be governed by the South

1 Carolina rules and regulations as well as the
2 Civil Practice Act. It's taken for use and evidence of
3 the comp. hearing before Commissioner McCaskill on January
4 21st, 2015; therefore, we need to make any objections on
5 the record.

6 Is that agreeable?

7 MR. SMITH: Fine with me.

8 BY MS. PAYNE:

9 Q Mr. Leonard, as we discussed, you've done this
10 before, so I'm sure you are aware of your right to read
11 and sign the deposition transcript to confirm what was
12 taken down. Did you want to reserve that right or waive
13 it?

14 A I generally waive it unless there is some
15 degree of technicality where percentiles and numbers can
16 get misinterpreted. But, for the most part, I'll waive
17 it.

18 Q Okay. So you want to waive it or do you want
19 to just decide at the end of the --

20 A We can decide at the end.

21 Q Okay.

22 A I would say 99 percent of the time I waive it,
23 but.

24 Q Okay, understood. I'll just try to remember
25 to revisit that at the end of the deposition.

1 Mr. Leonard, could you please give us
2 your full name and a summary of your educational
3 background?

4 A Yes, ma'am. My full name is Joel David
5 Leonard. I retain a Masters degree in rehabilitation
6 counseling from the University of South Carolina as well
7 as a Bachelors degree from Stonehill College.

8 Q What year did you obtain your Masters?

9 A '93.

10 Q Where do you practice, primarily?

11 A I currently work, own and operate Leonard and
12 Associates.

13 Q Is that here in Columbia?

14 A Yes, ma'am.

15 Q And you're a certified vocational evaluator as
16 well as rehabilitation counselor?

17 A That is correct.

18 Q When did you become certified?

19 A Rehabilitation counselor was in '93. I think
20 I got my CVE in '97, give or take -- no. CRC, you take
21 that upon completion of graduate school, so that would
22 have been in '93. And I think the CVE was '97, if I'm not
23 mistaken.

24 Q So you got your CRC when you graduated. Was
25 that a part of your Masters or was it a separate course?

1 A You have to take the national
2 certifying exam.

3 Q Okay.

4 A Sort of like when a paramedic graduates from a
5 program and they take the National Registry exam. That
6 type of stuff.

7 Q Okay. What course did you take to obtain your
8 CVE?

9 A It's no course work. It is -- well, you have
10 to have a Masters degree and a certain amount of hours,
11 experience, and you have to submit various types of
12 evaluations. I think it's ten products; I'm not 100
13 percent sure. And then you have to take a national
14 competency exam.

15 Q And you have continued to take periodic exams
16 to keep your license up to date?

17 A It's not a license; it's a certification.

18 Q Certification.

19 A And you submit continuing education hours.

20 Q Both of your certifications are up to date?

21 A Yes, ma'am.

22 Q Do you have any other certifications?

23 A No, ma'am.

24 Q Are you licensed to practice in any state
25 other than South Carolina?

1 A No, ma'am. There is no license for
2 the state of South Carolina.

3 Q I'm sorry. Certified. So you are certified
4 to practice?

5 A The certifications I maintain are national
6 certifications. Whether or not you can work in a
7 different state would depend on what their labor and
8 licensing rules and regulations are.

9 Q So it depends on the LLR?

10 A Generally, for that state, whether or not they
11 require vocational and rehabilitation counselors or case
12 managers to be licensed or not.

13 Q Okay. So South Carolina does not require a
14 license?

15 A There is no licensure for the state of South
16 Carolina; that is correct.

17 Q Okay.

18 A In the areas of vocational evaluation and
19 rehabilitation counseling.

20 Q Has your certification ever been suspended or
21 revoked?

22 A No, ma'am.

23 Q As we discussed, we are here to discuss the
24 workers' compensation claim that's been filed on behalf of
25 Mr. Barry Adickes. Did you bring his file with you today?

1 A I did.

2 Q Okay. What you have in front of you, is that
3 all of the file materials that you've received and
4 reviewed in relation to this case?

5 A Yes.

6 Q Other than a brief introduction before we all
7 went on the record today, have you ever spoken with
8 Mr. Smith or anyone from his firm regarding this case?

9 A Yes.

10 Q And were those phone discussions or in-person
11 meetings?

12 A Phone discussions.

13 Q How many phone discussions?

14 A I can't say for sure. I would probably say
15 we've had maybe three concerning Mr. Adickes' claim.

16 Q Were those discussions prior to your
17 evaluation or after?

18 A I think I have had, I would say, two prior to
19 and one or two after, so either three or four.

20 Q Can you summarize briefly the substance of
21 those conversations?

22 A Certainly. The first call or phone discussion
23 is almost always just a general referral discussion: I
24 have this claim; I would like to send it to you. Then I
25 usually get the case file and conduct an initial review,

1 basic general analysis on the case file, and will
2 generally give some type of maybe initial impression with
3 a referral source concerning that. And then there would
4 be -- after that, there would be some degree of
5 intermittent conversations, one way or the other. In
6 follow-up, oftentimes I'll give people an initial blush on
7 my opinion to see if they want to move forward with a full
8 report, at that point. And then there will be just
9 back-and-forth stuff.

10 And in this case, there was an issue about the
11 timing of the deposition, if I'm not mistaken, relative to
12 Dr. Mandel's deposition, which I think led to the
13 continuance of mine. And, most recently, a discussion
14 concerning the receipt of new evidence that I reviewed
15 with specific attention to the inability to read a
16 document that he had sent me, which was a blacked-out
17 portion of Phillips' personnel records or something to
18 that effect.

19 Q Okay. So do you recall what your initial
20 impression of the case was, prior to even meeting
21 Mr. Adickes?

22 A Not off the top of my head. But I have notes
23 that I can draw from, just to give you a general idea.

24 Q Sure.

25 A Let's see. Just a determination of what his

1 injuries were.

2 Q Can you tell me what you're looking at?

3 A Yes. You should have a copy of this

4 [indicating].

5 Q Case Intake Sheet?

6 A Yes.

7 Q Okay. So is this a document that you prepared
8 just upon review of --

9 A Yes. This is kind of --

10 Q -- the initial file materials?

11 A Yes, the Mickey Mouse stuff, you know, just
12 when I do an initial review, of my impressions and
13 what-not. And, basically, my circumstance was, at the
14 time that I evaluated the case -- I have a note in here
15 that I need to do a brief phone consult with the client,
16 so I, obviously, called Mr. Adickes prior to doing a
17 formal interview. Sometimes I'll do that. When I have a
18 case that I think that's an appropriate step in, I will
19 sometimes do that. I did that in this case.

20 My initial impression was, you know, this is
21 an issue of determining whether or not the wage loss that
22 was presently represented was accurate and reasonable
23 within the context of the vocational circumstances. So
24 that would be the initial impression: Consult to
25 Mr. Smith. And then, probably, a follow-up phone consult

1 to Mr. Adickes, just to kind of get initial
2 impression.

3 You know, sometimes we will talk with -- and
4 the reason I do this is -- quite simply, is I think it's
5 unfair or inappropriate to a client to have them come in
6 for an evaluation and bill for a significant amount of
7 hours and say, I'm sorry. You know what I mean? I don't
8 think any perspective client likes that. So in this type
9 of case, I can gradually go into it and ascertain what I
10 believe are the most relevant issues and make a
11 determination, yes or no, it would make sense to move
12 forward with an evaluation.

13 Q On your case file intake record, there's a lot
14 I can't read. I can read the fourth one down. It says
15 then just laid or then got laid off, got new job for much
16 less money.

17 A Uh-huh.

18 Q Who knows. Can you read the next?

19 A At present, depicted wage loss requires one to
20 accept the assessment for such from the claimant. Who
21 knows. Need to brief -- need to do a brief phone consult
22 with client.

23 Q At present --

24 A Who knows is language to myself where I might,
25 you know, who knows.

1 Q So depicted wage loss requires you to
2 accept an assessment of same from the claimant. What does
3 that mean; that you just have to accept that what the
4 claimant is telling you is true?

5 A Not so much necessarily true in that strict a
6 manner, yes, but that the turn of events and the
7 circumstances adequately portray what transpired. And,
8 you know, to a certain degree, yes, that is that you
9 accept at face value, what's going on. But the issue of,
10 you know, the strict truth, can sometimes be difficult in
11 these cases, especially when you're dealing with multiple
12 parties that you don't always have access to.

13 Q Okay. So you stated that initially you kind
14 of had a discussion with the Claimant's counsel about your
15 first blush of the claim. So, you know, upon your initial
16 review of the file materials did you have a gut instinct
17 as to whether Mr. Adickes' wage loss was related to -- or
18 whether there was a wage loss claim here?

19 A That was my gut instinct. Yes; that's my
20 initial impression.

21 Q But doesn't it say, "Who knows?"

22 A Correct.

23 Q So your gut instinct is that you weren't sure?

24 A Yes, and that there was more that needed to be
25 ferreted out, so to say. "Who knows" doesn't mean it's

1 not -- that is me writing a stream of
2 consciousness, you know: It could go this way, it could
3 go that way; can't necessarily tell, based upon the
4 documentary evidence, as to a definitive outcome.

5 Q And you said that it needed to be -- ferreted
6 out; is that what you said?

7 A Yes. You just need to dive a little deeper
8 into the circumstances.

9 Q Okay. At that point in time, what sort of
10 additional documentation or additional information did you
11 think that you needed to uncover in order to make a more
12 concrete determination?

13 A I just wanted a more -- a better understanding
14 of progression of events and time lines and circumstances:
15 You know, where he was with his symptoms and insertions.

16 Q I'm sorry; symptoms and what?

17 A Symptoms and insertions and limitations or
18 deficits or what his impression was on certain -- on the
19 chain of events, progression of events and what-not.

20 Q So after that, you evaluated him -- it looks
21 like August 25th?

22 A That's correct.

23 Q Okay. Let's go back. It looks like you
24 received \$1,850 to perform this vocational evaluation?

25 A That would -- yes. That would be the balance.

1 That would have been the total bill. I requested
2 initial case file of either \$100 -- one or two billable
3 hours, \$150 to \$300, and then a submission of a final
4 bill.

5 Q So \$1,850 is the total bill?

6 A To date. That's correct.

7 Q And I know you've performed vocational
8 evaluations on many workers or in relation to many
9 workers' compensation cases. What would you say is the
10 percentage of time that you've been hired by plaintiffs'
11 attorneys versus defense attorneys?

12 A It varies back and forth, 60/40, either side
13 of that coin. Sometimes I might be heavy plaintiff; other
14 times, I'm heavy defense. Sometimes -- I would imagine at
15 the end of the day it rolls out 50/50, quite frankly. I
16 have a -- I just receive a lot of referrals from both
17 sides.

18 Q And what about during this past year?

19 A I would say you are probably at around that,
20 50/50, give or take, and maybe a little bit percentage
21 higher here or there. I don't have those exact numbers.

22 Q Approximately how many times have you been
23 retained by Mr. Smith's law firm?

24 A I'd say in the past five years maybe four or
25 five times.

1 Q And out of those four to five times
2 that you've been retained by Mr. Smith's law firm, how
3 many of those plaintiffs did you deem were vocationally
4 challenged as a result of their work-related injuries?

5 A They were vocationally challenged?

6 Q Or that there was a vocational disability as a
7 result of their work-related injury?

8 A Well, I mean almost all of them have a
9 vocational disability, I mean to a certain degree, if they
10 have some degree of impairment. And I'm just talking
11 general. First of all, I can't tell you exactly who the
12 claimants are that I evaluated for them in the past couple
13 of years. I don't have that committed to memory.

14 But, you know, this may be a semantic issue.
15 Are you asking which ones I have found to be totally
16 disabled or are you -- because they all are going to have
17 a vocational disability, in theory, if there is an
18 impairment rating. And it adjusts what they can do
19 physically or psychologically because if it doesn't, it's
20 not really going to get to me, for the most part.

21 So if you're asking how many I found capable
22 of work or disabled outright, I really couldn't tell you.

23 Q Did you determine any of them were able to --
24 sorry. Let me back up.

25 Were there any circumstances within those four

1 to five cases that you worked on for this firm
2 where you found that there were suitable jobs within the
3 economy nearby that the claimant could return to work to?

4 A I can't tell you specifically because I don't
5 have -- I don't have an exact recollection of who those
6 claimants would be and what their outcomes were with their
7 cases.

8 Q So you don't recall that four to five that you
9 worked for?

10 A The four to five would be an estimate, give or
11 take. And I can't -- I don't have a specific
12 understanding or recollection of each one of those cases.
13 That's just a ballpark.

14 Q I know recently there's been some other
15 documents that have come about in this claim. I think
16 Mr. Smith has provided those to you, some of which last
17 week and some yesterday. Have you guys had a discussion
18 about any of these additional documents that have been
19 provided to you?

20 A Yes. As I indicated earlier, that I couldn't
21 read the first set because of the blacked out -- I think
22 it's referred to as Manager Comments on the performance
23 appraisal or whatever they are.

24 Q Well, just aside from logistically not being
25 able to read that part, has there been a discussion of the

1 substance of the documents, how it might impact
2 your assessment?

3 A Yes.

4 Q Okay. Tell me about that conversation.

5 A Well, the relevance of basically the four
6 documents that I've looked at prior to today, which would
7 be his personnel records, e-mail from a Mr. Johnson,
8 Dr. Mandel's deposition, and then a report from Dr. Waid
9 which I received in the constellation of records recently.
10 But I had received that previously, as well.

11 Q What was your discussion with Mr. Smith about
12 how that might impact your assessment?

13 A The discussion was that I felt that certain
14 documents were supportive of a measurable or discernable
15 degree of functional deficit, depending on how you read
16 some of the personnel documents.

17 You know, I felt that there was information
18 that was very supportive of Mr. Adickes' assertions to me
19 within the context of our interview. There were some that
20 I wasn't sure what the implications were. The deposition
21 of Dr. Mandel was generally supportive of continuing
22 dysfunction in some higher areas. The e-mail from the --
23 I believe it was Mr. Johnson, I can't recall his name --
24 it speaks for itself in terms of things were set forth
25 some difficulty with focus and maintaining expectations of

1 task performance in terms of the nature of his
2 job. That was the general nature of the discussion.

3 Q And Dr. Waid's report?

4 A And Dr. Waid's report, which basically
5 attended to some attention and concentration, persistence
6 issues.

7 Q So reading that lengthy report from Dr. Waid,
8 that was what you took away from it, was that he did have
9 attention issues?

10 A In summary; yes. I mean there was some other
11 things that -- in looking at the report, that concerned
12 me. I mean overall, I mean from a neuropsych perspective,
13 it just seemed that he had a lot of intact functioning
14 issues. There was some issues that were -- you know, at
15 one point you would think he would have problems with
16 memory, then some of the testing didn't necessarily show
17 that out. But then he had some other --

18 You know, with the Stroop test, he was well
19 below -- I don't know how to put -- I don't recall,
20 impaired performance or low or poor performance, or
21 something to that effect. But in the end, he -- I felt
22 like he was having attention/concentration deficits,
23 source attributable, if I can remember, possibly to the
24 headache issues and what-not.

25 Q Okay. We'll delve into that in just a moment.

1 So when you initially received the file, it looks
2 like you received a copy of Mr. Adickes' resumé that he
3 had submitted to VRI?

4 A That's in here. I don't know if I got that
5 with the file referral or if he gave that to me when I met
6 with him. But I do have it; yes.

7 Q You'll agree that, within the resumé, he
8 summarized his skills as being an impactful public
9 communicator with a comfortable ease and effective
10 delivery. He noted that he was extensively trained,
11 expertly organized and focused in developing sales
12 opportunities, and diligent, trustworthy and full of
13 integrity. Is that right?

14 A Yes, ma'am.

15 Q So you'll agree that he was at least
16 purporting to potential employers that he did not have any
17 cognitive issues?

18 A Well, he doesn't necessarily address cognitive
19 issues as an abstinence. But I would certainly say that
20 as he presents himself as a capable individual, certainly.

21 Q Now I'm showing you what is the application
22 for employment when he applied with VRI, which was
23 presented to his counsel prior to your evaluation. Have
24 you ever seen a copy of that?

25 A I don't believe so.

1 Q Can you look on the first page?

2 There's a section that says Desired Salary.

3 A Okay. Yes, ma'am; I see it. Desired Salary
4 or Hourly Rate.

5 Q Can you read for the record Mr. Adickes'
6 response to that?

7 A \$55,000 base.

8 Q You'll agree that when he applied to VRI, he
9 was requesting a desired salary of \$55,000 base?

10 MR. SMITH: Objection. Speculative.

11 BY MS. PAYNE:

12 Q Would you agree that that document --

13 A That document represents the \$55,000 base in
14 the area that says Desired Salary or Hourly Rate.

15 Q Okay. Did Mr. Adickes ever inform you that he
16 was seeking a salary of \$55,000 when he applied to VRI?

17 A No, ma'am.

18 Q Excuse me?

19 A No, ma'am.

20 Q Okay. I just want to look at your report.
21 Essentially, it looks like you created three different
22 profiles, Profile A, B and C, for consideration, and then
23 you kind of went through the potential considerations
24 based on the facts as you understood them, and then you
25 placed Mr. Adickes in one of those categories. Is that

1 right?

2 A Yes, ma'am.

3 Q It looks like you chose Profile B, which
4 essentially is based on your conclusion, based on the
5 facts as you understood them, was that his release from
6 Phillips Healthcare was due, at least in part, to
7 performance-based deficits arising from his work-related
8 injury; right?

9 A That's correct.

10 Q And that's just based on the information
11 related to you by Mr. Adickes?

12 A That is correct.

13 Q You'll agree that Mr. Adickes had informed you
14 that, prior to his work-related injury, he didn't have any
15 performance issues at Phillips Healthcare?

16 A No, nothing in a significant manner. That's
17 correct.

18 Q So now that you've had an opportunity to
19 review the documents regarding his performance at
20 Phillips, would you agree that, in 2009, he actually had
21 been placed on a performance improvement plan because of
22 his issues with performance?

23 A Yes; that's my understanding after reading
24 that document. I don't -- I couldn't find in that
25 document where it said the PIP was, but that might just be

1 because I'm not familiar with the document. But
2 I know that it was referenced. It was stated in some of
3 -- a sentence or something like that, that he had been on
4 a PIP plan, blah, blah, blah.

5 Q Okay. I'm handing you what is marked -- well,
6 it's titled Performance Improvement Plan. And this
7 document was actually sent to his counsel prior to your
8 evaluation of Mr. Adickes. Did you have an opportunity to
9 review that, prior to your evaluation?

10 A I've not seen this document.

11 Q I'm just going to give you a few seconds to
12 review it.

13 A [Reviewing.]

14 MR. SMITH: Just for the record, Brooke, what
15 date are you showing that was sent to us?

16 MS. PAYNE: It was sent on the -- I emailed it
17 to you a few times. It was sent -- it was emailed to you
18 on August 6th, and there was another packet that was sent
19 on August 26th. It was in both of those.

20 MR. SMITH: And that was, if I recall, in
21 response to the fact that we indicated we didn't have it
22 yet?

23 MS. PAYNE: I sent it a few times. You said
24 you didn't get it, so I resent it.

25 MR. SMITH: You resent it August 26th;

1 correct?

2 MS. PAYNE: Yes.

3 MR. SMITH: Okay.

4 MS. PAYNE: Yes. It was on the 26th, which is
5 still before your report was performed.

6 MR. SMITH: The day of the exam was 8/25.

7 MS. PAYNE: The date of the evaluation, not
8 the report. The report is the 2nd.

9 A I'm just briefly reading over this.

10 BY MS. PAYNE:

11 Q Yes. I just wanted you to briefly read over
12 it before I point out some things.

13 A Okay.

14 Q Would you agree that this Performance
15 Improvement Plan shows that Phillips informed him in 2009
16 that his performance over the past three quarters was
17 unacceptable and didn't meet the basic requirements of his
18 job?

19 A Yes, ma'am. Well, it says, simply, not
20 acceptable performance.

21 Q And he was also counseled on improving his
22 communication skills?

23 A If you are reading from the document, just
24 tell me where. And I would imagine "yes" would be the
25 answer.

1 Q The third page.

2 A The third page. We're under Action Plan, or
3 where are we?

4 Q On the third paragraph from the bottom, the
5 last sentence. Internally, you must communicate
6 precisely.

7 A Yes. And I imagine that anything you are
8 going to read to me is going to be accurate. I just, for
9 semantics -- for thoroughness -- just want to doublecheck.

10 Q Right.

11 A But you're not going to read something that's
12 not accurate to me and ask me to endorse it.

13 Q It's not my intention to read it to you. It's
14 more of just --

15 A Right.

16 Q Just making sure you're aware this information
17 was contained in the Performance Improvement Plan.

18 A Okay. Yes. Are you talking about internally
19 must communicate precisely with clear goals and outcomes
20 designed for the resources that reach out to you?

21 Q Yes. And on page two, they offer him a class
22 called Principles of Sales Mastery to help him in areas
23 such as assertiveness, and sales calls, and other
24 strengths that will help closing deals?

25 A Yes, ma'am.

1 Q So you'll agree that, based on this
2 Performance Improvement Plan which you are now being shown
3 for the first time, Mr. Adickes actually did have issues
4 with his performance, prior to his work-related injury?

5 A According to that document; yes.

6 Q Okay. So when you testified earlier that you
7 had seen that there was a Performance Improvement Plan
8 mentioned and you hadn't seen it, were you referring to
9 the People Performance Management, 2009?

10 A Yeah. Somewhere in the bottom there's a
11 reference to what's called a PIP. And then later in some
12 of the other stuff, I can't remember if they used the PIP.
13 Now they talk about him coming out of the Performance
14 Improvement Plan sometime prior to his accident, you know,
15 how he has done well and this, that and the other, so I --
16 that's what I haven't -- I think it's within those two
17 contexts that I see it. I have a document -- I can't
18 remember. I know for sure when they talk about he comes
19 out of it.

20 Q I know you said you were provided with the
21 deposition transcript of Dr. Mandel's deposition. Were
22 you provided with the deposition transcript from Mark
23 Johnson's deposition?

24 A I am not in possession of that deposition; no,
25 ma'am.

1 Q Okay. Mark Johnson was Mr. Adickes'
2 supervisor, actually at the time of his injury as well as
3 at the time of his termination. He's the one that was
4 actually on the phone with him that, you know, terminated
5 him, along with the HR representative that was -- or that
6 at least relayed the fact that he was being terminated.
7 So he was deposed in relation to this claim just so that
8 Mr. Smith could get more information about the reasons why
9 the termination, especially, you know, so that you could
10 further evaluate the vocational aspects here. So when he
11 was -- when Mr. Johnson was deposed -- I'm just going to
12 give you a summary of his testimony.

13 MR. SMITH: Can I interrupt you for a second?
14 For the record, I don't have his deposition yet. Do you
15 have it back yet?

16 MS. PAYNE: Yes. Do you want to see it?

17 MR. SMITH: No, no. I was curious as to what
18 your deposition summary, if that was from your notes or
19 memory, or if it was from the actual deposition.

20 MS. PAYNE: It's from the actual deposition.

21 MR. SMITH: Okay.

22 BY MS. PAYNE:

23 Q Essentially, Mark testified that he became
24 Mr. Adickes' supervisor two months prior to the date of
25 accident. He testified that he wasn't aware or he had

1 never worked with Barry before he became his
2 supervisor, but he was aware who Mr. Adickes was kind of
3 through the chain of management. There had been
4 discussions about Mr. Adickes and his prior position and
5 performance-related discussions by other managers. And so
6 when Mr. Adickes became part of Mark's team, Mark
7 Johnson's team, he actually changed him from whatever
8 position he was in into a lesser complicated position
9 based on the information that he had heard about his
10 performance issues in the past.

11 So, you know, approximately two months before
12 the date of accident, Mr. Adickes got changed into a
13 position which Mark Johnson thought would be less
14 complicated.

15 A What position is that?

16 Q The sale of -- I'll read it to you. The sale
17 of EMS machines or the EMS -- I'll read it to you just so
18 that you can get a good idea. What Mr. Smith said, asked
19 Mr. Johnson, "Would you characterize Barry had done very
20 well in sales during the time prior to him coming to work
21 for you?" Mr. Johnson responded, "No, sir, I do not
22 characterize that."

23 Okay; here we go. Mr. Smith said, "Did you
24 form any opinion" -- and I'm asking you to look back.
25 "Did you form any opinion about his abilities and that

1 sort of thing during that time, which was prior
2 to when he started working under your supervision in
3 January 1st, 2011?" I'm on page 13 of the transcript.

4 Mr. Johnson's response was, "Well, I had
5 formed some opinions of Barry before he and I began
6 working together. I had management discussions with Paul
7 Stoddard, and the Vice President of Sales, Julie Milner,
8 recognized that there were performance issues in the past
9 with Barry and that there was concern about Barry's
10 ability to comprehend the complicated sale that he was
11 being asked to engage with in the fire and EMS industry.
12 As a result, I requested permission to move Barry from the
13 fire and EMS position and exchange him with another
14 employee of mine to what I thought would be a better match
15 for Barry, a less complicated and involved sale. I
16 received approval for that to be considered. The approval
17 was contingent upon Barry and the other impacted employee
18 agreeing to swap positions and that they did."

19 A What was the position, though? I'm trying to
20 figure out. Wasn't he a product services specialist or
21 product specialist person?

22 Q He had changed into the channel manager.

23 MR. SMITH: Let me interpose an objection.
24 Two questions relying on Mr. Johnson's deposition and that
25 I had prior to that deposition subpoenaed the performance

1 appraisals and we were not provided prior to the
2 deposition so that I was able to question Mr. Johnson
3 about those performance appraisals.

4 MS. PAYNE: How does that objection relate to
5 this deposition?

6 MR. SMITH: It relates to your asking him
7 about his performance issues in the past and we have
8 actual documentary evidence that I could have questioned
9 him from regarding his performance appraisals in the past
10 that was not provided me, despite being subpoenaed prior
11 to the deposition.

12 MS. PAYNE: Well, that's correct, but there's
13 been -- well, just for the record, you can re-depose him.
14 I made that very clear.

15 BY MS. PAYNE:

16 Q Back to where we were. So assuming that
17 testimony to be accurate, wouldn't you agree that not only
18 does the 2009 Performance Plan indicate that Mr. Adickes
19 had performance issues, but also Mark Johnson's testimony,
20 based on his prior performance in the position before he
21 became a member of Mr. Johnson's team?

22 A Before I answer that question, let me just get
23 back to what -- I was asking what was the job position?
24 Is it correct that we're talking that he went from like a
25 products services specialist to a channel distribution

1 manager? Because that was your first question.
2 Your first question was, was I aware that he had been put
3 in an easier job, for lack of a better term. And I said,
4 well, what were the positions? And I think you were going
5 to read it to me and then we got off track.

6 I can answer your question, but I just want to
7 make sure that I have in my head first a proper
8 understanding that the job transition is what I understood
9 it to be, that's all.

10 Q Let me -- I know that the first one he was in
11 the fire and EMS -- oh. He was in the fire and EMS. I
12 guess that was the -- the product he was selling, and then
13 it went to the defibrillators, the heart defibrillators,
14 so he changed products.

15 A Okay. But the title was product to channel
16 distribution?

17 Q I don't know about what his title changed.
18 I'm just saying that, based on Mark's testimony, he
19 switched his positions --

20 A Okay, he switched.

21 Q -- or he changed his job duties to one of a
22 less-complicated nature.

23 A Okay.

24 Q Would you agree that that tends to indicate
25 performance issues?

1 MR. SMITH: I'm going to object to the
2 question in that I think it's stating facts that aren't
3 correct because he -- while it may have gone from fire
4 rescue to defibrillator, it was still a promotion to a
5 channel manager.

6 MS. PAYNE: My question is based on Mark
7 Johnson's testimony where he indicates that he requested
8 permission to place him in a less complicated position.

9 A And I apologize. I'm not trying to be
10 difficult. I want to make sure that I understand from
11 point A to point B. So you're asking me now does his
12 testimony reflect that he put him in a less challenging
13 job?

14 BY MS. PAYNE:

15 Q Right. Would you agree that the fact that
16 because changing from selling to the fire and EMS or
17 selling that product, he was changing not only product,
18 but also clients, from the -- yes, the product and the
19 clients were both scaled down and less complicated?

20 A And that's what Mr. Johnson testified to?

21 Q Yes.

22 A That, specifically?

23 Q Yes. I mean would you agree?

24 MR. SMITH: Same objection.

25 A I agree to whatever it is he testified to with

1 regard to that.

2 BY MS. PAYNE:

3 Q Okay.

4 A I mean I don't have any issue to --

5 Q But my question isn't would you agree that
6 that was his testimony. My question is, based on the fact
7 that two months prior to the work-related injury,
8 Mr. Adickes was placed in a less-complicated position by
9 his supervisor. Wouldn't you agree that that indicated
10 issues with performance?

11 A It could. My understanding was, though -- and
12 this could be an issue. My understanding was that it was
13 more of a promotion than a demotion.

14 Q But your understanding is based on what
15 Mr. Adickes told you?

16 A That's correct.

17 Q So I need you to assume that Mr. Johnson's
18 testimony is found to be more credible by the
19 Commissioner. So based on Mr. Johnson's testimony,
20 wouldn't you agree that Mr. Johnson's testimony indicated
21 that at least up to two months prior to his work injury
22 there were issues with his performance causing him to be
23 changed into a less-complicated position?

24 A Please indulge me and just read it again for
25 me, if you would.

1 Q Sure.

2 A Thank you.

3 Q Mr. Smith asked him -- this is the top of page
4 13. Okay. All right. "What was your experience in
5 working with Barry for the brief time that he was under
6 your supervision, up until the accident?" Mr. Johnson
7 responded, "I'm not sure I understand what you're looking
8 for there." Mr. Smith said, "Okay. Let me rephrase that
9 for you. He started working under your supervision
10 January 1, 2011. His accident happened March 22nd, 2011.
11 So it appears that he would have only been under your
12 supervision for 10 or 11 weeks prior to the accident; is
13 that correct?"

14 Mr. Johnson said, "Correct." Mr. Smith said,
15 "Did you form any opinion during that? And I'm asking you
16 to look back. Did you form any opinion about his
17 abilities and that sort of thing, during that time?"

18 Mr. Johnson replied, "Well, I had formed some
19 opinions of Barry before he and I began working together.
20 I had, in management discussions with Paul Stoddard and
21 the Vice President of Sales, Julie Milner, recognized that
22 there were performance issues in the past with Barry and
23 that there was concern about Barry's ability to comprehend
24 the complicated sale that he was being asked to engage
25 with in the fire and EMS industry.

1 "As a result, I requested permission
2 to move Barry from the fire and EMS position and exchange
3 him with another employee of mine for what I thought would
4 be a better match for Barry, a less-complicated and
5 involved sale. I received approval for that to be
6 considered. The approval was contingent upon Barry and
7 the other impacted employee agreeing to swap positions and
8 that they did."

9 A Thank you. I'm sorry, I'm not trying to be
10 difficult --

11 Q That's okay.

12 A But I want -- you got circled around.

13 Q Sure.

14 A So your question is, would that indicate that
15 he had been moved into a less-demanding job, more or less?

16 Q Well, wouldn't you agree that that testimony
17 indicates that there were performance issues all the way
18 up until two months prior to his date of accident?

19 A That testimony there leads me to believe that
20 he thought the job that he was doing might have been over
21 his head, and so he moved him into that other job.

22 Q Okay.

23 A Okay. Whether or not it's a performance issue
24 I'm not 100 percent sure, but it seems that he moved him
25 into a different job based upon his impression of his

1 capabilities.

2 Q Okay. And that he needed to be in a
3 less-complicated sale?

4 A Yes. That's what I heard.

5 Q All right. When you evaluated or interviewed
6 Mr. Adickes, did he inform you about being changed into
7 the less-complicated sale a few months prior to his date
8 of accident?

9 A He informed me that he had been involved in a
10 change, but it was defined more of a promotion as opposed
11 to a sideways -- or not actually a demotion, but a
12 decrease in -- it hadn't been phrased in that manner.

13 Q So this is your first understanding of this?

14 A That is correct.

15 Q Okay. Going back to Mr. Johnson's testimony,
16 he was asked whether he noticed any sort of difference,
17 cognitive differences, you know, before the accident as
18 compared to after the accident with regard to speech or,
19 you know, communication, forgetfulness, memory, and he
20 testified that he didn't notice any difference before or
21 after.

22 Now he did testify that he remembered Barry
23 complaining of some headaches right after the date of the
24 accident, but that that had occurred, you know, shortly
25 after he had returned to work following, you know, the two

1 months that he was out. And that he doesn't
2 remember any excessive dates or any work missed as a
3 result of these headaches in the next two years. Because,
4 keep in mind, he did continue to work for Mr. Johnson
5 until his termination in January of 2014.

6 Then Mr. Johnson was questioned about the
7 termination. And Mr. Johnson was very clear that this was
8 -- the termination was a result of the reduction in force,
9 which was sent down from corporate, Phillips, and it was a
10 nationwide -- well, I don't know if it was nationwide, but
11 it definitely targeted more than just his territory. It
12 came from the higher-ups. He had no input whatsoever in
13 who in his territory was terminated; that he was just told
14 that certain employees were being terminated and that he
15 had to make the call and inform these employees.

16 He recalls making all of these
17 reduction-in-force phone calls to the employees that were
18 being terminated. He doesn't recall specifically what he
19 said to Mr. Adickes, but he did state that Phillips'
20 corporate policy is very clear with regard to making these
21 reduction-in-force phone calls, that it's actually
22 scripted because there would be no mention of there being
23 any issues with production because they aren't based on
24 production or any sort of performance issues.

25 So he knows that he didn't say anything about

1 Barry's performance issues because it had noting
2 to do with that and that he just informed him, as he
3 informed all of the other employees, that they were being
4 terminated as a result of the reduction in force. Barry
5 was not the only channel manager that was terminated. He
6 was the only channel manager on Mr. Johnson's team that
7 was terminated, but within the reduction in force and its
8 entirety there were other channel managers that were
9 terminated. And in fact, that position has been
10 eliminated in its entirety, no one has replaced Barry in
11 that position. There is no longer a channel manager in
12 that territory.

13 So based on that testimony and assuming those
14 facts to be true, wouldn't you agree that Mr. Adickes'
15 termination was not a result of his work-related injury?

16 MR. SMITH: Objection. Assumes facts that are
17 not in evidence.

18 A As defined by what you just stated?

19 BY MS. PAYNE:

20 Q Assuming Mr. Johnson's testimony --

21 A Assuming everything you just said is to be
22 accurate?

23 Q That's correct.

24 A Yes, ma'am.

25 Q Okay. And assuming Mr. Johnson's -- or

1 assuming all those facts to be true with regard
2 to Mr. Johnson's testimony as well as, you know, the
3 documentation that we've looked at here regarding his 2009
4 performance issues, as well as the issues right before his
5 work-related injury, wouldn't you agree that assuming all
6 those facts to be true, if you had to reevaluate these
7 profiles, that again you would place Mr. Adickes in a
8 different profile?

9 A It's possible. But if I have to give you a
10 definitive opinion, I would say no, at this juncture.

11 Q What is that based on?

12 A Well, I think it's based on a couple of
13 things. I would agree that as you present that
14 information that it certainly begs for further
15 consideration to move away from my opinion on that matter.
16 I agree with that.

17 But my definitive statement as to halting my
18 opinion would be basically this with respect to it. I
19 would want to know a little bit about the e-mail document
20 that I have been given in which in 2012, I believe it's
21 Mr. Johnson apparently sent an e-mail concerning Barry's
22 performance. Also within the context of the performance
23 appraisal that I believe was done the year before, and I
24 may be messing up the dates, I hope not, where he
25 apparently performed very well, if I'm not mistaken, in

1 2010. And there was a lot of very kind statements
2 about him, if I remember correctly, from whoever the
3 manager is, which in that case I believe would be
4 Mr. Johnson, if I remember that correctly. And then you
5 have a pop-up of his performance issue roughly one year
6 following the injury within the context of that email.

7 Now let me also say that in addition to that
8 some of the additional evidence provided by Dr. Waid, as
9 well as Dr. Mandel, would factor into that opinion, as
10 well. I would state that there is perhaps additional
11 evidence that might pull me off of that opinion. But at
12 this point, it is still not fully compelling enough until
13 I find some resolution as to the outcome of where that
14 person is with that performance issue, also understanding
15 that I can't necessarily make that determination.

16 Q You can't make what determination?

17 A I can't necessarily make the determination,
18 that the comparison of his testimony in the deposition
19 versus the comparison of the information contained within
20 the performance appraisal versus the comparison of
21 information within his email, I don't know if I get to say
22 -- I don't know if I have a full scope of information
23 enough to say which one is going to be accurate or more
24 accurate, which one is inaccurate, which one's more
25 accurate.

1 So what I would generally do is hold a
2 conservative opinion until I get to see that evidence come
3 to fruition in a final manner. So at the current state, I
4 wouldn't change my opinion with respect to my impression
5 of his employability.

6 I would agree, though, that there is some
7 additional evidence that may impact it and may potentially
8 pull it off from where it is. But it hasn't -- in my
9 opinion, it's not fully resolved because in addition to
10 the issue with Johnson, you then have the stuff with Waid,
11 you then have the stuff with Mandel.

12 It's not enough for me to say, you know what,
13 yeah, I think I need to switch my opinion. I agree that
14 it is -- it gives me greater contemplation to that, but
15 not enough for me to definitively move off of it at this
16 point.

17 Q Okay. Well, knowing what you've heard about
18 Mark Johnson's testimony where he testified that the
19 reduction in force had absolutely nothing to do with
20 performance issues or production or meeting quota, or
21 anything like that, that it was solely a reduction of
22 force, and it didn't even come from him, it came from a
23 higher chain of command. Wouldn't you agree that just
24 knowing that information alone would place him in your
25 Profile A, which characterizes his departure from Phillips

1 Healthcare as an unfortunate personnel event
2 completely unrelated to the March 2011 injury? It
3 discounts a potential impact of any adverse functional
4 deficits attributable to the accident and points to his
5 length of employment at Phillips as support of such
6 circumstances?

7 A It could potentially move it towards that,
8 that certainly would be a potential impact of that
9 information. Whether or not it is the definitive
10 outcome --

11 Q But you'll agree that if you assume
12 Mr. Johnson's testimony to be accurate, it would place him
13 within Profile A?

14 A As a sole directive variable, exclusive of the
15 other information; yes.

16 Q But within Profile A, you haven't mentioned
17 any other information that would come into play. You just
18 discuss the characterization of his termination and then
19 the impact of that. I mean I'm just reading your report.
20 It states that if his termination is characterized as an
21 unfortunate personnel event, then his capacity to access
22 the open labor market and earn a wage commiserate with his
23 past employment would not be impacted by the accident.

24 A That's correct. And you asked me would the
25 information -- or would the opinions and statements,

1 whatever documents Dr. Johnson -- I keep calling
2 him "Dr. Johnson" -- Mr. Johnson, move from the Profile A,
3 and I would say, yes, if you are using that as the sole
4 directive variable. But keep in mind since then you've
5 had additional information that's come to light, meaning
6 Dr. Mandel's deposition, you've got what Dr. Waid has
7 said, in addition to what Mr. Adickes has set forth,
8 because that information wasn't available at the time that
9 that report was written.

10 Q But when you wrote this report, you relied
11 solely on the information that Mr. Adickes had given to
12 you with regard to his cognitive abilities and you
13 acknowledged that he believed that he had cognitive
14 disabilities as a result of his work-related accident?

15 A Uh-huh.

16 Q But even knowing that, that never played a
17 part in Profile A?

18 A I'm not following you.

19 Q Would you agree that in the Profile A that
20 you've created here for consideration, you look as to the
21 characterization of his departure from Phillips
22 Healthcare, and based on whether that is related to his
23 work-related injury or not related to his work-related
24 injury is the determining factor of whether the demise of
25 his residual earning capacity is related to his work

1 injury?

2 A Excuse me? I'm sorry.

3 Q The only factor you look at in Profile A to
4 determine whether any demise of his residual earning
5 capacity is related to his work injury is whether his
6 termination was a result of the work injury?

7 A What I say in Profile A is that he was RIF'd
8 unrelated to issues associated with his performance or the
9 head injury or impact, that's what Profile A says. And it
10 makes the point that if you assume those to be the
11 circumstances, this is the type of outcome you have.

12 You have asked me if I applied Dr. Johnson --
13 Mr. Johnson's statements to that would that not support
14 Profile A? And I've said yes, if you are utilizing
15 information Mr. Johnson as the sole directive variable. I
16 am not making a determination, an outcome of Profile A,
17 that considers Mr. Johnson's statement, as well as the
18 evidence as a whole.

19 I am qualifying, unfortunately, my answer to
20 you by saying, yes, if you consider that to be the
21 directive compelling and definitive evidence with respect
22 to that issue, then yes. I mean that's --

23 Q Well, I'm just basing it on when you created
24 Profile A, you used that as the only directive and
25 definitive factor, was whether it was a RIF or not?

1 A That's correct.

2 Q So now you're changing your opinion as to what
3 Profile A should say? Are you adding additional factors?

4 A No; I am not.

5 Q Okay.

6 A I'm responding to your question and making
7 sure that my response is specific to the issue that framed
8 your question.

9 Q Are you aware that in 2011 which was actually,
10 you know, the date of accident, he missed two months
11 during that period of time. He still almost made his
12 quota. In fact, he actually made over the quota of what
13 would have been prorated?

14 A I know that he did pretty well for being out
15 that chunk of time.

16 Q Yes. Prorated he should have made 84 percent
17 of his quota and he made 87 percent of his quota. So we
18 can agree that that indicates that he was performing
19 pretty well in 2011, the year of his accident?

20 A That's hard to say because I'm not sure to
21 what progression of how much work was front-loaded, how
22 much work was in place. If you take that as a percentage
23 and you factor just that percentage and don't dive deep
24 into it, yes. But you know if you look at that
25 performance appraisal, he's given a little bit of leeway

1 within those documents.

2 Q You're aware that in 2012 out of 11 on his
3 team he ranked number fifth -- number 5 -- in performance?

4 A I remember reading that; yes.

5 Q So he did very well comparatively to his team;
6 correct?

7 A Well, I don't know if very well is out of 11
8 and 5, if you consider that very well. But he was ranked
9 where he was ranked.

10 Q It's higher than average?

11 A If he did higher than average, then so be it.

12 Q And it looks like in your report there was an
13 analysis of -- I just saw two analyses of jobs: It looks
14 like one in North Carolina and one in South Carolina. And
15 it looks like you only really discussed these within the
16 third profile or Profile C. Would you agree that these
17 reports indicate that there are two suitable jobs that he
18 can perform: One in South Carolina and one in North
19 Carolina?

20 A There is no job analysis in that record.

21 Q So what are these wage --

22 A What are you referring to?

23 Q South Carolina OES Wage data.

24 A Those are statistical data citations, wage
25 data citations. And they do correlate to Profile C, if

1 I'm thinking about the same thing you're thinking
2 about. Let me look at what you're looking at.

3 Yes; they do not represent a job analysis.

4 Q So you didn't require any job analysis?

5 A No, ma'am.

6 Q Why is that?

7 A It's not necessary.

8 Q Why would it not be necessary? Isn't that --
9 as a vocational evaluator, aren't you determining whether
10 there are other suitable jobs of higher wages that he can
11 or cannot perform?

12 A Yes. But there was no need for a job analysis
13 in this case, given what my impression and opinion was.

14 Q And that impression and opinion was that he
15 fell under Profile B, that there was no need?

16 A That's correct.

17 Q So you never looked at the state of South
18 Carolina to determine whether there were other suitable
19 jobs that he could perform and make the same or higher
20 wages?

21 A I did within Profile C, but did it through a
22 generic and general term, process. I didn't do it within
23 the concept of a labor market survey, which I think is
24 more what you're talking about as opposed to a job
25 analysis. Semantically, you're mixing the two. A job

1 analysis -- well, no. It's within Profile C.

2 Excuse me.

3 Q I understand that, semantically, I'm referring
4 to a labor market survey. I just don't understand why
5 that wasn't performed.

6 A It was performed within the concept of Profile
7 C, at a very low level.

8 Q So what does this data that you have compiled,
9 what does that show?

10 A These are statistical wages parameters for
11 individuals in the sales area, inclusive of both South
12 Carolina statistical data and North Carolina statistical
13 data.

14 Q So the annual salary of someone within his
15 role in South Carolina is \$67,000?

16 A Are you looking at South Carolina or North
17 Carolina?

18 Q South Carolina.

19 A No, not within his job, within a general --
20 what's called a consolation or role of various sales
21 professions, not his specific job.

22 Q Couldn't this have been narrowed down to be
23 more reflective of his specific job and skills?

24 A From a statistical perspective; no. You have
25 roll ups. From a labor market survey, you could do that.

1 Q So if this isn't reflective of his
2 skills and his position, what good is it?

3 A It's reflective of Profile C --

4 Q If under Profile C --

5 A -- which basically --

6 Q -- you're saying that he would be capable of
7 performing many occupations, but, really, only earning
8 that wage. Isn't that actually inaccurate if a labor
9 market survey could have proven that, with his higher
10 skills and the positions he's had, it could have reflected
11 a higher salary?

12 A It's not inaccurate; it's restricted to the
13 statistical information that's cited. Let me tell you
14 something about labor market surveys just to address it.
15 All right? Labor market surveys are a very dangerous
16 process. They generally tend to be very handpicked based
17 upon some type of presentation within the context of the
18 evidence. You never know from one day to another day
19 whether an exact labor market survey is going to represent
20 what is available into the future. It generally is a
21 representation of what's there at the current time.

22 So you could have something come up in a labor
23 market survey that highly understates an earning capacity
24 and you could have one that highly-overstates an earning
25 capacity. And it might just be a timing incident of event

1 that at that point you are looking at data and
2 this is what you have, okay, in terms of what's open,
3 what's hiring.

4 Now you can do secondary labor market surveys
5 where you are just defining wage parameters. But believe
6 it or not, statistically, this stuff tends to be pretty
7 darn accurate because it's smoothed out with an extensive
8 amount of samples. And so you have to be very careful
9 about a direct reference to a labor market survey without
10 some statistical data to provide a -- a -- a reasonable
11 foundation or a reasonable point of reference. I mean --

12 you know, for example -- I'll give you an
13 example with attorneys. You know, there are attorneys,
14 depending on what they make for the year, the type of
15 cases they have, they might do great. There might be
16 someone who is a second-level State attorney who's making
17 \$47,000. The scope and breadth of earnings is
18 significant. The same for truck drivers; the same for
19 sales people.

20 So as a general rule of thumb, to maintain a
21 conservative approach, the statistical data is generally
22 most reliable.

23 Q But how do I know what certain factors you put
24 in to get the statistical data? Is this just a sales
25 representative?

1 A This is basically built off the Bureau
2 of Labor Statistics and their wage research processing and
3 you can put in a job title that's generally representative
4 of the area and it will give you what prevailing wages
5 are.

6 Q What job title did you put in?

7 A Oh, this would be a sales representative,
8 wholesale, technical, scientific products, all right,
9 which would fall -- which medical devices would fall
10 under. It doesn't represent the highest; it doesn't
11 represent the lowest.

12 Q It looks like, in your report, Mr. Adickes had
13 informed you that at Phillips Healthcare he earned \$90,000
14 base salary there?

15 A I can't remember what it was. I had what I
16 think his average weekly wage was. But if that's so, I
17 don't doubt that that makes sense.

18 Q Would you be surprised to know that his
19 average wage was actually \$80,000 -- or, I'm sorry -- his
20 base salary was \$80,000?

21 A It wouldn't surprise me, one way or the other.

22 Q So now I'm just focused on the second part of
23 your consideration, which was that Mr. Adickes continues
24 to experience level functional compromise that precludes
25 his ability to return to work -- or return to such work, I

1 should say. You already stated in your report,
2 the presence or absence of cognitive difficulties is of
3 great importance with respect to his employability and
4 you'll agree that the best way to test cognitive abilities
5 or inabilities is through a neuropsych eval.?

6 A I'm sorry?

7 Q The best way to test cognitive abilities or
8 inabilities is through a neuropsych evaluation?

9 A It's the best way we have, but I know of no
10 other than performance-based assessments. But, yes; I
11 think that's a fair statement.

12 Q And that's why in your report you actually
13 recommended that one be performed?

14 A That's correct.

15 Q And also it looks like you've had an
16 opportunity to review the report prepared by Dr. Randy
17 Waid?

18 A Yes, ma'am.

19 Q Are you familiar with Dr. Waid?

20 A I am.

21 Q What's your opinion with regard to his
22 reputation?

23 A I have no opinion concerning his reputation,
24 ma'am.

25 Q Have you seen a lot of his reports?

1 A I've seen plenty of his reports.

2 Q Have you had any reason to disagree with any
3 of his opinions?

4 A No. I mean he's a neuropsychologist; I'm
5 vocational expert.

6 Q So you would defer to him when it comes to an
7 analysis of Mr. Adickes' neuropsychological abilities?

8 A Yes, ma'am.

9 Q Okay. This is a lengthy report. I'm not
10 going to go through every page, but I assume that you read
11 all nine pages of it?

12 A I have. I do not have it committed to memory,
13 but I certainly read it.

14 Q I just want to hit some of the high notes.
15 There's some main categories that he tested, such as
16 language functions?

17 A Yes, ma'am.

18 Q Are you aware that he found there was no
19 evidence of language dysfunction?

20 A Yes, ma'am.

21 Q And he tested sensory perceptual/motor
22 functioning and he found no imperceptions or suppressions
23 affecting his tactile, auditory, or visual modalities?

24 A Are you reading from a specific location or
25 are you just generalizing?

1 Q Well, I'm generalizing what he has
2 under a paragraph that states Sensory Perceptual/Motor
3 Functioning.

4 A Okay. What page of his report are you on?
5 Okay. I see; it's page five. Failed to reveal any
6 imperceptions or suppressions affecting tactile, auditory.
7 Yes, ma'am.

8 Q And on that same page under Attention/Memory
9 Functioning, would you agree that Dr. Waid noted that
10 Mr. Adickes informed him that he was concerned about a
11 decreased capacity for sustaining attention and a slower
12 processing speed, but Dr. Waid's evaluation determined
13 that he was well-oriented, alert and able to register
14 information?

15 A Yes, ma'am.

16 Q And that he performed with an average range of
17 the memory scale?

18 A Where are you reading now, or where are you
19 calling from?

20 Q The third sentence.

21 A Of?

22 MR. SMITH: What page?

23 BY MS. PAYNE:

24 Q Attention/Memory Functioning, page five.

25 A Oh. You're talking about the Wechsler Memory

1 Scale?

2 Q The Wechsler Memory Scale.

3 A Okay, yes. Okay. Yes, ma'am.

4 Q It looks like earlier you testified as to the
5 one test that kind of stood out in your mind was this
6 Stroop Test?

7 A That's correct.

8 Q But we can agree that it noted that he
9 revealed average processing for word and color stimuli?

10 A That's what it says; yes, ma'am.

11 Q And just slower impaired performance on the
12 Divided Attention Test?

13 A Just slower impaired? It says demonstrated
14 slow/impaired, not just slow impaired. Demonstrated
15 slow/impaired performance on the Stroop Divided Attention
16 Test; yes.

17 Q Right. And that he performed efficiently on
18 the Brief Test of Attention?

19 A Yes, ma'am.

20 Q And he performed well within the average range
21 on attentional tests demanding discrimination of rhythmic
22 sounds, speech sounds and matching them to their phonemes?
23 Do you agree with that?

24 A Yes.

25 Q And Mr. Waid also administered the Paced

1 Auditory Serial Addition Test which measures
2 information processing speed and attentional regulation?

3 A Yes, ma'am.

4 Q Would you agree that the test performance
5 revealed a good initial performance with only mild
6 decrements in his performance on Trials 2 and 3, which
7 were more rapid?

8 A Yes, ma'am.

9 Q So there was only a mild issue with his
10 information processing speed and attentional regulation?

11 A With respect to Trials 2 and 3; yes.

12 Q Yes. And his total score on the Paced
13 Auditory Serial Addition Test placed him in the high
14 average range for an individual his age and educational
15 level?

16 A I see that, yes, ma'am.

17 Q So you would agree that just based on those
18 tests alone, that Dr. Waid -- or based on those tests
19 alone, you would agree that Mr. Adickes doesn't have any
20 sort of deficit when it comes to any attention or
21 processing speeds based on an individual of his age and
22 educational level?

23 A I wouldn't agree to that as a global
24 statement. He falls within the cumulative norms, in the
25 high average range. But that he has none is not

1 necessarily, in my opinion, consistent with the
2 statements cited, I mean.

3 Q You'll agree that an individual that falls
4 within the high average range is able to function well in
5 society?

6 A I don't know if functioning well in society is
7 an exact correlation with that set of circumstances. I
8 mean that's just an expansive statement there. I'm sure
9 that people that score like this that are great that don't
10 function well in society. I'm not trying to be a pain,
11 but I mean the statement of functioning well in society in
12 reference to these things, that's a little bit of a --

13 Q Well, would you agree that falling in a high
14 average range for his age and educational level when it
15 comes to information processing speed and attentional
16 regulation doesn't indicate any sort of cognitive
17 deficiencies that would impact his performance at work?

18 A I'm not so sure I would agree with that,
19 either. I would say he's got a high average, high range,
20 was at high average range with a T score of 59, on the
21 PASAT, but that there are -- if you drill down they are
22 very subtle, perhaps subtle, perhaps not subtle.

23 This is one of the concerns I have with these
24 circumstances. I'm not sure to what point some of these
25 individual citations of impaired performance or lower

1 performance. I'm not sure to what degree they
2 represent any functional manifestation. So in this
3 circumstance, I would agree that he got the test scores
4 that he got and that some are suggesting that he has
5 capacities and is capable without deficits and impairments
6 in those areas, and that some of the subtests suggest he
7 has a weakness or perhaps a deficit.

8 And I use the term "weakness" or "deficit,"
9 ma'am, because I don't know if it is a weakness in his
10 cognitive functioning, in the way he analyzes, or if it
11 represents a deficit derived from impairment. I don't
12 know.

13 Q Would you agree that his performance on tests
14 that assessed his immediate memory was in the high average
15 range? That's on page six, second paragraph. And he was
16 superior when it came to delayed memory tests?

17 A Yes, ma'am; I agree that's what that says.

18 Q And then Dr. Waid tested the visual spatial
19 and constructional functions and found no evidence of
20 visual inattention or neglect processes, nor was there
21 evidence of constructional dyspraxia?

22 A That's correct.

23 Q He also tested his executive and higher
24 Reasoning Abilities and found that Mr. Adickes performed
25 efficiently on the verbal and nonverbal tests assessing

1 reasoning and problem-solving abilities?

2 A Okay. As you stated that -- where are you
3 now?

4 Q I'm on the --

5 A The section at the bottom of page six? Okay.

6 Q Seven. Well, it's the bottom of page six onto
7 page seven.

8 A Yes, ma'am.

9 Q And he administered the Wechsler Adult
10 Intelligence Scale Test and classified his intellectual
11 functioning to be in the high average range compared to
12 age-related peers?

13 A Yes, ma'am.

14 Q Okay. He also tested his emotional/behavioral
15 functioning?

16 A You're at the bottom? Yes, ma'am.

17 Q And found it --

18 A I don't know if he -- did he -- yes. He did
19 give a Personality Assessment Inventory; yes, ma'am.

20 Q And he found that Mr. Adickes responded in a
21 defensive nature?

22 A Yes, ma'am. I see that. He's somewhat
23 defensive in his responding.

24 Q Okay. So Dr. Waid summarizes all of his
25 findings and, essentially, determines that the neuropsych

1 evaluation provided favorable results and that
2 Mr. Adickes functioned in a high average range of
3 intellectual abilities. Would you agree?

4 A Yes, ma'am.

5 Q And he noted that even though he complains of
6 forgetfulness in day-to-day pursuits, the assessment of
7 anterograde memory generally revealed intact learning and
8 memory as well as an efficient ability to retain and
9 recall information?

10 A Generally revealed intact immediate
11 learning/memory as well as efficient ability to retain and
12 recall information once it's effectively encoded/learned;
13 yes, ma'am.

14 Q Okay. And he also noted that Mr. Adickes was
15 generally able to meet the demands of higher reasoning and
16 problem-solving tasks?

17 A Yes.

18 Q So how is it that, based on Dr. Waid's summary
19 where he essentially performed all of these tests and
20 found Mr. Adickes to be very high functioning when it
21 comes to his neuropsychological capabilities, how is it
22 that your takeaway from this report is that he's got
23 deficits?

24 A Because he cited them. He said certainly, in
25 day-to-day pursuits, he likely experiences episodic

1 forgetfulness due to the interfering effects of
2 attention/executive difficulties and headaches.

3 Q But you will agree that he didn't -- there is
4 no test to perform on complaints of forgetfulness?

5 A There is no test? Apparently, he did test
6 him.

7 Q He tested forgetfulness?

8 A On issues of memory.

9 Q And he found that --

10 A Semantically, I'm not sure.

11 Q -- the tests of -- the memory tests revealed
12 intact immediate learning/memory as well as an efficient
13 ability to retain and recall information once it is
14 effectively learned?

15 A Yes. I agree.

16 Q So he found that his memory was intact?

17 A Right. I mean, yes; he said what he said with
18 respect to the interfering effect of attention/executive
19 difficulties.

20 Q I believe that what he stated is even though
21 Mr. Adickes complains of forgetfulness, that his findings
22 with regard to the memory show otherwise.

23 A I agree. And further up on page eight, the
24 third paragraph, he basically says he's got -- mild
25 executive dysfunction appears to be present potentially

1 affecting both cognitive and emotional demands.

2 Q I'm sorry; where are you?

3 A Let's see, the third paragraph from the
4 bottom, the very last sentence in that paragraph, he says
5 he has mild executive dysfunction appears to be present
6 potentially affecting both cognitive and emotional
7 demands.

8 Q So rather than taking this report in a
9 whole -- or as a whole, you are kind of honing in on the
10 one line that discussed potential mild executive
11 dysfunction?

12 A Actually, I'm taking the report as a whole and
13 addressing those issues. Dr. Waid is clearly indicating
14 that he has some degree of problem in terms of executive
15 dysfunction and some issues with attention and executive
16 difficulties. According to the testing, he tests great in
17 a number of areas and that he didn't pick up the
18 sensitivity, didn't pick up on any significant dysfunction
19 in some areas.

20 But this is what his general conclusion was.
21 I think there is some stuff that needs to be drilled out
22 down here. Again, weakness versus deficit due to
23 impairment.

24 Q So your reading of this report is that
25 Dr. Waid has determined him to be impaired?

1 A Yes. And, generally -- but I would
2 consider that from my impression, appears to be relatively
3 mild in nature. But I would certainly defer to Dr. Waid,
4 as anyone would expect that I would, as to the
5 quantification thereof.

6 Q Well, when Dr. Waid states here that
7 Mr. Adickes is generally able to meet demands of higher
8 reasoning/problem-solving tests, doesn't that indicate to
9 you that there are no cognitive disabilities with regard
10 to problem solving and higher reasoning that would affect
11 his employability?

12 A Not necessarily. I mean he met the demands of
13 higher reasoning/problem solving tests. If that is your
14 only measure of employability and in those specific two
15 domains, then yes. Keep in mind the guy is working. It's
16 not like he's not working.

17 Q Right. But if you're referring to Dr. Waid,
18 Dr. Waid found that he was -- Mr. Adickes was able to meet
19 the demands of higher reasoning/problem-solving tests. He
20 was functioning at a high average range of intellectual
21 abilities. The neuropsychological evaluation provided
22 favorable results. The assessment of his memory revealed
23 that he had intact immediate memory and he was able to
24 retain information. How can you look at all of those and
25 state that he has any sort of disability which could

1 affect his employability?

2 A Because of what else Dr. Waid has stated.

3 Q Because of the one sentence that states mild
4 executive dysfunction?

5 A Well, it's not the one sentence. There's
6 additional sentences, as well. I think that for the most
7 part he has a pretty decent neuropsych. I mean he's got
8 good tests and demonstrates good functioning in a number
9 of areas.

10 Q Well, you would agree that he --

11 A He has these --

12 Q -- actually has favorable neuro -- if you're
13 going to defer to Dr. Waid, it's actually a favorable
14 neuropsych --

15 A Yes.

16 Q -- evaluation?

17 A Yes.

18 Q Okay. We can agree that the findings of
19 Dr. Waid's neuropsychological evaluation actually
20 contradicts the subjective complaints relayed to you by
21 Mr. Adickes about his ability to function at work?

22 A Possibly, and possibly not. It's hard to
23 answer that question right now based upon the evidence in
24 the record.

25 Q What other evidence would you need?

1 A I would like to see a little more
2 drill-down on some of the deficits. Again, as I have
3 said, determine is it a deficit due to impairment or is it
4 a general weakness.

5 Q How would that change your opinion?

6 A It could be significantly changing. You know,
7 one of the things about neuropsychs is sometimes you don't
8 know if you're assessing a general temperamental or a
9 cognitive weakness that a person possesses or doesn't
10 possess versus an impairment in cognitive functioning.

11 A A perfect example is when I administer the
12 Wide Range Intelligence Test, there is a shape thing where
13 you have to put shapes together, okay, to form a picture.
14 I can't do that. Maybe if my life depended on it I would
15 do it, but I'm very poor in that area. All right. But I
16 don't have a cognitive impairment; I have a weakness in
17 visual spatial processing to form things. That's why I
18 can't put that type of freaking molding up, because I cut
19 them wrong every dang time. Okay?

20 Q So that would be important. All right? And
21 it could --

22 Q How would that be important?

23 A Because I would need to know what's a weakness
24 and what's a cognitive impairment. A cognitive impairment
25 of a deficit arising from his head injury would be

1 something that would potentially be novel, which
2 could potentially support deviation in functional status.
3 If it's simply just a weakness, it's not
4 impairment-driven. He's probably had that weakness all
5 his life and it may be of limited relevance.

6 Q Is this kind of like how within his medical
7 records he informs his doctors on few occasions that he's
8 forgetful and he, you know, leaves things at home, that he
9 just -- he believes it is just due to his age? That would
10 be like a general weakness?

11 A No. That's a totally different set of
12 circumstances. You're dealing with self-reporting there
13 and physicians. There's already been some connotation to
14 that. I'm talking about an inherent weakness in capacity,
15 an ability deficit versus an acquired deficit. I'm not
16 talking about what he's reporting.

17 The other thing is, and what's more important,
18 is the correlation of deficits to the impairments and he
19 correlates them to them. But there's a couple areas in
20 here that I would be very interested in; right.

21 Here's the thing, too, that you have to know
22 about. You know, working with the amount of head injury
23 people I've worked with, sometimes the higher level of
24 people you would think that them missing a small
25 percentage can sometimes have much greater implications

1 than lower level people missing a greater
2 percentage or having a greater percentage of deficit. You
3 just never know with head injuries how it's going to lay
4 out.

5 But you're not familiar -- I don't know if you
6 have ever heard of what's called the shaken sense of self.
7 That's the concept of the basis of that mild traumatic
8 brain injury can affect multiple domains in a person's
9 life and it has a constellation effect that's greater.
10 And I'm not saying that that guy has this, but there is a
11 lot of different things to sort of look at that I would
12 want to know a little bit more.

13 But sometimes even with people who have mild
14 head injuries the impact can be greater for higher level
15 involvement in areas that may not necessarily be evaluated
16 neuro-psychologically in terms of, for example, I've got
17 nothing in here that talks about time management or
18 fatigue, or persistence of pace.

19 Granted, he did well. I'm not trying to make
20 him have greater dysfunction than what he has. He did
21 well on the neuropsych and he should be happy about that,
22 all right, but there's a lot more that needs to be drilled
23 down out of this stuff.

24 Q So you think that those tests weren't
25 sufficient?

1 A No; I didn't say that.

2 Q So you haven't seen any indication of
3 Mr. Adickes being unable to secure any jobs following his
4 termination from Phillips, related to his cognitive
5 abilities or disabilities?

6 A I have no specific evidence indicating that he
7 can't secure a job due to his cognitive abilities or
8 limitations.

9 Q And you don't have any evidence that -- I
10 guess evidence or a statistical report to prove that were
11 it not for his cognitive issues Mr. Adickes would be
12 earning significantly more money?

13 A I'm not so sure I understood your question.
14 Can you state it as it was or --

15 Q You don't have any evidence to prove that,
16 were it not for Mr. Adickes' cognitive issues, he would be
17 earning substantially higher wages?

18 A I think there was some evidence that at
19 present would support the dimension in his wages due to
20 some cognitive dysfunction.

21 Q What was that evidence?

22 A Just what we talked about with respect to
23 Dr. Waid's opinion. I think that there is some reasonable
24 correlation present as to some of his cognitive
25 dysfunction and potential likely impact on higher level

1 occupations and in turn higher level employment.

2 Q Where is the evidence that he would be making
3 more money?

4 A I'm sorry. We must be -- I must be confused.

5 Q I understand that your reading of Dr. Waid's
6 report is that he is -- has cognitive deficits and that
7 you are using that to state that he, I guess, should be
8 able to earn significantly-higher wages?

9 A That's not what I'm stating.

10 Q Well, my question is, where is the evidence to
11 prove that he is now earning lesser wages than he would be
12 earning if it weren't for his cognitive issues?

13 A Well, to a certain degree, in his demonstrated
14 work activity.

15 Q So you're just basing that on his base salary
16 at VRI?

17 A To a certain degree; yes. Also, to the
18 evidence within the record that suggests consistency with
19 the pattern of dysfunction in terms of the nature of his
20 injury and how it impacts him.

21 Q What about the fact that he continued to work
22 for Phillips until 2014 and earning the same wages as he
23 was earning pre-injury? Where does that come into play?

24 A That's something that I did consider and is an
25 important variable you know that he continues to persist

1 in employment. I think at that point you just
2 have to sort of look at his job performance from that
3 point forward after the injury and see that there are some
4 deficits documented in his job performance for the
5 constellation of jobs he was doing or the constellation of
6 job tasks that he was charged with accomplishing and
7 doing. It appears that he has a functional demise.

8 Q You'll agree that he also had job performance
9 issues before his injury?

10 A That is documented; yes. And the interesting
11 thing though -- and you know, I never knew -- I was
12 unaware that the concept of the job that he identified as
13 a promotion is depicted within Mr. Johnson as being almost
14 a -- not necessarily a demotion, but a reduction in tasks
15 that he is required to accomplish because of the
16 sophistication of who he is selling to and what he is
17 doing.

18 To me, that's sort of interesting that he then
19 had further demise after that, meaning after they put him
20 in an easier job per their arguments, but he then had
21 demise after that. There's potential for that to be
22 interpreted and implied as -- you know, that there is a
23 greater degree of dysfunction that persisted.

24 Q You would agree that could also be interpreted
25 or implied as he's just bad employee?

1 A It's certainly possible.

2 Q Based on everything that we've discussed up
3 until this point, wouldn't you agree that the information
4 you have now had an opportunity to review indicates that
5 -- or I guess your testimony earlier was that Mr. Adickes
6 doesn't necessarily completely fall within this Profile B,
7 as you stated in your report?

8 A That wasn't my testimony, previously. And
9 that's not my opinion presently, either.

10 Q Wouldn't you agree that, based on information
11 you have been presented with today, there is a likelihood
12 that Mr. Adickes could also or could fall into Profile A?

13 A There is a possibility of it; certainly.

14 Q Wouldn't you agree that that likelihood is
15 greater than him falling in Profile B?

16 A At this point; no.

17 Q Nothing further.

18 E-X-A-M-I-N-A-T-I-O-N

19 BY MR. SMITH:

20 Q Mr. Leonard, a few questions for you.

21 When you evaluated Mr. Adickes, one of the
22 things that you recommended was a neuropsychological
23 evaluation; is that correct?

24 A Yes, sir.

25 Q Why did you recommend that for him?

1 A I wanted to have some degree of
2 objective verification or potential of his subjective
3 complaints within the context of the interview and job
4 performance.

5 Q Was there something you saw in testing him
6 that made you go that way, as well?

7 A Well, there was one thing in that he had some
8 fatigue when he was dealing with the last bit of testing
9 that we did with him, which is sometimes an issue of
10 fatigue with head injuries, especially with headaches,
11 post-concussive issues, so I wanted to see how he would do
12 in a more extended regimen of testing. Also, it's --
13 quite frankly --

14 I mean anyone that has a head injury, in my
15 opinion, should have a neuropsych at one point or another
16 just to have a baseline. The concept also for
17 Mr. Adickes is, he needs to know where he's at with
18 respect to his functioning so that he can accommodate it
19 if possible.

20 Q What is the effect of a high IQ on neuropsych
21 testing?

22 A I can only tell you what it is on the type of
23 testing that I do. I cannot speak for a
24 neuropsychologist. But generally, the higher the IQ is,
25 the harder it is to reveal deficits in testing.

1 Q Does that mean that intelligence masks
2 some of the results?

3 A Yes, in general. The norm group is a sample
4 of the population. All right? It's not -- if he's norm,
5 his tests are norm'd on individuals that fall into a
6 sample which include a wide range of general intelligence
7 capabilities. All right? So I don't know where he would
8 compare to -- I don't even know --

9 This would be something you have to ask
10 Dr. Waid or something, if there are even norms for a high
11 average individual. I don't think there are. I mean
12 there might be. And this is what I said earlier, that one
13 of the biggest issues with higher functioning individuals,
14 sometimes subtle limitations that aren't as pronounced can
15 have more magnified circumstances.

16 And I'm not saying that's definitively
17 happening in this case, I'm just saying that's what you
18 have to be concerned about.

19 Q There are certain pieces of information that
20 you now have that you did not have at the time that you
21 performed your evaluation and issued your report; is that
22 correct?

23 A That's correct.

24 Q One of those is the neuropsychological
25 testing?

- 1 A Yes, sir.
- 2 Q I know there is a deposition of Dr. Mandel?
- 3 A That's correct.
- 4 Q Another are the performance appraisals?
- 5 A That's correct.
- 6 Q And another is an email that was sent by, I
- 7 believe, Tracey DeBruin, to Mr. Adickes, about a year post
- 8 injury?
- 9 A I thought it was -- was it Tracey DeBruin or
- 10 was it Mr. Johnson?
- 11 Q I think it was Tracey DeBruin.
- 12 A No; it is Tracey. It was sent to Mr. Johnson.
- 13 It wasn't sent to Mr. Adickes.
- 14 Q I'm sorry. You are correct.
- 15 A And then it was given to -- it appears that it
- 16 was then given to Barry.
- 17 Q According to the email, it says it was sent to
- 18 Mark Johnson. But it's titled to Barry; is that correct?
- 19 A Yes, sir.
- 20 Q What did you take from that email?
- 21 A That he's having some problems with his job
- 22 performance as of March 9th, 2012. Whether or not when
- 23 these things -- these things occurred to be happening in
- 24 2012, but.
- 25 Q Okay.

1 There it is. I knew I read it. In
2 2010, on a PIP for lack of performance. Excuse me.
3 That's where I saw it from.

4 BY MR. SMITH:

5 Q All right. Now following that sentence, does
6 it indicate that he was exhibiting a lack of focus?

7 A Yes, sir. On time management.

8 Q Okay. And then does it go on to the next
9 sentence and talk about problems with focus?

10 A Yes. It says, My concern about your time
11 management and/or -- and/or focus.

12 Q Okay. And then you see three little bullet
13 points. The second one; does it deal with poor or slow
14 follow-up?

15 MS. PAYNE: I'm going to object. Leading..

16 A What bullet point are you looking at --

17 BY MR. SMITH:

18 Q The second one.

19 A The first one? Yes. Well, it says that. I
20 just want to make sure I read it. Again, I'm not trying
21 to be difficult, Mr. Smith.

22 Q Yes, sir.

23 A I want to make sure when I answer the question
24 that I have a proper understanding. It says the statement
25 I received -- I continue to receive calls from fellow

1 employees and customers regarding your poor or
2 slow follow-up.

3 Q Okay. And then in the -- what is the problem,
4 if any, identified in the first sentence of the last
5 paragraph?

6 A It says as a stand-alone these items may not
7 seem important, but collectively, they point to a
8 potential -- potential, underlined -- problem in both
9 focus as well as territory management.

10 Q Now you were asked to give kind of -- not all
11 of the testing, but some of the testing that Dr. Waid did.
12 So let me get you to go to -- to get to his report again.

13 A Give me a minute.

14 Q Sure.

15 A Yes, sir.

16 Q On page five, did it indicate whether or not
17 he provided good effort in the report?

18 A Yes. He did a test of TOMM, the Test of
19 Mental Malingerling. And they do something else, which --
20 and I recall that he had good effort. I can't say
21 exactly.

22 Q And with regard to attention and memory
23 functioning, you mentioned earlier the Stroop test. What
24 was the significance of that?

25 A Well, I know how the Stroop works, but I'm not

1 so sure how the Stroop Divided Attention works.
2 But he had slow impaired performance on it. And I'm not
3 sure -- I mean I know how the Stroop -- how the Stroop is
4 administered. I have taken that test before, and I
5 understand it, but I don't know what the subsection of
6 Divided Attention Test is. But it said that it's
7 suggestive of interference and divided attentional
8 capacities.

9 Q Okay. What about the Conner's Continuous
10 Performance Test?

11 A Okay. What about it?

12 Q Did he have difficulties, or does that have
13 any significance to you?

14 A It could, possibly.

15 Q Did it note substantial declines in reaction
16 time?

17 A It says Mr. Adickes' performance on the CPT
18 was substantially affected by the interstimulus interval.
19 Specifically, there was a substantial decline in reaction
20 time when the interstimulus interval was slowed from one
21 second to two or four seconds.

22 Q Does that test, does it deal with attention
23 problems?

24 A Yes. It measures -- yes. I mean that's the
25 focus of it. It's an interesting test. I don't know the

1 in's and out's good enough because I'm not a
2 neuropsychologist.

3 Q Okay.

4 A But just to be -- you know. He did
5 demonstrate good ability to sustain vigilance on the
6 demands of the test. And he had a poor -- he had a poor
7 -- his performance was classified as poor and consistent
8 with potential attentional problems -- with attention
9 problems; excuse me.

10 Q All right. Going down further, the California
11 Verbal Learning Test.

12 A Where are you?

13 Q I'm about just below the middle of the page.
14 It gives the anterograde memory functioning.

15 A Okay.

16 Q What, if anything, does that tell you?

17 MS. PAYNE: I'm just going to object. He's
18 not -- objection as to his testimony. This is not within
19 his realm of expertise. I'm fine with you pointing out
20 what the tests found, but I don't want him to discuss the
21 testing and evaluate the results on his own because he's
22 not an expert in that field.

23 MR. SMITH: Let me rephrase my question.

24 BY MR. SMITH:

25 Q Do you rely on neuropsychological testing in

1 coming up with your opinions and reports?

2 A I rely on the interpretation and the
3 application. I don't independently define the functional
4 parameters, not within the context of a stated opinion. I
5 can do it within the research of the case and the analysis
6 of the problems and looking for consistencies, but to a
7 certain -- to the greater degree, I'm at the disposal of
8 the neuropsychologist as to classify the impressions and
9 the impact of the test results.

10 Q Okay. Without asking you to interpret them,
11 was that test below average?

12 A Where are you reading?

13 Q I'm sorry. The California Verbal Learning
14 Test: Was he below average on recall?

15 A Okay. I don't think that you can say that
16 that whole test is below average because if you look at
17 the top, his total score placed him in the 47th percentile
18 compared to age-related peers, so for his performance on
19 that whole test fell in the 47th percentile. I think he
20 is talking about assessment of learning characteristics,
21 which would be either a subsection or a secondary
22 assessment revealed him to be below average.

23 Q Okay. Got you.

24 A In the recall or recency regions of the word
25 list.

1 Q And I'm not going to make you go
2 through all these. But on the next page, did he have
3 deficits on the Wisconsin Card Sorting Test?

4 A What page are you on? Page seven, down where
5 it says, Wisconsin Card Sorting, there appears to be some
6 problem with the completion of that test. I mean it says
7 that on the Wisconsin Card Sorting Test, Mr. Adickes was
8 observed to readily identify the first correct solution
9 set. Following that, he was unable to methodically
10 generate and discover the correct second solution set.

11 Q All right.

12 A The test results were discontinued.

13 Q And you've already testified regarding your
14 impression of this neuropsychological testing and what it
15 showed. You have also reviewed the deposition I believe
16 from Dr. Mandel; is that correct?

17 A That is correct.

18 Q Do you typically rely on reports and opinions
19 from neurologists with regard to your opinions regarding
20 vocational testing?

21 A Yes. They are formative, in my opinion.

22 Q Okay. Is it your opinion that Dr. Mandel also
23 found that he had a cognitive disorder and deficits?

24 A It is my understanding.

25 MS. PAYNE: Objection. Assumes facts not in

1 evidence.

2 BY MR. SMITH:

3 Q You have also now had an opportunity to review
4 the performance evaluations for a couple of years prior to
5 the accident and a couple of years after the accident; is
6 that correct? Well, at least one year after the accident?

7 A I thought it was into 2013.

8 Q All right.

9 A I don't know.

10 Q And in reviewing the performance evaluations,
11 were those positive performance evaluations prior to the
12 accident?

13 A There were -- in what I had -- what I have
14 reviewed prior to today, which was before looking at that
15 document which is the PIP, there were positive statements
16 and conclusions within those performance appraisals.

17 MS. PAYNE: I just want to object for the
18 record because his question wasn't responsive to your
19 answer -- I mean the response wasn't responsive to your
20 question, because he's only responding with regard to what
21 he was provided with prior to today as opposed to all of
22 the information in its entirety.

23 BY MR. SMITH:

24 Q Now you have been told --

25 MS. PAYNE: Wait.

1 MR. SMITH: Are you through? I'm
2 sorry. I thought you were done.

3 MS. PAYNE: It's an evidentiary deposition, so
4 I'd like you to rephrase the question and have him respond
5 or just respond accurately.

6 MR. SMITH: I'm comfortable with my question
7 and his answer.

8 BY MR. SMITH:

9 Q With regard to Mr. Adickes being placed on a
10 performance improvement plan for 2009, have you reviewed
11 the comments from his manager as to what the problem was
12 in 2009?

13 A Well, I have looked at the document and have
14 reviewed it; yes.

15 Q Okay. And was it economy-related in terms of
16 his sales?

17 A Well, I mean I can't say for 100 percent sure
18 what it is. But there was a connotation that there was a
19 major economic issue present that would appear within
20 the --

21 Q And I'm referring to the People Performance
22 Management Report dated January 2, 2010 for performance
23 review of 2009, when he was placed on the Performance
24 Improvement Plan. Specifically, when it relates to
25 meeting or exceeding the 2009 AOP sales quota in all

1 measured mags, M-A-G-S --

2 A You're referencing Objective One?

3 Q Objective One. What did his supervisor say
4 about his performance at that time?

5 A Given the economic conditions, I think Barry
6 did a decent job versus AOP. I have talked live with
7 Barry to express how critical it is to obtain quota on a
8 more regular basis. Barry had a great December 2009 and I
9 look forward to a great start to 2010. The personal
10 objective was not met.

11 Q When you get to the bottom of the page under
12 Development and the manager's overall reflections -- it
13 says Manager's Reflections.

14 A When you say bottom of the page, you're
15 talking about the bottom of the whole assessment?

16 Q Yes. I'm sorry. The end of the assessment.

17 A Yes, sir.

18 Q Okay. Under Manager's Reflection, what was
19 reported?

20 A It states -- you want me to just read it?
21 Even though Barry did not take any courses outside of his
22 territory due to the financial cutbacks with Phillips and
23 the time-consuming customer facing -- and the
24 time-consuming customer facing issues, I believe there was
25 great development with Barry. This was possibly the

1 toughest year we had all faced due to the
2 recession and cutbacks. Everyone was doing the work of
3 many and in self-producing opportunity which -- new
4 knowledge and development. We have all seen things and
5 learned from them this year that have not happened in many
6 years and we all furthered our knowledge base and
7 development from this.

8 Q Based on what you have learned today, do you
9 know if Barry came out of this Personal Performance Plan?

10 A Yes. It's my understanding that it's
11 referenced in one of these documents that he came out of
12 his PIP plan.

13 Q In general, from what you see in the
14 vocational arena, do employers keep bad employees around
15 for years?

16 A That's a loaded question. You know, I think
17 you just --

18 MS. PAYNE: Objection.

19 A I've just got to defer --

20 MS. PAYNE: Outside of his scope of knowledge.

21 A -- to the personnel manager, with respect to
22 that.

23 BY MR. SMITH:

24 Q All right. Do headaches constitute a barrier
25 to employment?

1 MS. PAYNE: Objection. Leading.

2 A They can.

3 BY MR. SMITH:

4 Q Tell me how, sir.

5 A Primarily, the issue with headaches is task
6 completion, work attendance, and what we call
7 sustainability of persistence and pace. Basically,
8 showing up to work, being available, not missing meetings,
9 being able to complete work days, that type of stuff,
10 without the adverse effects of a headache.

11 Q You've read Dr. Mandel's deposition, and
12 you're aware that Barry, potentially, has to miss two or
13 three days of work every six weeks or so?

14 A That's my understanding; yes. Or that's what
15 he estimated, I believe.

16 Q What impact, if any, would that have on
17 continued or future employment?

18 A The impact varies significantly. It could
19 have a preclusive effect.

20 Q Completely?

21 A Completely. I mean it's -- not in this case
22 do I think that is present because he's had the headaches.
23 And he's not at present been terminated because of them.

24 In general, in general effects it can have a
25 preclusive effect if you have a new job and you miss a

1 certain amount of days and you're on probation
2 and all that type of stuff. It can have a limiting effect
3 in terms of your ability to, you know, attend meetings,
4 completion of tasks on time.

5 Headaches are sort of a wild card. It's hard
6 to figure out definitively how they are going to weight
7 out. I mean everyone has had a headache. Everyone knows
8 what it's like to have one. But there are plenty of
9 people who have significant headaches who continue to
10 work. But there is a potential for that amount of
11 absences to be preclusive. There is a potential for those
12 amount of absences to just be disruptive.

13 Q Okay. What impact, if any, does the use of
14 medications have on employment?

15 A It depends on the side effect and it depends
16 on the employer. Generally speaking -- and this is
17 generally speaking, not employer-by-employer. There are
18 some employers who will not allow certain medicative
19 agents to be used. There are some that it's not a big
20 deal. For me, from a vocational perspective, I am most
21 concerned about the represented side effects of
22 medication, not what it says on the bottle, not what they
23 read on the warning, but what they actually do experience.

24 Q And I guess this kind of goes back to a
25 previous issue. The use of Frova or Imitrex being an

1 injectable that knocks you out for a while; does
2 that have any impact on employment?

3 A In general, it potentially could; yes. I mean
4 you are dealing with removal from the work setting. In
5 Mr. Adickes' case, he related that if he gets into that
6 cycle of a type of headache, he's out of commission at
7 least for one full day and then less functional following
8 in that regime. But keep in mind that headaches are
9 specific to the individual. I mean he definitely have
10 some problems with headaches, but he seems to persevere
11 and push on with it.

12 Q And what impact, in general, if any, does
13 cognitive issues have on performance?

14 A Excuse me?

15 Q I'm sorry. What impact, if any, does
16 cognitive issues such as shown in the report of Dr. Waid,
17 have on employment?

18 A Without speaking specifically with Dr. Waid,
19 first just in general terms, you know, cognitive issues,
20 depending on the level of impairment and severity, may
21 limit the scope of work tasks that a person can be engaged
22 in, all right. With respect to Dr. Waid, he has cited
23 what he has cited and I have referenced it already. The
24 bigger question that obviously remains is to what degree
25 do the deficits that are present represent a level of

1 dysfunction in the manner that Mr. Adickes sets
2 forth.

3 Q Okay. What does the level of dysfunction, in
4 executive dysfunction, as testified by Dr. Mandel, what
5 kind of limits does that place on Mr. Adickes?

6 A That's just more of the coordination. I can't
7 remember exactly what Dr. Mandel said, but with the
8 executive dysfunction in vocational stuff you're looking
9 at merging of tasks and juggling of balls and
10 multitasking, that type of stuff.

11 Q You have issued your report and in that report
12 you came to the conclusion that Mr. Adickes' present
13 employment was -- reflected what you thought his
14 vocational abilities were at this point in time or his
15 residual learning capacity is. Have you heard anything
16 today that's changed that opinion?

17 A No. In a definitive manner, nothing that has
18 firmly moved me away from my initial opinion in this
19 matter. I have heard, read and discussed information that
20 in my opinion both confirms my impression and, you know,
21 there is also some information that if it's interpreted
22 and implied could vary, change my opinion.

23 Right now I don't think the evidence as a
24 total is sufficient enough for me to change my opinion in
25 this matter, though it appeared there is some evidence

1 that I think strongly supports maintaining that
2 opinion. And I think there is some evidence that could be
3 interpreted to potentially sway that opinion.

4 Q A lot of Profile A in your report deals with
5 circumstances of why Mr. Adickes is no longer at Phillips;
6 is that correct?

7 A Yes, sir.

8 Q Let me get you to look at -- let me ask you
9 something different. Let's just take away any reason for
10 termination, whether it's simply a layoff, performance,
11 nonperformance, what have you. Through no fault of his
12 own, he no longer works at Phillips. Okay?

13 Now if you will consider the new evidence that
14 you have, including the neuropsychological evaluation done
15 by Dr. Waid and the deposition of Dr. Mandel, the
16 documented headaches, the documented use of medications
17 and the cognitive issues as testified by Dr. Mandel as
18 shown in Dr. Waid's report. Considering those things on
19 their own regardless of any employment issues, all right,
20 what is your opinion, if any, regarding Mr. Adickes'
21 residual earning capacity?

22 A Let me make sure I'm understanding what you're
23 asking. Are you saying just remove the personnel drama as
24 to what's been asserted, denied or whatever with respect,
25 just take that out?

1 Q Yes, sir.

2 A The business closed yesterday for no fault of
3 anyone's Medicaid fraud or something like that. It's
4 gone.

5 Q Yes.

6 A All right. And then your question then, is?

7 Q Then based on the deposition of Dr. Mandel,
8 what he's indicated in terms of use of medication, the
9 missing work with regard to headaches, the cognitive
10 issues as stated by Dr. Mandel and the report of Dr. Waid,
11 what is your opinion regarding his residual earning
12 capacity?

13 A I would continue to endorse what I have within
14 my report, which would be Profile B, which basically that
15 his current earning capacity is a more than reasonable
16 representation of his access to the labor market and his
17 residual employability and earnings subsequent to the
18 event.

19 Q You were asked about a labor market survey.
20 Did you feel the need to do a labor market survey in this
21 case?

22 A No.

23 Q As a vocational counselor, when somebody is
24 completing a resume, would you advise them to accentuate
25 the negative or accentuate the positive?

1 A Accentuate the positive.

2 Q Thank you, sir, no further questions.

3 MS. PAYNE: I have a few follow-ups.

4 R-E-E-X-A-M-I-N-A-T-I-O-N

5 BY MS. PAYNE:

6 Q There's been some questions about Mr. Adickes
7 possibly needing to miss days of work due to his
8 headaches; is that right?

9 A Yes.

10 Q You'll agree that you haven't spoken to any of
11 his supervisors for his current employment at VRI; right?

12 A That's correct.

13 Q And you haven't spoken with anyone at
14 Phillips?

15 A That's correct.

16 Q And you don't have any sort of documentation
17 of time cards or wage statements as definitive proof that
18 he's missed any days or had any absences due to headaches?

19 A That's correct. In this particular case, I
20 don't think that the headaches are -- I think they are a
21 significant issue for him, but I don't think that they're
22 a preclusive area for him; that's correct.

23 Q In fact, Mr. Adickes never even reported to
24 you that he had to miss significant periods of days a
25 month or for per year due to his headaches; did he?

1 A No. He did report to me that there
2 were days that he was out of commission.

3 Q And that was right after the accident; right?

4 A Well, no; that persists presently. But, you
5 know, his statement is I just deal with it, you know, to
6 that degree.

7 Q He just deals with it by continuing to work?

8 A That's right.

9 Q Right. So he hasn't actually missed any days
10 of employment due to his headaches?

11 A That, I don't know for sure.

12 Q Correct. Okay. Just to go back to -- you had
13 read into the record the performance review from 2009 was
14 completed on January 2nd -- I'm sorry, February -- it's
15 actually February 1st, 2010, regarding how he performed
16 after his performance review. So now I want to hand you
17 this e-mail, which was between -- from his supervisor,
18 sent to him on May 3rd, 2010, which showed his progress in
19 January, February and March of 2010. I want you to take a
20 look at that.

21 A Okay.

22 Q Wouldn't you agree, based on that e-mail, it
23 actually indicates that he was still performing
24 substandard in the first few months of 2010?

25 A All right. Let me just read it. It says I've

1 been reading the Q1 sales number and comparing the
2 PIP that is still in progress. Your Q1 number is in
3 January -- so, yeah, the first three months. Okay.

4 [Reviewing.] What this says is that he is not
5 achieving a percentage. Now I'm not sure what the
6 percentage cutoff. I would suspect -- it says you've only
7 achieved 65 percent only once, which must have gone back
8 into 2009, since it's prior to being in 2010. Okay. And
9 this shows percentages which I would imagine fall below an
10 expected standard for him.

11 Q Okay. So you'll agree that even following the
12 2009 performance review, that there is documentary
13 evidence of continued performance issues with
14 Mr. Adickes?

15 A As of March 2010, that appears to be so.

16 Q When was that email sent to Mr. Adickes?

17 A May 2010.

18 Q Okay. So he was counseled about it at least
19 in May of 2010?

20 A Yes. The numbers that they were referencing
21 were March. But, yes; he was counseled or -- well, I
22 don't know if he was counseled about it. But it does say
23 May, 2010, at the top of the email.

24 Q Okay. And then I just want to point you last
25 to this email that I believe you testified you found to be

1 troubling that was sent from Tracey DeBruin, who
2 is the HR representative, to Mark Johnson, regarding
3 Barry's performance. The email is dated March 9th, 2012.
4 And you read a lot of this email into the record earlier
5 where it notes that he is exhibiting a lack of focus on
6 time management; is that right?

7 A Yes, ma'am.

8 Q I want you to read the first sentence in the
9 second paragraph in its entirety.

10 A The first sentence, "Barry, in 2010, you were
11 on a PIP for lack of performance. I'd like to bring your
12 attention to some concerns that I have" -- that I have --
13 "I have that are resurfacing."

14 Q What does "resurfacing" mean to you?

15 A That would mean coming back to the top.

16 Q Coming back from 2010; right?

17 A In that case it would appear to be the frame
18 of reference; yes.

19 Q So you'll agree that, based on your reading of
20 this email, it indicates that Tracey is informing Barry
21 that he is now suffering from the same performance
22 concerns that he had back in 2010?

23 A I don't know if it says the same performance
24 concerns, but some performance concerns of some type --

25 Q Similar.

1 A -- are resurfacing; yes:

2 Q Okay.

3 A And following; right.

4 Q Based on the information that you have been
5 provided with today, you will agree that his performance
6 before the accident was actually not all favorable
7 performance?

8 A Based upon what you presented, I think that's
9 reasonable.

10 Q That at least within two years, in 2009, he
11 goes on a PIP plan, and then in 2010 he received an email
12 about his being below quota, and then in 2012 the HR
13 representative kind of reminded him of the issues that he
14 had in 2010 that she's bringing back up again in 2012. So
15 you will agree that he definitely had performance issues
16 prior to date of accident?

17 A Based upon the evidence presented, I think
18 that supports some of that; yes.

19 Q Okay.

20 A I mean now I'm -- I'm just going to answer
21 your question yes, meaning in correlation to some of the
22 stuff, the context of the whole performance evaluation
23 with the labor market -- I mean with the economy and
24 whatnot, it appears to me that that's reasonable.

25 Q Okay. So based on everything you've reviewed

1 today and was discussed, you can't state within a
2 reasonable certainty that any diminution in his wages is
3 related to his March 2011 accident; can you?

4 A No; I can. I think at present, within a
5 reasonable degree of vocational certainty, I think that
6 his decrease in his earning capacity is correlated to the
7 accident.

8 MS. PAYNE: No further.

9 MR. SMITH: Just a couple.

10 R-E-E-X-A-M-I-N-A-T-I-O-N

11 BY MR. SMITH:

12 Q You were asked about whether or not you have
13 documented evidence that Barry missed time from work with
14 headaches. You have seen Dr. Mandel's deposition and
15 reports indicating that he will have to miss time from
16 work because of his headaches?

17 A That's correct. In response to the question,
18 I was responding to personnel citations and references.

19 Q And with regard to the email that you reviewed
20 from May 14, 2010 about the performance improvement plan;
21 is it your understanding that Barry successfully came out
22 of that Performance Improvement Plan?

23 A That is my understanding.

24 Q Okay.

25 Thank you, sir. No further questions.

MS. PAYNE: Nothing further.

(The deposition concludes at 12:12 p.m.)

CERTIFICATE OF REPORTER

I, Diane Grubowski, Court Reporter and Notary Public in and for the state of South Carolina, do hereby certify that the aforementioned deposition of JOEL D. LEONARD, CVE, was recorded by me and transcribed through computer-aided transcription by me to the best of my ability.

I FURTHER CERTIFY that the foregoing transcript is a true and correct transcript of the testimony given by the said deponent at the time and place specified.

I FURTHER CERTIFY that I am neither attorney nor counsel for, nor related to nor employed by any of the parties to the action in which this deposition is taken, neither am I financially interested in this action.

IN WITNESS WHEREOF, I have set my hand and seal this 7th day of January, 2015.

Diane Grubowski
Notary Public for South Carolina
My Commission Expires: 12/10/2017

COSA-Carolina Orthopaedic Surgery Associates • 134 Professional Park Dr. ROCK HILL SC 29732-1178

ADICKES, BARRY (id #361770, dob: [REDACTED] 1961)

COSA-Carolina Orthopaedic Surgery Associates • 134 Professional Park Dr. ROCK HILL SC 29732-1178

ADICKES, BARRY (id #361770, dob: [REDACTED] 1961)

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ADICKES, BARRY (id #361770, dob: [REDACTED] 1961)



Carolina Orthopaedic Surgery Associates, P.A.
134 Professional Park Dr
ROCK HILL, SC 29732-1178
Phone: (803) 329-3130, Fax: (803) 329-2811

Date: 10/16/2014

Dear Barry Adickes,

The following is a summary of your visit today. If you have any questions, please contact our office.

Sincerely,

MICHAEL F. HEINIG

Patient Care Summary for Barry Adickes

Most Recent Encounter

10/16/2014 Michael F Heinig: 134 Professional Park Dr, Rock Hill, SC 29732-1178, Ph. (803) 329-3130

Reason for Visit

Back pain, lumbar

The patient states he is here today for low back pain. He states he did alot of yard work the last weekend in August and has had back pain since that time. No xrays have been taken.

Assessment and Plan

The following list includes any diagnoses that were discussed at your visit.

1. Low back pain

• x-ray, lumbar spine

2. Lumbar spondylosis

3. Mechanical low back pain

Discussion Note

Continue his back stretching and strengthening exercises, aspirin, walking if he remains symptomatic 3-4 weeks call for physical therapy. Prednisone dose pack is given

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Plan of Care

Reminders

Imaging

X-ray, Lumbar Spine

10/16/2014

Provider

In-Office Order

Current Medications

Your medical record indicates you are on the following medicine. If this list is not consistent with the medications you are currently taking, or if you are taking additional over-the-counter medicines, please inform your provider.

Name

Prescribed Date

Start Date

Frova 2.5 mg tablet

Take by oral route as needed.

ibuprofen 200 mg tablet

Take 1 tablet(s) every 6 hours by oral route as needed.

Imitrex STATdose Kit Refill 4 mg/0.5 mL subcutaneous cartridge

Inject by subcutaneous route as needed.

Maxalt 10 mg tablet

Take 1 tablet(s) as needed by oral route.

nadolol 20 mg tablet

Take 1 tablet(s) twice a day by oral route.

Medications Administered

None recorded.

Vitals

Height

5 ft 9 in

Weight

191 lbs

BMI

28.2

Lab Results

Date

Name

Result

Description

Status

X-ray, Lumbar Spine

No observation recorded.

Allergies

Please review your allergy list for accuracy. Contact your provider if this list needs to be updated.

Name

Reaction

Severity

Onset

Cortisone

Other

Mild to Moderate

NKDA

Problems

Name

Status

Onset Date

Source

APA 1002

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Name	Status	Onset Date	Source
Derangement of Knee	Active	07/24/2013	Encounter
Knee Pain	Active	07/24/2013	Encounter
Sprain of Knee and Leg	Active	07/24/2013	Encounter
Lumbar Spondylosis	Active	10/16/2014	Encounter
Low Back Pain	Active	10/16/2014	Encounter
Mechanical Low Back Pain	Active	10/16/2014	Encounter

Procedures

Date	Name	Performed by
10/01/2011	Orthopaedic, Shoulder Notes: right biceps tenodesis	Information not available
01/01/1993	Orthopaedic, Knee Notes: right knee scope	Information not available
	Orthopaedic, Shoulder Notes: left SLAP repair	Information not available
	Other Notes: thyroidectomy	Information not available
09/16/2014	MRI, Shoulder	Information not available
10/16/2014	X-ray, Lumbar Spine	In-Office Order For Internal Use Only 00000

Vaccine List

Here is a copy of your most up-to-date vaccination list.

None recorded.

Smoking Status

Smoking Status

Never Smoker

Past Encounters

10/16/2014

Low Back Pain; Lumbar Spondylosis; Mechanical Low Back Pain

Michael F Heinig: 134 Professional Park Dr, Rock Hill, SC 29732-1178, Ph. (803) 329-3130

09/16/2014

Impingement Syndrome of Shoulder Region

James N Rentz, Jr: 1690 W Hwy 160, Fort Mill, SC 29708-8024, Ph. (803) 329-3130

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ADICKES, BARRY (id #361770, dob: [REDACTED] 1961)

COSA-Carolina Orthopaedic Surgery Associates • 134 Professional Park Dr, ROCK HILL SC 29732-1178

ADICKES, BARRY (id #361770, dob: [REDACTED] 1961)

Demographics

Sex:	Male	Ethnicity:	Not Hispanic or Latino
DOB:	08/12/1961	Race:	White
Preferred language:	English	Marital status:	Married

Contact: 1137 Hummingbird Ln, Rock Hill, SC 29732-7737, Ph. (803) 328-9561

Care Team Members

Other

Nicholas Tuttle MD 1435 Ebenezer Rd, Rock Hill, SC 29732, Ph. (803) 328-3828

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ADICKES, BARRY (id #361770, dob: [REDACTED] 1961)

Imaging Orders

Imaging Order

10/18/2014

To Provider	From Provider
IN-OFFICE ORDER FOR INTERNAL USE ONLY SC 00000 Phone: Fax:	MICHAEL F. HEINIG RH 134 Professional Park Dr ROCK HILL, SC 29732-1178 Phone: (803) 329-3130 Fax: (803) 329-2611

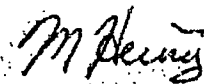
Imaging Order Information

Diagnosis	• Low back pain ICD-9: 724.2: Lumbago
Order Name	Orders Included: 1 Low back pain ICD-9: 724.2: Lumbago • X-RAY, LUMBAR SPINE Send To: IN-OFFICE ORDER Position: SUPINE Views (X-RAY, LUMBAR SPINE): AP Lateral Spot
Notes	

Patient Information

Patient Name	ADICKES, BARRY
Sex - DOB - Age	M 08/12/1961 53 YR
Address	1137 HUMMINGBIRD LN ROCK HILL, SC 29732-7737
Phone	H: (803) 328-9581 M: (803) 328-0106
Primary Insurance	BCBS-SC: BLUECROSS BLUESHIELD OF SC ID: YRP600M77302 Group: 00172490 Policy Holder: ADICKES, BARRY Eligibility: Member is eligible. (Verified 10/13/2014)
Secondary Insurance	None recorded.

Electronically Signed by: MICHAEL F. HEINIG, MD



MICHAEL F. HEINIG

Imaging Order

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APA 1005

Offer Letter Authorization Form

Candidate Information

Regulation Number: 60402	Submission Date:
Candidate Type: Internal	Rehire: Yes ☐ No ☐
Specific Source: Please enter the source	
Empl ID: 000279421	E-mail: barry.adickes@philips.com
Name: (Last, First, MI): Adickes, Barry,	Preferred Name:
Street Address: 1137 Hummingbird Lane	Phone: 803-328-0106
City, State, Zip: Rock Hill, South Carolina 29732	
Apt:	
SSN:	DOB:

Job Information

Job Title: Account Manager (Charlotte, NC; Raleigh, NC or Greenville, SC)	Job Code: E03743 - Account Manager, Sales 2
Manager Name: James Hendrix	Manager Department: Philips offers a full range of defibrillators - from easy-to-use automated external defibrillators (AEDs) used in the home and community to sophisticated multifunction monitor/ defibrillators for ALS, EMS and healthcare professionals - each tailored to the needs, training and skill of a particular type of user from home to hospital. And we support our defibrillators and their owners with solutions, accessories and programs so that the best possible treatment for cardiac arrest is available, and more lives can be saved.
Manager Title: Region Sales Mgr.	HRBP: Tracey DeBruin
Start Date: 6/4/2008	New PD: HEALTHCARE
Reporting Location:	Current PD (Transfers Only): CONSUMER HEALTHCARE SOLUTIONS
Physical Location: US-NC-Charlotte	New Cost Center: ME9005109 Funks: 149316
Work from home: Yes ☒ No ☐	Current Cost Center (Transfers Only): LIF3400
	FLSA: Not-US Not Applicable Shift: First
	Union: Yes ☐ No ☐
Corporate Grade: 60	Local Grade: Not Indicated
	Canadian Offer Information:
	Salary Grade: First Level:

Mailing/Special instructions, e.g., overnight the packet, send to different address, etc.

Delivery Method: ☐
Special Instructions: 3 month Guarantee

Compensation Information

Employee Type: ☐	
Annual Salary: \$116K TTC (\$80K base salary) Hourly Rate:	If Internal, is compensation rate changing? ☐
Annual Bonus Target: Pay Cycle: Bi-Weekly	Commission: Yes ☒ No ☐
Stock Option Amount:	Sales Draw: Yes ☐ No ☐ Duration: 3 month Guarantee
Sign-on Bonus:	Recoverable Draw: ☐ Non-Recoverable Draw: ☐
	For Philips Medical Systems Use Only
	Geo Structure: ☐

Additional Information

Employee Referral Bonus: Philips is an equal opportunity employer. Employee Referral Bonus - 7500 Simplicity Rewards Points.	Drug Test: Yes ☐ No ☐
Relocation Amount:	Immigration Assistance/Visa Yes ☐ No ☒ Type:
Welchert: Homeowner: ☐ Renter: ☐	Car Allowance: Yes ☒ No ☐
POB:	Details: Company Car
	For Transferring employees going from a non-driving position to a driving position: DUE State of Issue
	Credit Check: Yes ☐ No ☐
Online App Completed By Applicant? Yes ☐ No ☐	International Degree Yes ☐ No ☐

Self-ID Information (To Be Completed By Recruitment Coordinator)

Race & Ethnicity: ☐	Vet Status: ☐
Sex: ☐	

Recruiter / Hiring Manager / HR Approval

Recruiter: Lindsey Barrows	Date Approved: JUL 21
Hiring Manager Name: James Hendrix	Date Approved: AUG - 6 2008
HRBP Name:	Date Approved:

Recruiter completes and attaches to candidate record in Peopleclick. This serves as documentation to support the approval of the offer.

FORM 07 12 0000 004

ExA008

2008 W-2 and EARNINGS SUMMARY

Employee Reference Copy
W-2 Wage and Tax Statement 2008

Copy 2 to be filed with employee's return

Control Number: 0000013002 V01 Dep: 400000 PHEA A Employer use only: 4004

Employer's name, address, and ZIP code:
PHILIPS ELECTRONICS NORTH AMERICA
3000 MINUTEMAN RD BLDG 2 MSS1
ANDOVER, MA 01810

Employer's name, address, and ZIP code:
BARRY S ADICKES
1137 HUMMINGBIRD LN
ROCK HILL, SC 29732

1 Wages, tips, other comp. 42155.30
2 Federal income tax withheld 2534.19
3 Social security wages 43039.90
4 Social security tax withheld 2668.47
5 Medicare wages and tips 43039.90
6 Medicare tax withheld 624.60
7 Social security tips
8 Advanced EIC payment
9 Dependent care benefits
10 Nonqualified plan
11 Other
12 State (Employer's state ID no.) SC 2500007 7
13 State income tax 2832.09
14 Local income tax
15 Local wages, tips, etc. 42155.30
16 Local income tax
17 Local wages, tips, etc. 42155.30
18 Local income tax

REGULAR
SIMPLICITY REWARDS POINTS + \$42,334.64
VACATION TRUCK REWARDS REGULAR + \$25.00
HOLIDAY PAY REDUCE REG + \$1,769.23
PONSERAVES + \$1,326.93
DENTAL FAMILY + \$884.60
BASIC LIFE + \$99.00
BLUETRACK/BLACKSHIELD PPO R+2 + \$40.50
VISION CARE FAMILY + \$1,062.00
TOTAL BOX 2 FEDERAL WAGES - \$42,155.30

BARRY S ADICKES
1137 HUMMINGBIRD LN
ROCK HILL, SC 29732

Social Security Number: [REDACTED]
Taxable Model Status: [REDACTED]
MARRIED
Exemption/Allowances:
Federal: 13
State: 0
Local: 0

1 Wages, tips, other comp. 42155.30
2 Federal income tax withheld 2534.19
3 Social security wages 43039.90
4 Social security tax withheld 2668.47
5 Medicare wages and tips 43039.90
6 Medicare tax withheld 624.60
7 Social security tips
8 Advanced EIC payment
9 Dependent care benefits
10 Nonqualified plan
11 Other
12 State (Employer's state ID no.) SC 2500007 7
13 State income tax 2832.09
14 Local income tax
15 Local wages, tips, etc. 42155.30
16 Local income tax
17 Local wages, tips, etc. 42155.30
18 Local income tax

Federal Filing Copy
W-2 Wage and Tax Statement 2008
Copy 2 to be filed with employee's return

1 Wages, tips, other comp. 42155.30
2 Federal income tax withheld 2534.19
3 Social security wages 43039.90
4 Social security tax withheld 2668.47
5 Medicare wages and tips 43039.90
6 Medicare tax withheld 624.60
7 Social security tips
8 Advanced EIC payment
9 Dependent care benefits
10 Nonqualified plan
11 Other
12 State (Employer's state ID no.) SC 2500007 7
13 State income tax 2832.09
14 Local income tax
15 Local wages, tips, etc. 42155.30
16 Local income tax
17 Local wages, tips, etc. 42155.30
18 Local income tax

SC State Filing Copy
W-2 Wage and Tax Statement 2008
Copy 2 to be filed with employee's State income tax return

1 Wages, tips, other comp. 42155.30
2 Federal income tax withheld 2534.19
3 Social security wages 43039.90
4 Social security tax withheld 2668.47
5 Medicare wages and tips 43039.90
6 Medicare tax withheld 624.60
7 Social security tips
8 Advanced EIC payment
9 Dependent care benefits
10 Nonqualified plan
11 Other
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13 State income tax 2832.09
14 Local income tax
15 Local wages, tips, etc. 42155.30
16 Local income tax
17 Local wages, tips, etc. 42155.30
18 Local income tax

City or Local Filing Copy
W-2 Wage and Tax Statement 2008
Copy 2 to be filed with employee's City or Local income tax return

Ex8009

File, accurately, FAST! Use **e-file** Visit the IRS Web Site at www.irs.gov/efile

Employee Reference Copy **W-2 Wage and Tax Statement 2009**

Copy C for employee's records. OMB No. 1545-0047

a Employer's name, address, and ZIP code
**PHILIPS ELECTRONICS NORTH AMERICA
3000 MINUTEMAN RD BLDG 2 MS31
ANDOVER, MA 01810**

a/f Employee's name, address, and ZIP code
**BARRY S ADICKES
1137 HUMMINGBIRD LN
ROCK HILL, SC 29732**

b Employer's FED ID number 13-3429115	a Employee's SSA number [REDACTED]
1 Wages, tips, other comp. 89919.27	2 Federal income tax withheld 5076.21
3 Social security wages 91822.12	4 Social security tax withheld 5692.97
5 Medicare wages and tips 91822.12	6 Medicare tax withheld 1331.42
7 Social security tips	8 Allocated tips
9 Advance EIC payment	10 Dependent care benefits
11 Nonqualified plans	12a See instructions for box 12 C 90.00
14 Other	12b D 1902.85
15 State Employer's state ID no. SC 25363907 7	16 State wages, tips, etc. 89919.27
17 State income tax 5995.00	18 Local wages, tips, etc.
19 Local income tax	20 Locality name

BASIC LIFE - TAXABLE	+	\$90.09
CIVIC DUTY REGULAR REDUCE	+	\$1,539.46
COMMISSION SALES SUPPLEMENTAL	+	\$9,858.94
DENTAL	+	\$264.00
HOLIDAY PAY REDUCE REG	+	\$4,365.37
MEDICAL	+	\$2,892.00
POWERSAVER	+	\$1,902.85
REGULAR	+	\$75,442.25
SALES BONUS	+	\$3,937.50
TOTAL BOX 1 FEDERAL WAGES		\$89,919.27
VISION	-	\$254.40

**BARRY S ADICKES
1137 HUMMINGBIRD LN
ROCK HILL, SC 29732**

Social Security Number: [REDACTED]
Taxable Marital Status: **MARRIED**
Exemptions/Allowances:
Federal: 13
State: 0
Local: 0

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PAGE 01 OF 01

1 Wages, tips, other comp. 89919.27	2 Federal income tax withheld 5076.21
3 Social security wages 91822.12	4 Social security tax withheld 5692.97
5 Medicare wages and tips 91822.12	6 Medicare tax withheld 1331.42
d Control number 000279421	Dept. ME9005
PHED	A 3354
c Employer's name, address, and ZIP code PHILIPS ELECTRONICS NORTH AMERICA 3000 MINUTEMAN RD BLDG 2 MS31 ANDOVER, MA 01810	
b Employer's FED ID number 13-3429115	a Employee's SSA number [REDACTED]
7 Social security tips	8 Allocated tips
9 Advance EIC payment	10 Dependent care benefits
11 Nonqualified plans	12a See instructions for box 12 C 90.00
14 Other	12b D 1902.85
a/f Employee's name, address, and ZIP code BARRY S ADICKES 1137 HUMMINGBIRD LN ROCK HILL, SC 29732	
15 State Employer's state ID no. SC 25363907 7	16 State wages, tips, etc. 89919.27
17 State income tax 5995.00	18 Local wages, tips, etc.
19 Local income tax	20 Locality name

Federal Filing Copy
W-2 Wage and Tax Statement 2009
Copy B to be filed with employee's Federal income tax return.

1 Wages, tips, other comp. 89919.27	2 Federal income tax withheld 5076.21
3 Social security wages 91822.12	4 Social security tax withheld 5692.97
5 Medicare wages and tips 91822.12	6 Medicare tax withheld 1331.42
d Control number 000279421	Dept. ME9005
PHED	A 3354
c Employer's name, address, and ZIP code PHILIPS ELECTRONICS NORTH AMERICA 3000 MINUTEMAN RD BLDG 2 MS31 ANDOVER, MA 01810	
b Employer's FED ID number 13-3429115	a Employee's SSA number [REDACTED]
7 Social security tips	8 Allocated tips
9 Advance EIC payment	10 Dependent care benefits
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14 Other	12b D 1902.85
a/f Employee's name, address, and ZIP code BARRY S ADICKES 1137 HUMMINGBIRD LN ROCK HILL, SC 29732	
15 State Employer's state ID no. SC 25363907 7	16 State wages, tips, etc. 89919.27
17 State income tax 5995.00	18 Local wages, tips, etc.
19 Local income tax	20 Locality name

SC. State Filing Copy
W-2 Wage and Tax Statement 2009
Copy 2 to be filed with employee's State income tax return.

1 Wages, tips, other comp. 89919.27	2 Federal income tax withheld 5076.21
3 Social security wages 91822.12	4 Social security tax withheld 5692.97
5 Medicare wages and tips 91822.12	6 Medicare tax withheld 1331.42
d Control number 000279421	Dept. ME9005
PHED	A 3354
c Employer's name, address, and ZIP code PHILIPS ELECTRONICS NORTH AMERICA 3000 MINUTEMAN RD BLDG 2 MS31 ANDOVER, MA 01810	
b Employer's FED ID number 13-3429115	a Employee's SSA number [REDACTED]
7 Social security tips	8 Allocated tips
9 Advance EIC payment	10 Dependent care benefits
11 Nonqualified plans	12a C 90.00
14 Other	12b D 1902.85
a/f Employee's name, address, and ZIP code BARRY S ADICKES 1137 HUMMINGBIRD LN ROCK HILL, SC 29732	
15 State Employer's state ID no. SC 25363907 7	16 State wages, tips, etc. 89919.27
17 State income tax 5995.00	18 Local wages, tips, etc.
19 Local income tax	20 Locality name

City or Local Filing Copy
W-2 Wage and Tax Statement 2009
Copy 2 to be filed with employee's City or Local income tax return.

State, accurate FAST! Use **File** VISIT THE IRS WEB SITE at www.irs.gov/efile

Employee Reference Copy **W-2 Wage and Tax Statement 2010**

OMB No. 1545-0047
Copy B to be filed with employee's records.

a Employer's name, address, and ZIP code
**PHILIPS ELECTRONICS NORTH AMERICA
3000 MINUTEMAN RD BLDG 2 MS31
ANDOVER, MA 01810**

af Employee's name, address, and ZIP code
**BARRY S ADICKES
1137 HUMMINGBIRD LN
ROCK HILL, SC 29732**

b Employer's FED ID number **13-3429115** c Employer's SSA number **13-3429115**

1 Wages, tips, other comp. **123989.18** 2 Federal income tax withheld **14145.31**

3 Social security wages **106800.00** 4 Social security tax withheld **6621.60**

5 Medicare wages and tips **128276.01** 6 Medicare tax withheld **1860.00**

7 Social security tips **128276.01** 8 Allocated tips **1860.00**

9 Advance EIC payment 10 Dependent care benefits

11 Nonqualified plans 12a See instructions for box 12 **C 72.00**

14 Other 12b D **4286.83**

12c **12d**

13 See emp. Ret. plan and party elec pay **X**

15 State Employer's state ID no. **SC 25363907** 16 State wages, tips, etc. **123989.18**

17 State income tax **8379.24** 18 Local wages, tips, etc.

19 Local income tax 20 Locality name

2010 W-2 and EARNINGS SUMMARY

This summary section is included with your W-2 to help describe this portion in more detail. The reverse side includes general information that you may also find helpful. The following reflects your final pay stub, plus any adjustments made by your employer.

GROSS PAY	131,962.41	SOCIAL SECURITY TAX WITHHELD	6,621.60
FED. INCOME TAX WITHHELD	14,145.31	BOX 04 OF W-2	1,860.00
BOX 02 OF W-2		MEDICARE TAX WITHHELD	1,860.00
STATE INCOME TAX	8,379.24	BOX 06 OF W-2	
BOX 17 OF W-2		SUI/SDI	0.00
LOCAL INCOME TAX	0.00	BOX 14 OF W-2	
BOX 19 OF W-2			

To change your employee W-4 profile information file a new W-4 with your payroll department

**BARRY S ADICKES
1137 HUMMINGBIRD LN
ROCK HILL, SC 29732**

Social Security Number: **13-3429115**

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PAGE 01 OF 01

1 Wages, tips, other comp. 123989.18	2 Federal income tax withheld 14145.31
3 Social security wages 106800.00	4 Social security tax withheld 6621.60
5 Medicare wages and tips 128276.01	6 Medicare tax withheld 1860.00
d Control number 0000008240 VZZ	Dept. V155
e Employer's name, address, and ZIP code PHILIPS ELECTRONICS NORTH AMERICA 3000 MINUTEMAN RD BLDG 2 MS31 ANDOVER, MA 01810	
b Employer's FED ID number 13-3429115	a Employer's SSA number 13-3429115
7 Social security tips	8 Allocated tips
9 Advance EIC payment	10 Dependent care benefits
11 Nonqualified plans	12a See instructions for box 12 C 72.00
14 Other	12b D 4286.83
12c	12d
13 See emp. Ret. plan and party elec pay X	
af Employee's name, address and ZIP code BARRY S ADICKES 1137 HUMMINGBIRD LN ROCK HILL, SC 29732	
15 State Employer's state ID no. SC 25363907	16 State wages, tips, etc. 123989.18
17 State income tax 8379.24	18 Local wages, tips, etc.
19 Local income tax	20 Locality name

**Federal Filing Copy
W-2 Wage and Tax Statement 2010**
Copy B to be filed with employee's Federal Income Tax Return.

1 Wages, tips, other comp. 123989.18	2 Federal income tax withheld 14145.31
3 Social security wages 106800.00	4 Social security tax withheld 6621.60
5 Medicare wages and tips 128276.01	6 Medicare tax withheld 1860.00
d Control number 0000008240 VZZ	Dept. V155
e Employer's name, address, and ZIP code PHILIPS ELECTRONICS NORTH AMERICA 3000 MINUTEMAN RD BLDG 2 MS31 ANDOVER, MA 01810	
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7 Social security tips	8 Allocated tips
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11 Nonqualified plans	12a See instructions for box 12 C 72.00
14 Other	12b D 4286.83
12c	12d
13 See emp. Ret. plan and party elec pay X	
af Employee's name, address and ZIP code BARRY S ADICKES 1137 HUMMINGBIRD LN ROCK HILL, SC 29732	
15 State Employer's state ID no. SC 25363907	16 State wages, tips, etc. 123989.18
17 State income tax 8379.24	18 Local wages, tips, etc.
19 Local income tax	20 Locality name

**SC State Filing Copy
W-2 Wage and Tax Statement 2010**
Copy 2 to be filed with employee's State Income Tax Return.

1 Wages, tips, other comp. 123989.18	2 Federal income tax withheld 14145.31
3 Social security wages 106800.00	4 Social security tax withheld 6621.60
5 Medicare wages and tips 128276.01	6 Medicare tax withheld 1860.00
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15 State Employer's state ID no. SC 25363907	16 State wages, tips, etc. 123989.18
17 State income tax 8379.24	18 Local wages, tips, etc.
19 Local income tax	20 Locality name

**City or Local Filing Copy
W-2 Wage and Tax Statement 2010**
Copy 3 to be filed with employee's City or Local Income Tax Return.

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Employee Reference Copy W-2 Wage and Tax Statement 2011

OMB No. 1545-0045
a Control number 140 VZZ Dept. Corp. Employer use only V155 14694

b Employer's name, address, and ZIP code
PHILIPS ELECTRONICS NORTH AMERICA
3000 MINUTEMAN RD BLDG 2 MS31
ANDOVER, MA 01810

c Employee's name, address, and ZIP code
BARRY S ADICKES
1137 HUMMINGBIRD LN
ROCK HILL, SC 29732

1 Wages, tips, other comp. 104481.77	2 Federal income tax withheld 10836.85
3 Social security wages 106800.00	4 Social security tax withheld 4485.60
5 Medicare wages and tips 114276.31	6 Medicare tax withheld 1657.01
7 Social security tips	8 Allocated tips
9	10 Dependent care benefits
11 Nonqualified plans	12a See instructions for box 12 C 110.40
14 Other	12b D 9794.54
15 State wages, tips, etc. SC 25363907 7	16 State income tax 7295.75
17 Local wages, tips, etc.	18 Local income tax
19 Local income tax	20 Locality name

2011 W-2 and EARNINGS SUMMARY

This summary section is included with your W-2 to help describe this portion in more detail. The reverse side includes general information that you may also find helpful. The following reflects your final pay stub, plus any adjustments made by your employer.

GROSS PAY	118,514.71	SOCIAL SECURITY TAX WITHHELD BOX 04 OF W-2	4,485.60
FED. INCOME TAX WITHHELD BOX 02 OF W-2	10,836.85	MEDICARE TAX WITHHELD BOX 06 OF W-2	1,657.01
STATE INCOME TAX BOX 17 OF W-2	7,295.75	SUI/SDI BOX 14 OF W-2	0.00
LOCAL INCOME TAX BOX 19 OF W-2	0.00		

To change your employee W-4 profile information file a new W-4 with your payroll department

BARRY S ADICKES
1137 HUMMINGBIRD LN
ROCK HILL, SC 29732

Social Security Number: [REDACTED]

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PAGE 01 OF 01

1 Wages, tips, other comp. 104481.77	2 Federal income tax withheld 10836.85
3 Social security wages 106800.00	4 Social security tax withheld 4485.60
5 Medicare wages and tips 114276.31	6 Medicare tax withheld 1657.01
d Control number 0000002340 VZZ Dept. Corp. Employer use only V155 14694	
c Employer's name, address, and ZIP code PHILIPS ELECTRONICS NORTH AMERICA 3000 MINUTEMAN RD BLDG 2 MS31 ANDOVER, MA 01810	
b Employer's FED ID number 13-3429115	a Employer's SSA number [REDACTED]
7 Social security tips	8 Allocated tips
9	10 Dependent care benefits
11 Nonqualified plans	12a See instructions for box 12 C 110.40
14 Other	12b D 9794.54
12c	12d
13 See emp. stat. plan and party elec pay X	
e Employee's name, address and ZIP code BARRY S ADICKES 1137 HUMMINGBIRD LN ROCK HILL, SC 29732	
15 State wages, tips, etc. SC 25363907 7	16 State income tax 7295.75
17 Local wages, tips, etc.	18 Local income tax
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Federal Filing Copy
W-2 Wage and Tax Statement 2011
OMB No. 1545-0045
Copy 2 to be filed with employer's Federal Income Tax Return.

1 Wages, tips, other comp. 104481.77	2 Federal income tax withheld 10836.85
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OMB No. 1545-0045
Copy 2 to be filed with employer's State Income Tax Return.

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3 Social security wages 106800.00	4 Social security tax withheld 4485.60
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c Employer's name, address, and ZIP code PHILIPS ELECTRONICS NORTH AMERICA 3000 MINUTEMAN RD BLDG 2 MS31 ANDOVER, MA 01810	
b Employer's FED ID number 13-3429115	a Employer's SSA number [REDACTED]
7 Social security tips	8 Allocated tips
9	10 Dependent care benefits
11 Nonqualified plans	12a See instructions for box 12 C 110.40
14 Other	12b D 9794.54
12c	12d
13 See emp. stat. plan and party elec pay X	
e Employee's name, address and ZIP code BARRY S ADICKES 1137 HUMMINGBIRD LN ROCK HILL, SC 29732	
15 State wages, tips, etc. SC 25363907 7	16 State income tax 7295.75
17 Local wages, tips, etc.	18 Local income tax
19 Local income tax	20 Locality name

City or Local Filing Copy
W-2 Wage and Tax Statement 2011
OMB No. 1545-0045
Copy 2 to be filed with employer's City or Local Income Tax Return.

Safe, accurate, FAST! Use **efile** Visit the IRS Web Site at www.irs.gov/efile

Employee Reference Copy
W-2 Wage and Tax Statement 2012

OMB No. 1545-0047

1 a Employer's name, address, and ZIP code
PHILIPS ELECTRONICS NORTH AMERICA
3000 MINUTEMAN RD BLDG 2 MS31
ANDOVER, MA 01810

2 b Employer's name, address, and ZIP code
BARRY S ADICKES
1137 HUMMINGBIRD LN
ROCK HILL, SC 29732

3 c Employer's FED ID number
13-3429115

4 d Control number
0000002340 VZZ

5 e Employer's name, address, and ZIP code
PHILIPS ELECTRONICS NORTH AMERICA
3000 MINUTEMAN RD BLDG 2 MS31
ANDOVER, MA 01810

6 f Employer's name, address, and ZIP code
BARRY S ADICKES
1137 HUMMINGBIRD LN
ROCK HILL, SC 29732

7 g Employer's name, address, and ZIP code
BARRY S ADICKES
1137 HUMMINGBIRD LN
ROCK HILL, SC 29732

8 h Employer's name, address, and ZIP code
BARRY S ADICKES
1137 HUMMINGBIRD LN
ROCK HILL, SC 29732

9 i Employer's name, address, and ZIP code
BARRY S ADICKES
1137 HUMMINGBIRD LN
ROCK HILL, SC 29732

10 j Employer's name, address, and ZIP code
BARRY S ADICKES
1137 HUMMINGBIRD LN
ROCK HILL, SC 29732

11 k Employer's name, address, and ZIP code
BARRY S ADICKES
1137 HUMMINGBIRD LN
ROCK HILL, SC 29732

12 l Employer's name, address, and ZIP code
BARRY S ADICKES
1137 HUMMINGBIRD LN
ROCK HILL, SC 29732

13 m Employer's name, address, and ZIP code
BARRY S ADICKES
1137 HUMMINGBIRD LN
ROCK HILL, SC 29732

14 n Employer's name, address, and ZIP code
BARRY S ADICKES
1137 HUMMINGBIRD LN
ROCK HILL, SC 29732

15 o Employer's name, address, and ZIP code
BARRY S ADICKES
1137 HUMMINGBIRD LN
ROCK HILL, SC 29732

16 p Employer's name, address, and ZIP code
BARRY S ADICKES
1137 HUMMINGBIRD LN
ROCK HILL, SC 29732

17 q Employer's name, address, and ZIP code
BARRY S ADICKES
1137 HUMMINGBIRD LN
ROCK HILL, SC 29732

18 r Employer's name, address, and ZIP code
BARRY S ADICKES
1137 HUMMINGBIRD LN
ROCK HILL, SC 29732

19 s Employer's name, address, and ZIP code
BARRY S ADICKES
1137 HUMMINGBIRD LN
ROCK HILL, SC 29732

20 t Employer's name, address, and ZIP code
BARRY S ADICKES
1137 HUMMINGBIRD LN
ROCK HILL, SC 29732

2012 W-2 and EARNINGS SUMMARY

This summary section is included with your W-2 to help describe this portion in more detail. The reverse side includes general information that you may also find helpful. The following reflects your final pay stub, plus any adjustments made by your employer.

GROSS PAY	125,558.14	SOCIAL SECURITY TAX WITHHELD BOX 04 OF W-2	4,624.20
FED. INCOME TAX WITHHELD BOX 02 OF W-2	12,363.13	MEDICARE TAX WITHHELD BOX 06 OF W-2	1,748.52
STATE INCOME TAX BOX 17 OF W-2	7,559.73	SUI/SDI BOX 14 OF W-2	0.00
LOCAL INCOME TAX BOX 19 OF W-2	0.00		

To change your employee W-4 profile information file a new W-4 with your payroll department

BARRY S ADICKES
1137 HUMMINGBIRD LN
ROCK HILL, SC 29732

Social Security Number: [REDACTED]

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PAGE 01 OF 01

1 Wages, tips, other comp. 112282.05

2 Federal income tax withheld 12363.13

3 Social security wages 110100.00

4 Social security tax withheld 4624.20

5 Medicare wages and tips 120587.74

6 Medicare tax withheld 1748.52

7 Social security tips 1748.52

8 Allocated tips

9 Nonqualified plans

10a See instructions for box 12

10b C 165.60

10c D 8305.69

10d DD 18355.44

11 Other

12a See instructions for box 12

12b C 165.60

12c D 8305.69

12d DD 18355.44

13 See emp./ret. plan and party split pay

14 Employee's name, address, and ZIP code
BARRY S ADICKES
1137 HUMMINGBIRD LN
ROCK HILL, SC 29732

15 State wages, tips, etc. 112282.05

16 State income tax 7559.73

17 Local wages, tips, etc.

18 Local income tax

19 Locality name

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1137 HUMMINGBIRD LN
ROCK HILL, SC 29732

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1137 HUMMINGBIRD LN
ROCK HILL, SC 29732

15 State wages, tips, etc. 112282.05

16 State income tax 7559.73

17 Local wages, tips, etc.

18 Local income tax

19 Locality name

Federal Filing Copy
W-2 Wage and Tax Statement 2012
Copy 2 to be filed with employer's Federal Income Tax Return.

SC. State Filing Copy
W-2 Wage and Tax Statement 2012
Copy 2 to be filed with employer's State Income Tax Return.

City or Local Filing Copy
W-2 Wage and Tax Statement 2012
Copy 2 to be filed with employer's City or Local Income Tax Return.

Safe, accurate, FAST! Use **efile** Visit the IRS Web Site at www.irs.gov/efile

Employee Reference Copy W-2 Wage and Tax Statement 2013

Copy 1 to be filed with employer's records. Copy 2 to be filed with employee's federal income tax return. Copy 3 to be filed with employee's state income tax return. Copy 4 to be filed with employee's local income tax return. Copy 5 to be filed with employee's city or local income tax return.

Employer's name, address, and ZIP code
PHILIPS ELECTRONICS NORTH AMERICA
3000 MINUTEMAN RD BLDG 2 MS31
ANDOVER, MA 01810

Employee's name, address, and ZIP code
BARRY S ADICKES
1137 HUMMINGBIRD LN
ROCK HILL, SC 29732

1 Wages, tips, other comp. 109865.41	2 Federal income tax withheld 10375.97
3 Social security wages 109865.41	4 Social security tax withheld 6811.66
5 Medicare wages and tips 109865.41	6 Medicare tax withheld 1593.05
7 Social security tips	8 Allocated tips
9 Dependent care benefits	10 Nonqualified plans
11 Other	12a See instructions for box 12 C 193.20
13a DD 18518.91	13b DD
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DeBruin, Tracey

From: DeBruin, Tracey
Sent: Friday, November 13, 2009 12:06 PM
To: Hendrix, James
Subject: RE: Oct Finish and YTD Status

thanks

Tracey DeBruin
Philips Healthcare Systems
Sr. Human Resources Manager
3000 Minuteman Road MS205
Andover, MA 01810-1099
Office: (978) 659-2481
Cell: (978) 830-1218
Fax: (978) 659-3883
tracey.debruin@philips.com

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Thank you.

From: Hendrix, James
Sent: Friday, November 13, 2009 11:18 AM
To: DeBruin, Tracey
Subject: RE: Oct Finish and YTD Status

Yes, he is on PIP. I have the signed copy of his PIP (along with Glenn Spengler's) here. I was waiting until I received Carl's so that I could send them all at one time. So far, the only deficiency is sales-to-plan. He is current on all other aspects of the PIP. Same with Spengler.

Best,
JimH

James Hendrix
South Region Sales Manager
EMS & Fire Rescue
Philips Healthcare
james.hendrix@philips.com
(912) 230-6241 Mobile
(978) 659-7950 Philips Voicemail

From: DeBruin, Tracey
Sent: Friday, November 13, 2009 11:15 AM
To: Hendrix, James
Subject: RE: Oct Finish and YTD Status

He's on PIP right...did I get a signed copy? Also, make sure you summarize his total status of his deficiencies so we keep a biweekly update trending up or down.

Thanks

Tracey DeBruin
Philips Healthcare Systems
Sr. Human Resources Manager
3000 Minuteman Road MS205
Andover, MA 01810-1099
Office: (978) 659-2481
Cell: (978) 930-1218
Fax: (978) 659-3883
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Thank you.

From: Hendrix, James
Sent: Friday, November 13, 2009 11:12 AM
To: Adickes, Barry
Cc: DeBruin, Tracey; Hendrix, James
Subject: Oct Finish and YTD Status

Per my voicemail

	Sales	Quota	%
October finish	\$46K	\$154K	30%
YTD	\$427	\$1.2M	36%

Barry,

Your October sales did not meet the PIP requirement of 50% to plan. While I appreciate the fact that you are working hard and that you are meeting the administrative parts of the PIP, it critical that your sales improve. As always, I am available to help in any way I can.

Best,
JimH

James Hendrix
South Region Sales Manager
EMS & Fire Rescue
Philips Healthcare
james.hendrix@philips.com
(912) 230-6241 Mobile
(978) 659-7950 Philips Voicemail

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PHILIPS

PERFORMANCE IMPROVEMENT PLAN

TO: Barry Adickes
FROM: James Hendrix
CC: Tracey DeBruin
DATE: 10/16/09

BACKGROUND:

Barry, as we have discussed several times, your sales results have been well below your sales plan for all of 2009. In fact, in not one quarter this year have your sales risen above 45% to plan. This is simply not acceptable performance. Below is a review of sales-to-quota performance for 2009:

Q1 09	05%
Q2 09	61%
Q3 09	41%
YTD	37%

Barry, I know that your sales territory has been harshly affected by the economic downturn. The state of North Carolina has been especially hard hit with state and county employee layoffs and furloughs. However, we simply must find a way to close some business and begin the turnaround in your sales performance. The purpose of this Performance Improvement Plan is to define the areas of deficiency, develop a plan for improvement and define the consequences of failure to improve. Below, we will examine the state of your business and outline the plan for improvement.

SALES SKILLS AND STYLE

Barry, I have seen you out in the field, and if you're making the calls, the next thing we have to look at is what you say and do during the call. We have discussed before that I believe you need to ratchet up the assertiveness that you show during a sales call. Your style seems to be very relaxed, very conversational and that's fine as long as you are constantly leading the customer to the close. In a sales call, every word you say, every action that you take must assertively lead the customer down the path to the sale. Now of course, assertiveness and aggressiveness must be approached carefully. It is easy to go too far and appear too high-pressure, too "salesy". I have absolute confidence that you will be able to sense that line and not cross it. Another thing that I believe would help you in sales calls is to ask more open ended questions; questions designed to allow the customer to provide long answers that give you direction as to how to differentiate Philips from the competition. I believe that in a really good sales call, the customer does most of the talking.

ExD017

Philips offers a class called "Principles of Sales Mastery" that I believe would help you in these areas. Once our travel and training restrictions are lifted we can look at registration. In the meantime I have training materials from that class as well as some other books that might help.

SALES FUNNEL

Barry, your funnel is actually one of the healthiest in the region. As you know we require that your sales funnel be valued at a minimum of twice your annual quota. We have also discussed many times how three times quota is probably a safer number. In June your funnel was valued at \$3.6 million which was a little over twice your quota. Today, as I write this document, your quota is valued at 5.8 million with over four times your 2009 quota. Now, we've just got to find a way to get some of those deals closed. Even though your funnel is very healthy I urge you to continue in your efforts to uncover new deals to add to the funnel.

PRODUCT KNOWLEDGE

As you know, the ALS market sale is highly complex, requiring a great deal of product, market, technical, and clinical knowledge. You must be the expert in all of these things for your customers. Your ability to use your expert knowledge to link Philips solutions to customer needs must be immediate and smooth. Overall, I think your grasp on these issues is pretty good. However, improving your level of knowledge and refining the way in which you present to customers can only help. Please make the effort to improve your knowledge and the way in which you present Philips solutions to customers.

CHANNEL MANAGEMENT

Your territory has historically been managed primarily by channel partners. You have four sales representatives from two major channel partners (Boundtree Medical and Southeastern Emergency Equipment). You have worked well with Ed Hampton from Southeastern throughout the year and you have begun to work well with Dave Murray from Boundtree. I know that you have not had the same level of success with Jimmy Uary and Glenn Alderfer. I think it's important that you increase your efforts to develop ways to make these reps more effective. In a year like this we must exhaust all of the tools we have at our disposal.

PIP METRICS

Barry, it is important that you focus your attention on improving your sales-to-quota results. This will require time and territory management and a clear focus on closing business. In order to satisfy the terms of this PIP you must meet the following PIP Metrics:

- October sales must come in at a minimum of 50% to October quota—you are currently forecasting a 47% finish.
- November sales must come in at a minimum of 65% to November quota—you are currently forecasting a 158% finish.
- December sales must come in at a minimum of 65% to December plan—you are currently forecasting a 53% finish.
- Continue to add at least 5 new deals per month to your funnel.

Failure to achieve any of the above metrics will result in further disciplinary action up to, and including immediate termination of employment.

ExD018

ACTION PLAN

Barry, this action plan has been developed in order to help you improve the areas outlined above. As a part of this action plan you will need to develop written plans and goals. As you create these plans and goals take care to insure that your goals and plans are written in a SMART format, meaning: Specific, Measurable, Achievable, Realistic, and Time bound.

The following performance improvement plan is being put into place:

- By the end of October schedule a meeting with me to review your business plan. You have already developed a business plan for your territory. You and I should review your progress on this plan in detail.
- At the end of each week submit a report of all customer visit and sales activities for that week including: account name, contact information, discussion topics and business potential. This report must be received by 10:00 AM ET the following Monday.
- Meet with me on a bi-weekly basis to discuss your progress. It will be your responsibility to schedule the review meetings. It is my expectation that we will speak regularly about your progress. However, to fulfill the terms of this PIP, at a minimum we will discuss the status of your territory and key areas of responsibility every two weeks.
- By the end of October, schedule a face to face meeting with all your Boundtree and Southeastern Emergency Equipment sales representatives to discuss ways in which you can work together to close business in the 4th quarter and moving into 2010

In summary Barry, your performance over the past 3 quarters has been unacceptable and does not meet the basic requirements of the job. We are looking for a sustained improvement in these areas. Failure to improve in these areas or occurrence of additional performance issues during this Performance Improvement Plan will result in further disciplinary action, up to and including immediate termination.

During this Performance Improvement Plan, it is our intention to help you. In 2010 you will have additional territory in which to sell. This should improve your chances to succeed. I encourage you to reach out to all of your resources, which include me, your channel partners, Nancy Iarobino, and your colleagues in the sales force to help you organize your sales strategies and strengthen your closing skills. You must use your strong relationship skills and lead customers to purchase. Internally, you must communicate concisely with clear goals and outcomes defined for the resources that you reach out to.

Once we are past this period, should any part of your performance return to an unacceptable level, further disciplinary action, up to and including termination of employment, without engaging in another Performance Improvement Plan will occur.

Barry, it is our desire that you be successful here, however that success depends on you. As I have said to you before, I see no reason why you should not be successful in your job. I am

ExD019

firmly convinced that you possess the necessary skills and competencies to succeed. Tracey DeBruin and I will be available to assist you.

I have reviewed and understand the conditions of this plan.

Name of Employee: _____ Date _____

Name of Manager: _____ Date _____

ExD020

DeBruin, Tracey

From: DeBruin, Tracey
Sent: Tuesday, May 04, 2010 10:57 AM
To: Stoddard, Paul
Subject: RE: PIP status

How did he finish in April?

Tracey DeBruin
Philips Healthcare Systems
Sr. Human Resources Manager
3000 Minuteman Road MS205
Andover, MA 01810-1099
Office: (978) 859-2481
Cell: (978) 930-1218
Fax: (978) 859-3883
tracey.debruin@philips.com

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Thank you.

From: Stoddard, Paul
Sent: Monday, May 03, 2010 3:52 PM
To: Stoddard, Paul; Adickes, Barry
Cc: DeBruin, Tracey
Subject: RE: PIP status

Barry,

I have been reviewing the Q1 sales numbers and comparing them to the PIP that is still in progress. Your Q1 number breakdown is:

January	28%
February	56%
March	54%

As you can see you have achieved over 65% only once (November) in the last 6 months. Please call me at your earliest convenience to discuss these results.

Regards,

Paul

Paul Stoddard
Regional Manager

Philips Healthcare
EMS & Fire Rescue

(C) 917-751-4621



PHILIPS
sense and simplicity

From: Stoddard, Paul
Sent: Friday, 15 January, 2010 4:08 PM
To: Adickes, Barry
Cc: DeBruin, Tracey
Subject: PIP status

Barry,

I wanted to send you the status of your PIP that we have been working on together. First I would like to say congratulations again on a great December. You finished at 180% and number 1 in the region. This is a great step in the right direction.

Below are a few highlights that I would like to reiterate from the PIP and make sure you are aware that achieving quota on a continued basis is very important. I understand you already have a nice deal coming in this month (January) from SEE with Ed Hampton. If this sale is realized then you will have achieved quota for 2 months in a row. I will continue to revisit this topic and once we see sustained grow and stability we can think about removing this PIP.

Here are a few key thoughts from the PIP to keep in mind:

SALES FUNNEL

Barry, your funnel is actually one of the healthiest in the region. As you know we require that your sales funnel be valued at a minimum of twice your annual quota. We have also discussed many times how three times quota is probably a safer number. In June your funnel was valued at \$3.6 million which was a little over twice your quota. Today, as I write this document, your quota is valued at 5.8 million with over four times your 2009 quota. Now, we've just got to find a way to get some of those deals closed. Even though your funnel is very healthy I urge you to continue in your efforts to uncover new deals to add to the funnel.

PIP METRICS

Barry, it is important that you focus your attention on improving your sales-to-quota results. This will require time and territory management and a clear focus on closing business. In order to satisfy the terms of this PIP you must meet the following PIP Metrics:

- October sales must come in at a minimum of 50% to October quota—you are currently forecasting a 47% finish.
- November sales must come in at a minimum of 65% to November quota—you are currently forecasting a 158% finish.

- December sales must come in at a minimum of 65% to December plan—you are currently forecasting a 53% finish.
- Continue to add at least 5 new deals per month to your funnel.

Failure to achieve any of the above metrics will result in further disciplinary action up to, and including immediate termination of employment.

Barry, I see great improvement in your skills and I am confident that you will continue to achieve and produce great results for Philips. Please let me know what I can do to keep your recent success moving forward.

Regards,

Paul

Paul Stoddard
Regional Manager
Philips Healthcare
EMS & Fire Rescue

(C) 917-751-4621



PHILIPS
sense and simplicity

Healthcare

The information contained in this message may be confidential and legally protected under applicable law. The message is intended solely for the addressee(s). If you are not the intended recipient, you are hereby notified that any use, forwarding, dissemination, or reproduction of this message is strictly prohibited and may be unlawful. If you are not the intended recipient, please contact the sender by return e-mail and destroy all copies of the original message.

DeBruin, Tracey

From: DeBruin, Tracey
Sent: Monday, September 20, 2010 5:06 PM
To: Milner, Julie
Subject: RE: PIP

That is it Adickes and we still have not termed because he's trending up...but still think it's not the right job for him.

Other people not performing Scheiman, Steele, Brown, Wallace new at 51% and Vetrano is at 52% ouch
Managers have not contacted me about performance in awhile.

Tracey DeBruin
Philips Healthcare Systems
Sr. Human Resources Manager
3000 Minuteman Road MS05
Andover, MA 01810-1099
Office: 978-659-2481
Cell: 978-930-1218
Fax: 978-659-3883
tracey.debruin@philips.com

From: Milner, Julie
Sent: Monday, September 20, 2010 4:35 PM
To: DeBruin, Tracey
Subject: PIP

Anyone in PreHospital ECR on PIP?
I have Barry Adickes.
But, I am unclear on Michele Steele and anyone else (Dennis Vetrano)...

Julie



Julie S. Milner
VP of Sales
Prehospital Emergency Care & Resuscitation
Philips Healthcare

978.659.7129 Tel
978.930.4567 Cell
978.659.3500 Fax



January 15, 2014

Barry S Adickes
1137 Hummingbird Ln
Rock Hill, SC 29732

This Settlement and General Release Agreement ("Agreement") is made in final consideration of the termination of your employment with Philips Electronics North America Corporation ("Philips"). You will conclude your current assignment and your payroll and employment status will terminate on January 17, 2014. Any accrued, unused vacation will be paid to you in your final paycheck. In return for your executing this Agreement and having it notarized, you will then be given the following considerations to which you would not otherwise be entitled:

- A) You will receive, as soon as practical after the effective date of this Agreement, a lump sum severance payment of \$ 90,139.00
- B) For a period of three months after your termination date (that is, through April 17, 2014, you will continue to be eligible for coverage under the medical, dental, vision and basic life benefit programs that are made available to employees of Philips and as they may be amended from time to time. Of course, your benefits elections will continue to apply; Philips will be responsible for all premiums.
- C) Sales incentives on orders that booked or met *order closing* requirements within 2013 will be paid pursuant to the Terms and Conditions of your applicable incentive plan. In lieu of 2014 sales incentives, you will be paid, as soon as practical after the effective date of this Agreement, the following pro-rated amount of the annual incentive target for your sales position for the period January 1 through January 17; \$ 2,095.89
- D) Your eligibility for any previously granted stock options/restricted shares and the exercise of those options will be strictly governed by the terms and conditions of the stock option/restricted share plan(s).
- E) Philips shall select an outplacement program and make a one-time payment to the vendor for these services to be provided to you.

In exchange for the foregoing promises and undertakings by Philips, you agree to the following:

PHILIPS

- 1) You agree to release Philips and its affiliated companies ("Philips Group") and their past and present officers, directors, agents, shareholders, representatives and employees from any and all known or unknown claims you now have against them. In releasing them from all claims, you understand that such a release includes, but is not limited to, any type of employment, discrimination or termination claim you may have, including all claims under the Age Discrimination in Employment Act. This release does not include claims that by law cannot be waived by you, including but not limited to your right to file a charge or complaint with governmental agencies. Nor does this release waive any claims which may arise after your execution of this Agreement. This release also does not waive any rights you may have in any vested pension or 401(k) benefit plan(s) or under COBRA. You do, however, waive any rights to collect money damages or to reinstatement as a result of your employment with Philips or the termination of that employment.
- 2) You agree that all information contained or possessed by you relative to the activities of the Philips Group which is of a secret or confidential nature, which may include but is not limited to customer lists, pricing, and technical and production know-how, developments, inventions, processes, or administrative procedures, is the property of the Philips Group or its licensors, as the case may be, and you shall not during the term of this agreement or thereafter, use for the benefit of others or disclose to others such information so long as its secret or confidential nature be preserved by the Philips Group; nothing herein shall prevent you from using and availing yourself of your general technical, engineering and inventive skill, knowledge and experience, including that pertaining to or derived from the non-secret and non-confidential aspects of the activities of the Philips Group.
- 3) You understand that federal and state taxes and other deductions will be taken from the above payments.
- 4) If you currently possess a Philips leased automobile, you may continue to operate the vehicle under the terms of the Philips Corporate Fleet Policy until, at the latest, January 17, 2014. Prior to that date, you will be contacted by a local representative of Amerifleet Transportation who will arrange to have a driver pick up the company vehicle. The scheduled pick-up date must be no later than January 17, 2014. If you would like to have the company vehicle picked up immediately, please email Philips Fleet at Philips.Fleet@Philips.com.
- 5) You agree that this Agreement shall not be construed in any way as an admission by the Philips Group or any of their officers, employees or agents, of any liability whatsoever, or as an admission of any wrong doing



whatsoever against any person. Any such liability and/or admission is expressly denied.

- 6) You agree that you shall not at any time, directly or indirectly, disparage or make any statement or publication that is intended to or has the effect of disparaging, impugning or injuring the reputation or business interests of the Philips Group or any of their respective products, services, officers, or employees regardless of any perceived truth of such statement or publication.
- 7) You agree that during the remainder of your employment and for a period of one year thereafter, you shall not, directly or indirectly, divert, entice away, solicit or in any other manner persuade or attempt to persuade (a "Solicitation") any person who is, or was, at any time within the twelve (12) month period prior to such Solicitation, an officer, director, manager, employee, agent, licensor, licensee or supplier of the Philips Group to discontinue, terminate or adversely alter its or their relationship with the Philips Group.
- 8) You agree, in consideration of the payments, promises, and other consideration described in this Agreement, and as a further material inducement to Philips to enter into this Agreement, that should you subsequently apply for re-employment, rehire, reinstatement or any other employment or consulting relationship, this Agreement may constitute a complete and final reason for any denial of re-employment, rehire, reinstatement, or any other employment or consulting relationship, and this Agreement may be offered as a complete defense to any charge, claim, or cause of action for such denial.
- 9) You agree that you will reasonably assist, without charge, Philips as a witness and/or advise on any litigation, ethics, compliance or regulatory matter of which you may have personal knowledge or have been involved within your present scope of responsibilities; Philips will reimburse you for any related out-of-pocket expenses.
- 10) You shall refer any requests for references to Philips' designated representative (currently the Work Number: www.theworknumber.com or 1-866-604-6572). The Work Number is instructed to only provide dates of employment and positions held and for certain requests, confirmation of salary earned.
- 11) With the exception of the specific payments and benefits to be provided pursuant to this Agreement, you agree that all compensation, rights and benefits, including but not limited to vacation, personal time off, sick pay and leave as provided by the Family and Medical Leave Act, have been

PHILIPS

paid and/or exercised in full without interference and that you have no outstanding claims for compensation or benefits.

This Agreement sets forth the entire agreement between the parties and fully supersedes any and all prior agreements and understandings between you and any Philips Group company pertaining to the subject matters of this Agreement, including but not limited to any payments owed to you by the Philips Group. Should any provision of this Agreement be declared or determined to be illegal or invalid, the validity of the remaining parts, terms or provisions shall not be affected thereby, and the illegal or invalid part, term or provision shall be deemed not to be a part of this Agreement.

If the foregoing is in accordance with your understanding of our entire and complete agreement concerning the subject matters discussed in this Agreement, please confirm by signing and returning the accompanying copy of this letter by March 7, 2014 to:

Philips People Services
3000 Minuteman Drive - MS: 5301
Andover, MA 01810
Attn: People Services Contact Center.

The other copy is for your personal files.

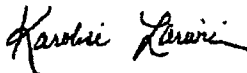
You should know that by law you must be given at least forty-five (45) days to consider this Agreement. Furthermore, you may revoke this Agreement within seven (7) days (fifteen days in Minnesota) after signing. Lastly, this Agreement will not become effective or enforceable until the revocation period has expired. You have been provided with a list of the job titles and ages of those eligible for severance and a list by job title of the ages of all individuals in the same job classification or organizational unit who are not eligible for severance.

You agree that you have been provided with a reasonable amount of time within which to consider this Agreement.

We suggest that you seek legal counsel before signing this Agreement.

Very truly yours,

Philips Electronics North America Corporation



By: _____

Adickes, Barry S - 10279421

Page 4 of 5

ExE028

PHILIPS

I hereby knowingly and voluntarily agree to and accept the foregoing terms and conditions:

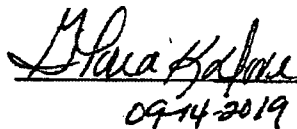

Barry S Adickes

1-28-14
Date

State of: S-C

County of: Chester

Subscribed and sworn to (or affirmed) before me on this 28th day of January (month), 2014 by _____, personally known to me or proved to me on the basis of satisfactory evidence to be the person(s) who appeared before me.

 (signature of Notary)
09-14-2019

(seal of Notary)

VRI

Application for Employment

Consider all applicants are considered for all positions without regard to race, color, religion, sex, national origin, age, or marital status, or the absence of a non-related medical condition or disability. All applicants must be at least 18 years old and application signed. Any application that does not provide requested information will be considered incomplete.

Name (Last, First, Middle) **ADDRES** **City** **Function Applying For**
 Street Address **1337 Hawthorne Blvd** **Key** **Room** **South Carolina** **Zip** **29733**
 Email Address **harrym@earthlink.net** **Phone Home No.** **803-527-1872** **Business Phone No.** **803-527-0101**
 How did you hear about us? **Employee Referral - Joe Corne** **Days available to start** **As soon as I have drivers of apt**
 Tell us what interest you have in this job: ☒ Full time ☐ Part time ☐ Temporary ☐ Any **Desired salary or hourly rate** **65.00 Hour**
 When will you be available to work? ☐ 1st shift ☐ 2nd shift ☐ 3rd shift ☐ Any
 Have you previously been employed by VRI? ☐ Yes ☒ No
 If yes, when? **1998** **Are you eligible to work in the United States?** ☒ Yes ☐ No
 If yes, what? **Proof of eligibility for licensed laborers can be provided**
 Do you have any relatives currently employed by VRI? ☐ Yes ☒ No
 If yes, please list name and relationship: **None**

Volunteers by all South Carolina Counties					
			☒	Management / Marketing	South Carolina

Name **Philips Healthcare** **City** **State** **Zip**
 Job Title **Channel Manager** **State** **Address** **SC** **Zip** **29201-1114**
Southwest Region for sales of AEDs in the public space, commercial industry, and institutes of medical education.
 Please give your reason for leaving:

An Equal Opportunity Employer
 VRI is a drug-free workplace. We do not tolerate the use of drugs.

ExF030

ROA - 482

VRI

Employer: Procter		City, State: Procter, MA		Date: 07/19/92 to 07/22/11	
Job title: District Sales Manager	Supervisor:	Phone: 877-580-5176	Final rate of pay:		
Duties: Sales					
Please give your reason for leaving:					
Employer: Procter Handkerchiefs		City, State: Procter, MA		Date: 09/03/92 to 07/22/11	
Job title: Product Sales Specialist	Supervisor:	Phone: 877-580-5176	Final rate of pay:		
Duties: Sales					
Please give your reason for leaving:					
Employer:		City, State:		Date:	
Job title:	Supervisor:	Phone:	Final rate of pay:		
Duties:					
Please give your reason for leaving:					
Comments and other notes, letters, instructions and qualifications (including explanation of any gaps in employment): Please review my attached resume. It is a concise summary of 30 years of sales experience.					

As Equal Opportunity Employer
VRI is a drug-free workplace. We do not tolerate the use of drugs.

ExF032

ROA - 484

A Little Bit About Me

Name: Barry Adickes Department: Sales & marketing

Who is in your family? Jeanie - spouse

What is your favorite color? Siyanne, Elizabeth, Neal, & Al
(25) (22) (18) (12)

What do you like to do for fun? Correll
Gardening, cycling, spending time with family.

What's your favorite animal? Rhinoceros

What motivates you? My desire to help others who need a hand.

Why did you choose VRI? Did my drive to provide for my family and help them find joy in their lives.
I have 14 years of experience in the PERS industry and I have witnessed the passion of so many VRI folks that I share.

What do you hope to gain from working here? There is a psychological bonus you get at the end of each day for making others feel safe and well in their own homes.

What are your goals? To excel as a sales leader and to bring my knowledge of the industry to help improve the VRI offering. Ultimately, making VRI irreplaceable to established PERS programs and our clients.

What are your Dreams? To live to see our children grow healthy and happy and to spoil our grand children.
In retirement, I wish to buy a tract of land and build a nice place on it.

Barry S. Adickes

1437 Hummingbird Lane
Rock Hill, South Carolina 29732
803-370-1873
BarrySAdickes@aol.com

PROFESSIONAL SUMMARY

Conscientious sales professional with 30 years of sales success, unique career experiences, and a relentless drive to excel.

Summary of Skills

- o Impactful public communicator with a comfortable ease and effective delivery.
- o Extensively-trained practitioner of consultative sales methods.
- o Expertly-organized and focused when developing sales opportunities.
- o Developer of solid, long-term customer relations through diligence, trust and integrity.

PROFESSIONAL EXPERIENCE

Philips Healthcare

Andover, Massachusetts

June 1983 - January 2014

- Positions held with Philips Healthcare, Emergency Care & Resuscitation Division
Channel Manager, Southeast Region for sales of AEDs in the public space, commercial industry, and institutes of medical education. (May 2011 - January 2014)
Product Sales Specialist, the Carolinas for pre-hospital, EMS, and fire markets for sales of AEDs and advanced life support monitors. (August 2008 - April 2011)
Accomplished 122% to plan sales performance average over a five year period.

- Positions held with Philips Healthcare, LifeLine Division
HeartStart National Business Development Manager (June 2007 - July 2008)
Division Sales Manager, Southeast Region (August 1997 - May 2007)
Senior Accounts Manager (August 1998 - July 1997)
Accounts Manager (June 1983 - July 1988)

Accomplishments while with the Philips LifeLine Division:

- o 128% to plan sales performance average over a 14 year period.
- o Recognized 8 times with the *President's Achievement Award* for sales excellence.
- o Grew \$1 million territory in 1983 to \$3.1 million in 1988
- o Promoted to Division Sales Manager upon completion of 16-month Sales Management Training Program, August 1997.

Benny S. Adickes

page two

- o As *Division Sales Manager*, launched special projects in Alabama, Florida, Louisiana, and Texas, 1988 through 2001.
- u Spent much of 2001 in Louisiana to establish and develop the Louisiana Healthcare Lifetime program. Louisiana Healthcare is now Philips Lifetime's largest U.S. accounts.
- o As *HeavyStart National Business Development Manager*, launched the national integration of the Philips AED product line with the Philips *CarePoint* Response System.

Commerce Clearing House, Inc.

Chicago, Illinois

September 1989 - June 1993

Sales Representative for this *Fortune 500* publisher of business and tax law research reports. Primary sales focus was with corporate and tax attorneys, hospital CFOs and public accountants. Accomplishments while with CCH, Inc.:

- o In 1992, earned *Winner's Circle Award* for top 20 sales performance out of 630 field sales representatives.
- u Ranked in the *CCH Weekly Top 25* seventy-three weeks from January 1990 to May 1993.

TUNES Music & Video, LLC

Rock Hill, South Carolina

October 1986 - August 1989

Owner-operator of this retail music and video outlet.

- o Despite South Carolina's small business first-year/failure rate of 90% and second-year/failure rate of 80%, *Tunes* was turning a profit by April 1987.
- o Remained profitable through the buy-out by *Manitex Records*, Columbia, South Carolina in August 1989.

Monsey Products, Inc.

Kimberlin, Pennsylvania

September 1983 - August 1986

Sales Representative, southeastern region for this manufacturer of roof coatings.

- o Developed territory sales from \$1.5 million to \$7 million, 1983 to 1986.
- o Three-year sales performance average of 214% to plan.

EDUCATION

University of South Carolina

Columbia, South Carolina

School of Business Administration - Bachelor of Science Degree, Management / Marketing



Sterling Testing Systems

Results for Order # 26567886 Client: Vri

SUBJECT INFORMATION	
NAME: ADICKES, BARRY	SSN: ###-##-####
CURRENT ADDRESS:	DOB: 01/01/1900
ADDITIONAL INFORMATION	

Service

DRUG

Finding

Negative

California Applicants/Employees Only: The report does not guarantee the accuracy or truthfulness of the information as to the subject of the investigation, but only that it is accurately copied from public records, and information generated as a result of identity theft, including evidence of criminal activity, may be inaccurately associated with the consumer who is the subject of the report. An investigative consumer reporting agency shall provide a consumer seeking to obtain a copy of a report or making a request to review a file, a written notice in simple, plain English and Spanish setting forth the terms and conditions of his or her right to receive all disclosures, as provided in Section 1786.26.

Sólo para los Solicitantes/Empleados de California: En el informe no se garantiza la exactitud o veracidad de la información en cuanto al tema de la investigación, sino sólo que se ha copiado exactamente de los registros públicos, y la información generada como resultado del robo de identidad, incluyendo las pruebas de una actividad delictiva, podría estar incorrectamente asociada con el consumidor que sea el sujeto del informe. Una agencia investigadora de informes de crédito deberá suministrarle a un consumidor que trate de obtener una copia de un informe o solicite revisar un archivo una notificación por escrito en inglés y español lisas y llanos, en la que se establezcan los términos y las condiciones de su derecho a recibir toda la información, como se dispone en la Sección 1786.26.

Pursuant to Minn. Stat. Ann. § 332.70(4): The report may include information that has been expunged, sealed, or has otherwise become inaccessible to the public since the date it was collected.

Results pertaining to the subject's potential criminal background results are only included in the report if there is an exact match between the full name and date of birth provided by the subject and the court record. To ensure the integrity of our results, the criminal information reported appears exactly as it is received from each search. However, if the same information is revealed in numerous criminal background searches, it is only listed once in the report to assist the client in interpreting the findings.

As sex offender, office of foreign asset control and federal criminal offender databases may only list names, information is provided only if there is a complete name match between the subject and the entry in the government records.

Department of motor vehicle records are provided only if there is an exact match between the license number provided by the subject and the agency record.

Credit reports are provided by the credit bureau based on 2 matching criteria among name, address and social security number.

To the extent criminal background results are duplicative of findings from non-criminal background checks, such as a sex offender hit, the results are duplicated in the report. Accordingly, a thorough review of the complete report is required to ensure that the company properly recognizes duplicative results.



Sterling Testing Systems

Results for Order # 26567886 Client: Vri

NAME ADICKES, BARRY.

SSN 000-00-0000

The purpose of Social Security Trace/Address Locator Report is to locate jurisdictions for purposes of expanding the scope of the criminal background check. The Social Security number provided by the applicant

is not checked against the Social Security Administration database since the Social Security Administration database generally is not accessible for pre-employment screening purposes. In determining whether a number appears to be validly issued, SSN protocols are applied but please note that due to the randomization of the issuance of social security numbers, any conclusion regarding whether the number is valid may not be accurate for recently issued numbers.

This report or portions of this report may have been rated or scored pursuant to criteria provided by the client. The rating is merely to ease the reviewer(s) review of the report and does not indicate that any disqualification decision has been made. Regardless of ratings, absent any statutory provision mandating an employment action, an individualized analysis should be performed.

As it may not be permissible or recommended to use certain information contained in this report for employment decision, it is advisable to consult with counsel prior to making any adverse hiring decisions. By requesting and accepting this report, client confirms it is acting in compliance with its end user certification.



STATUS CLOSED OPEN DATE/TIME May 31 2014 12:20PM CLOSE DATE/TIME Jun 2 2014 5:08PM

COC NUMBER 0699931632 LABORATORY LabCorp

General Information

Last Name : ADICKES
First Name : BARRY
Social Security Number : ###-##-####
Report Status : FINAL
Clinical Information : ###-##-####
Control Number : ###-##-####
Patient Number : ###-##-####
Accession Number : 15174323600
Customer Info : VRI03 VRI
Date/Time Collected : 05/30/2014
Date/Time Received : 05/31/2014
Date/Time Reported : 06/02/2014
Account Info : Acc.# 31667310
RICHARD WORONOFF, M.D.
249 W.17 ST 6TH FLOOR
NEW YORK, NY 10011
212-736-5100

Drug test results

TEST(S)	RESULT	FLAG	UNITS	REFERENCE RANGE
10 DRUG PANEL 788206				01
Chain-of-Custody Protocol Performed				NG/ML
Amphetamine Screen, U	Negative		ng/mL	Cutoff=1000 NG/ML
Methadone Screen, Urine	Negative		ng/mL	Cutoff=300 NG/ML
Benzodiazepines	Negative		ng/mL	Cutoff=300 NG/ML

EXP-037



Sterling Testing Systems

Results for Order # 26567886 Client: Vri

NAME AIRCRAFT HARRY

SSN 440-00-0000

DRUG RESULTS			
TOXICOLOGY			
Cocaine (Metab.)	Negative	ng/ml	Cutoff=300 NG/ML
Opiates	Negative	ng/ml	Cutoff=300 NG/ML
Methqualone	Negative	ng/ml	Cutoff=300 NG/ML
Phencyclidine	Negative	ng/ml	Cutoff=25 NG/ML
Barbiturate	Negative	ng/ml	Cutoff=300 NG/ML
Cannabinoid	Negative	ng/ml	Cutoff=50 NG/ML
Propoxyphene, Urine	Negative	ng/ml	Cutoff=300 NG/ML

**** Comments ****

Reason for testing: Pre-Employment
Collectors Name: DEBBIE SETZER
Collectors Phone #: 8033281724
MRO Name from CCF:

SPECIMEN WAS RECEIVED AND PROCESSED IN A DHHS CERTIFIED LABORATORY.
Laboratory: LABORATORY CORPORATION OF AMERICA/ LABCORP-OTS RTP
CLOSED BY -DINESH CHAUHAN

ExF038

LabCorpLaboratory Corporation of America Holdings
1904 Alexander Dr., Research Triangle Park, NC 27709
69 First Ave., Raritan, NJ 08869

URINE CHAIN OF CUSTODY FORM

COPY 3 - DONOR (green)

SVP P RYING L2006

7207 North Grassier, Houston, TX 77040

1120 Main St., Southaven, MS 38671

Specimen Id No. **0699931632**

0699931632

STEP 1: TO BE COMPLETED BY COLLECTOR OR EMPLOYER REPRESENTATIVE

A. Employer Name, Address, Phone, Fax, I.D.No.:

VBI
C/O STERLING INFOSYSTEMS
249 W. 17TH ST., 6TH FLOOR
NEW YORK, NY 10011
Phone: (212)736-5188 Fax: (646)536-5233

B. MRO Name, Address, Phone, Fax:

STERLING TESTING SYSTEMS, INC
RICHARD WORONOFF, MD
1 STATE STREET PL, 24TH FLOOR
NEW YORK, NY 10004
Phone: (212)736-5188 Fax: (646)827-6443

31887310

C.

D. Reason for Test: PRE EMPLOYMENT

E. Collection Site Address:

3450 INDIA HOOK ROAD SUITE 101
ROCK HILL, SC 29732

Collector Phone No. (803)338-1724

Collector Fax No. (803)980-5734

F. Donor Identification Verified By: PHOTO ID

STEP 2: TO BE COMPLETED BY COLLECTOR

Read specimen temperature within 4 minutes. Is temperature between 90 & 100 F? YES

Split Specimen Collection? NO Collection Observed? NO

REMARKS:

STEP 3: TO BE COMPLETED BY COLLECTOR AND DONOR

Collector affixes bottle seal(s) to container(s). Collector dates seal(s). Donor initials seal(s).

STEP 4: TO BE COMPLETED BY COLLECTOR AND DONOR

Q. Daytime Phone: (803)370-1673

Evening Phone: (803)370-1673

Date of Birth (Mo/Day/Yr):

H. TEST(S) REQUESTED BY EMPLOYER: 788206

I authorize the collector of this specimen for the purpose of a drug screen. I acknowledge that the specimen container(s) was/were sealed with tamper-proof seal(s) in my presence; and that the information provided on this form and on the label(s) affixed to the specimen container(s) is correct. I authorize the laboratory to release the results of the test to the company identified on this form or its designated agents.

Barry S. Adkins
Donor's Name (First M. Last)

Signature of Donor

Initial

05/28/2014
Month Day Year

STEP 5: CHAIN OF CUSTODY-INITIATED BY COLLECTOR AND COMPLETED BY LABORATORY

I certify that the specimen given to me by the donor identified on this form was collected, sealed, and released to the Delivery Service noted in accordance with applicable regulations.

X

Signature of Collector

Debbie Setzer
Collector's Name (Print Last)

Collection Time: 04:17 PM EDT

Collection Date: 05/28/2014

SPECIMEN BOTTLE(S) RELEASED TO:

LabCorp Courier

Name of Delivery Service Transporting Specimen to Lab

RECEIVED AT LAB:

X

Signature of Acceptance

(Print Acceptance's Name (First M. Last))

Date (Mo/Day/Yr)

Primary Specimen

Bottle Seal Intact

[] Yes

[] No, enter remark below

SPECIMEN BOTTLE(S) RELEASED TO:

ExF039

South Carolina Workers' Compensation Commission
1333 Main Street, Suite 500
P.O. BOX 1715
Columbia, SC 29202-1715
803-737-5675



WCC File #: 1102937
Carrier File #: 002380009116WC01
Carrier Code #: _____
Employer FEIN #: _____

Claimant's Name: Barry Simmons Adickes SSN: [REDACTED] Employer's Name: Phillips Healthcare
Address: 1137 Hummingbird Lane Address: 3000 Minuteman Road
City: Rock Hill State: SC Zip: 29732 City: Andover State: MA 01810
Home Phone: (864) 328-0160 Work Phone: () Insurance Carrier: Galagher Basset Services
Preparer's Name: Brooke A. Payne Law Firm: Lueder, Larkin & Hunter, LLC Preparer's Phone #: (843) 353-0796

SUBPOENA

To: Valued Relationships, Inc., 1400 Commerce Center Drive, Franklin, OH 45005

- ☐ **YOU ARE COMMANDED** to appear before the above-named Commission at the place, date and time specified below to testify in the above case.

PLACE OF TESTIMONY: _____ **ROOM:** _____
DATE AND TIME: _____

- ☐ **YOU ARE COMMANDED** to appear at the place, date and time specified below to testify at the taking of a deposition in the above case.

PLACE OF DEPOSITION: _____ **DATE AND TIME:** _____

- ☒ **YOU ARE COMMANDED** to produce and permit inspection and copying of the following documents or objects in your possession, custody or control at the place, date and time specified below.

LIST OF DOCUMENTS: Any and all files in your possession or control related to Barry Adickes (DOB: [REDACTED]), employment records including, but not limited to:

Job description outlining all duties and functions, applications for employment, termination documents, performance evaluations, time and attendance records, wage records, pre or post-hire testing. If no actual employment relationship exists, please provide copies of any applications for employment and pre-hire testing submitted on behalf of Barry Adickes. THIS SHOULD BE ACCOMPLISHED WITHIN TEN (10) DAYS FROM RECEIPT OF THIS SUBPOENA AT THE OFFICE OF LUEDER, LARKIN & HUNTER, LLC, WHICH MAY BE MAILED VIA U.S. MAIL or FAXED to 843-353-0796.

PLACE: Lueder, Larkin & Hunter, LLC, 1037-D Chuck Dawley Blvd., Ste. 210, Mt. Pleasant SC 29464 **DATE AND TIME:** Within 10 days from the date of Subpoena

- ☐ **YOU ARE COMMANDED** to permit inspection of the following premises at the date and time specified below.

PREMISES: _____ **DATE AND TIME:** _____

THIS SUBPOENA SHALL REMAIN IN EFFECT UNTIL YOU ARE GRANTED PERMISSION TO DEPART BY THE COMMISSIONER OR AN OFFICER ACTING ON BEHALF OF THE COMMISSIONER. QUESTIONS CONCERNING THIS SUBPOENA SHOULD BE ADDRESSED TO THE FOLLOWING ISSUING OFFICER.

[Signature] (843) 353-0796 July 30, 2014
ISSUING OFFICER'S SIGNATURE AND TITLE PHONE NUMBER DATE

Serve this form according to R.67-211(C). Refer to R.67-211 and R.67-214 for additional information. Procedural questions may be addressed to the Judicial Department at 803-737-5765.

WCC Form # 27
Rev. 3/2014

27

SUBPOENA

ExF040



1400 Catamount Center Dr
Franklin, OH 45005
Tel: 614-338-2000
Fax: 614-338-2100

Hi,
Gerry,

We are pleased to offer you an opportunity to join the VRI family. This letter outlines the compensation package and benefits for the position.

Title: Territory Manager - Sales
Start Date: May 20, 2014
Compensation: Annual salary: \$55,000 (paid bi-weekly for each period worked)
Bonus plan: You will be paid one month's revenue for all new business you create. For instance if you create 30 clients at \$30 a month, your commission will be \$900 for that month.

Benefits:

Health: The company provides all full time employees with health insurance coverage through Anthem with 3 plan choices. Employees are eligible to join the plan after 90 days of continuous employment with VRI. The company currently pays 100% of employee premiums and a portion of the premiums for employee families or spouses. For details on the specific plans, please contact Kimberly Whitson at kwhitson@vri.com

The company also provides a dental plan that employees may elect to participate in if they choose. VRI pays a portion of the cost, and asks the employee to pay a portion of the cost depending on the plan selected.

Life: VRI provides a life insurance policy of \$25,000 for all employees. The premiums are paid 100% by VRI.

401(K): VRI provides a 401(K) plan for its employees. The plan currently matches 50% of employee contributions up to 6% of each employee's salary. Employees are eligible to participate in the plan after one year of employment. The company also makes a discretionary profit sharing contribution for all employees that are qualified and in the plan.

Other: VRI offers access to short term disability and extended health coverage through Anthem and Aetna. Premiums for these coverages are paid for by the employee, but can be paid on a pre-tax or post-tax basis depending on the choice of the employee.

VRI

Be Safe, Live Well

1450 Culverhouse Center Dr.
 Birmingham, OH 45005
 VRI: 800-368-0050
 Fax: 513-493-8559

Personal Time: Company does not allow time off to extend sales reps. Take 2 days or two months. You have goals to hit and we are confident you put in the time required to hit and exceed these goals.

Other: VRI requires completion of a background check and drug screening as conditions of this offer.

VRI requires the employee to sign a non-solicit and non-compete agreement.

This offer of employment is an at-will offer, and does not bind either VRI or the employee to any length or commitment of employment. No term or language in this letter shall be construed as an exception.

WARRANTY:

VALUED RELATIONSHIPS, INC

Barry Addison

By: _____ (Authorized Signature)	By:  (Authorized Signature)
Name: <u>Bob McDonald</u> (Print or Type)	Name: <u>Barry Addison</u> (Print or Type)
Title: <u>Sales Manager</u>	Title: <u>Territory Manager - Sales</u>
Date: _____	Date: <u>May 20, 2014</u>

JOB DESCRIPTION - Territory

Position Title: Sales Territory Manager
 Program Area: Sales/Marketing
 Review Dates:
 Supervision Responsibilities:

Reports to: Director, Sales/Marketing
 Date Approved: 2013
 Reviewed By:
 Supervisor:

Position Summary: Interact, daily, via phone, mail, email, or personally with VRI Customers, Prospective Customers, State Agency Employees, Case Managers, Home Service Representatives (HSRs), and VRI Team Members to establish and/or maintain a positive working relationship with all parties. Development and execution of a strategic sales plan targeting competitive programs, and new geographies. Works with Executive Management to staff and direct a sales team, provides leadership, evaluation, and management towards the achievement of maximum growth in line with company vision. The position includes not only management of sales activity, but also deep personal involvement and participation in direct sales efforts and execution of sales plans, by performing the following duties:

Essential Duties and Responsibilities include the following. Other duties may be assigned to meet business needs.

- Answer customers' questions about products, prices, availability, product uses, and credit terms.
- Recommend products to customers, based on customers' needs and interests.
- Contact regular and prospective customers to demonstrate products, explain product features, and solicit orders.
- Estimate or quote prices, credit or contract terms, warranties, and delivery dates.
- Consult with clients after sales or contract signings to resolve problems and to provide ongoing support.
- Prepare drawings, estimates, and bids that meet specific customer needs.
- Provide customers with product samples and catalogs.
- Identify prospective customers by using business directories, following leads from existing clients, participating in organizations and clubs, and attending trade shows and conferences.
- Arrange and direct delivery and installation of products and equipment.
- Monitor market conditions, product innovations, and competitors' products, prices, and sales.

Experience and Qualifications: Minimum 3-5 years experience and successful track record managing sales, establishing leads, and selling products or services in a business-to-business environment. Passion for driving new business through prospecting and building relationships -- "order takers" need not apply. Excellent written and verbal communication skills, strong interpersonal presence, and a proven track record of using those abilities to educate, persuade, and influence others. Ability to present to small or large groups, both via the Internet and in person. Available to travel up to 60% of the time. Must have a positive attitude; the ability to think and respond quickly in a fast-paced work environment; be detail-oriented.

Competency/Skill Requirements:

Must be proficient in Microsoft Office Products -- Word, Excel, PowerPoint, and Publisher
 Most candidates must possess:

Competencies:
Active Listening - Giving full attention to what other people are saying, taking time to understand the points being made, asking questions as appropriate, and not interrupting at inappropriate times.
Social Perceptiveness - Being aware of others' reactions and understanding why they react as they do.
Judgment and Decision Making - Considering the relative costs and benefits of potential actions to choose the most appropriate one.
Complex Problem Solving - Identifying complex problems and reviewing related information to develop and evaluate options and implement solutions.
Building and Maintaining Effective Relationships - Developing constructive and cooperative working relationships with others, and maintaining them over time.
Gathering Information - Observing, receiving, and otherwise obtaining information from all relevant sources.
Identifying Influencing Others - Persuading others to buy merchandise, products or to perform a change.

Interacts with others	Communicating with Persons Outside Organization — Communicating with people outside the organization, representing the organization to customers, the public, government, and other external agencies. This interaction can be conducted in person, in writing, or by telephone or e-mail.
Communicating with Supervisors, Peers, or Subordinates	Communicating with Supervisors, Peers, or Subordinates — Providing information to supervisors, co-workers, and subordinates by telephone, in person, or by electronic mail.
Resolving Conflicts and Negotiating with Others	Resolving Conflicts and Negotiating with Others — Handling complaints, settling disputes, and resolving grievances and conflicts, or otherwise negotiating with others. Bringing others together and trying to reconcile differences.
Organizing, Planning, and Prioritizing Work	Organizing, Planning, and Prioritizing Work — Developing specific goals and plans to prioritize, organize, and accomplish your work.
Monitoring Operations, Activities, and Events	Monitoring Operations, Activities, and Events — Identifying information by categorizing, estimating, recognizing differences or similarities, and detecting changes in circumstances or events.
Processing Information	Processing Information — Comparing, coding, categorizing, calculating, tabulating, auditing, or verifying information or data.
Monitoring Processes, Materials, or Surroundings	Monitoring Processes, Materials, or Surroundings — Monitoring and reviewing information from materials, events, or the environment to detect or assess problems.

Ideal candidate will be able to:

- Think at a high-level but also be detail-oriented
- Work under tight deadlines in a high-pressure environment
- Ability to perform multiple tasks with minimal direction

Working Environment:
Office environment

Integrity	Job requires being honest and ethical.
Accountability	Job requires being reliable, responsible, and dependable, and fulfilling obligations.
Attention	Job requires a willingness to take on responsibilities and challenges.
Persistence	Job requires persistence in the face of obstacles.
Self Control	Job requires maintaining composure, keeping emotions in check, controlling anger, and avoiding aggressive behavior, even in very difficult situations.
Stress Tolerance	Job requires accepting criticism and dealing calmly and effectively with high stress situations.
Independence	Job requires developing one's own ways of doing things, guiding oneself with little or no supervision, and depending on oneself to get things done.
Analytical Thinking	Job requires analyzing information and using logic to address work-related issues and problems.
Cooperation	Job requires being pleasant with others on the job and displaying a good-natured, cooperative attitude.
Concern for Others	Job requires being sensitive to others' needs and feelings and being understanding and helpful on the job.

Position Physical Demands:

Walking, sitting, and standing with lifting limited to 10 lbs and records typically not expected to exceed 25 pounds in weight. Extended time at a computer work screen and on the telephone.

I, Bernie Adick, acknowledge receipt and understanding of this job description, I realize that this reflects a general list of responsibilities of the position, as well as a general description of the working environment and physical demands of the position I have accepted.

[Signature]
Signature
June 10, 2014
Date