APPELLATE PANEL DECISION AND ORDER

OF THE

SOUTH CAROLINA WORKERS' COMPENSATION COMMISSION

W.C.C. FILE NO: 1406130

Billy Wayne Herndon — EMPLOYEE, CLAIMANT/RESPONDENT

vs.

G & G Logging, Inc. — EMPLOYER,

and

Palmetto Timber S.I. Fund c/o Walker, Hunter & Associates, Inc. — CARRIER, DEFENDANTS/APPELLANTS,

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Appellate Panel Review held in Columbia, South Carolina, on October 10, 2016 per notices timely And properly served upon all parties of interest.

Appellate Panel Decision and Order Filed:

February 23, 2017

APPEARANCES: Claimant/Appellant represented by John R. Hetrick, Esquire

Defendants/Respondents represented by Benjamin T. Cruse, Esquire

STATEMENT OF THE CASE

This matter came to be heard before the Single Commissioner on May 3, 2016, upon the filing of Claimant's Form 50 and Defendants' Form 51. Claimant alleged a work-related accident on May 13, 2014 involving injury to the cervical spine with an affect to Claimant's left upper extremity in the form of cervical radiculopathy. Claimant sought entitlement to permanent and total disability benefits pursuant to S.C. Code Ann. §42-9-10. Claimant contended he has an average weekly wage of $695.00, with a compensation rate of $463.36, based upon a Form 20 previously submitted in this claim. Claimant asserted that social security retirement benefits have no bearing on a workers' compensation case and should not be considered. It was Defendants' position that Claimant was involved in a work-related accident on May 12, 2014 involving injury to the cervical spine only. Defendants asserted Claimant failed to meet his burden of proof to establish any other injuries pursuant to *Collona v. Marlboro Park Hosp.*, 404 S.C. 537, 745 S.E.2d 128 (2013), as there was no opinion from any physician that Claimant sustained any injury or impairment to any other body part aside from the cervical spine. Defendants further asserted Claimant's correct average weekly wage is $297.69, with a compensation rate of $198.47. This figure is based upon the social security retirement cap offset for wages earned in 2014, equaling a maximum of $15,480.00 in earned wages per year and based upon Claimant's admission that he planned to limit his earnings to that cap so as not to reduce his retirement benefits. Defendants sought a credit for overpayment of temporary total disability benefits paid at the wrong compensation rate, as well as following the date of maximum medical improvement.

The Single Commissioner issued the following Findings of Fact, Conclusions of Law, and Order.

SINGLE COMMISSIONER'S FINDINGS OF FACTS

1. Jurisdiction, venue and notice are proper and stipulated by the parties.

2. The AWW and CR reflected on the Form 20 are correct and have not been contested by the Defendants for more than two years.

3. Claimant sustained an admitted injury by accident to his neck arising out of and in the course and scope of his employment on 5/12/2014.

4. Claimant alleged additional causally-related injuries to his left shoulder, left arm, left hand, and fingers. Dr. Donald Johnson, II, in his narrative report of 6/30/2015, opined that "The patient has decreased functional use of his left arm secondary to radiculopathy with residual numbness and weakness of the left arm and hand." Also, Claimant was initially diagnosed by Dr. Bryan Tompkins on 5/27/2014 and 6/10/2014 with "neck pain and left shoulder pain" starting after a motor vehicle accident while working. It is noted that the left shoulder pain improved significantly throughout the course of treatment, although the left arm radiation continued even following Claimant's anterior discectomy and fusion at C6-7 by Dr. Artur Pacult on 1/13/2015.

5. Claimant underwent various evaluations and treatment for his alleged work-related injuries as provided in detail in the medical evidence section of this Decision and Order as set forth herein and incorporated herein by reference.

6. On 4/27/2015 the ATP Dr. Artur Pacult of Neurosurgery and Spine Specialists of Charleston, placed Claimant at MMI, recommending no further treatment and referred him to another specialist for an impairment rating. (APA 3, P. 42)

7. On 6/11/2015, on a Form 14B, Dr. James E. Gee of Tuomey Internal Medicine and Wellness placed Claimant at MMI as of 04/27/2015, assigned a 9% medical impairment to

the whole person, assigned work restrictions to limit heavy work and strain, and opined Claimant will not need future medical treatment. (APA 1, P. 1)

8. On 6/30/2015, in an IME for the Claimant, Dr. Donald R. Johnson, II of Southeastern Spine Institute opined, to a reasonable degree of medical certainty, that before Claimant closes his case he should update his cervical MRI scan because of concerns about the levels above the previous cervical fusion. In addition, Dr. Johnson assigned a 26% impairment to the whole person and opined Claimant has decreased functional use of his left arm secondary to radiculopathy with residual numbness and weakness of the left arm and hand. Dr. Johnson recommended future medical treatment and opined Claimant may not return to his previous vocation and assigned work restrictions. Specifically, Dr. Johnson noted that Mr. Herndon has "complaints of neck pain with radiating pain, paresthesias and numbness down the left arm to the left hand." Dr. Johnson's evaluation was after Claimant was seen and rated by Dr. Gee on June 11, 2015, when Dr. Gee noted that "He (Claimant) does not have radicular pain and paresthesias in the left arm as he did prior to surgery." The records of Dr. Johnson and Dr. Gee appear to contradict one another, but Dr. Johnson's records are more current in time than Dr. Gee's. Dr. Johnson noted that Claimant's "pain is typically 6 out of 10," and the "pain is made better by medication and worse by driving, riding, and lifting or straining." On physical examination, Dr. Johnson found that the "Spurling's maneuver is provocative on the left side," while Dr. Gee noted that "Spurling's sign is not present." Also, Dr. Johnson noted that "His numbness interestingly is in the C5-6 distribution. He has symptoms down into the index and forefinger. He also has some symptoms along the brachioradialis. He has pain with range of motion of the neck." The surgery performed by Dr. Pacult was to Claimant's C6-7 disc, and the "C5-6 distribution" is the disc above this. Based on his review of Claimant's cervical MRI scan, Dr.

Johnson noted that "the patient has multi-level pathology at 3-4, 4-5, 5-6, and 6-7. Indeed, in regards to left-sided pathology, the 6-7 level looks to be worse. However, I am concerned the patient has pathology at the adjacent levels above." Dr. Johnson was "concerned about the levels above the previous cervical fusion," at C6-C7 performed by Dr. Pacult. He believed that Claimant needed an updated cervical MRI scan and would need future medical treatment. (APA 6, P. 87-89)

9. On 01/07/2016, in deposition testimony, Dr. Pacult testified he did not recommend Claimant returning to work as a logging truck driver. At the time of his deposition, he was asked:

> Q. I'm looking at it from an objective standpoint, if there's a greater risk of further injury to his back (neck) by going back to work in the logging woods.
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> A. Uh-huh.
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> Q. Would you recommend – if he came back in today and said, you know, "Going out in the logging woods, I bounce around all the time. I don't want to do further damage to my neck," would you recommend to him, "Well, you need to go back to work" or "You need to go back to work as a log truck driver?"
>
> A. No, I don't ...

(APA 7, P. 99)

10. Claimant underwent vocational evaluations/assessments by George Page and Dixon Pearsall, Ph.D. Dr. Pearsall, in his private interview with Claimant, determined that Claimant "does consider himself to be depressed and anxious." He determined that "unfortunately, (Claimant) cannot meet the basic expectations and requirements of competitive employment (work) at any exertion or skill level. This would include but not be exclusive to SEDENTARY positions."

Dr. Pearsall concludes as follows:

> In consideration of current medical and functional residual capacity, and consideration of age (65) and prior work experience, and incorporating the absence of readily transferrable skills to "Light" and/or "Sedentary" work; it is "highly likely" and "probable" that Mr. Herndon will not return to competitive employment. This is true of all full-time competitive positions represented in significant numbers in the national economy at all exertion and skill levels.

Dr. Pearsall went on to opine that "I am confident to a reasonable degree of professional assurance that my analyses and opinions accurately represent Mr. Herndon's vocational capacity and vocational access (employability)."

11. Claimant's alleged additional body parts, left shoulder, left arm, left hand and fingers are causally-related to his admitted work injury.

12. I give the greatest weight to Dr. Johnson and little weight to Dr. Gee. I find no reason for Claimant to be rated by Dr. Gee in Sumter, South Carolina when all of Claimant's medical treatment was provided in the Walterboro/Charleston area.

13. I give greater weight to the vocational assessment of Dixon Pearsall.

14. Claimant is at MMI as of 04/27/2015.

15. Based on Claimant's sworn testimony, which I found to be very credible, and the evidence as a whole, I find the Claimant is totally and permanently disabled pursuant to §42-9-10(B). I incorporate by reference the lay testimony of Claimant and his wife as previously set forth herein, which corroborates the medical and vocational evidence herein. In *McCollum v. Singer Company*, 300 S.C. 103, 386 S.E.2d 471 (Ct. App. 1989), the South Carolina Court of Appeals, citing our Supreme Court opinion in *Coleman v. Quality Concrete Products, Inc.*, 245 S.C. 625, 142 S.E.2d 43 (1965), stated a guideline for determining permanent and total disability under the general disability criteria for loss in earning capacity. The court stated that "Under

workers' compensation law 'total disability' does not require complete, abject helplessness. Rather, it is an inability to perform services other than those that are so limited in quality, dependability, or quantity that no reasonably stable market exists for them." *McCollum*, Id. at 474. Continuing, "Evidence that the Claimant has been able to earn occasional wages or perform certain kinds of gainful work does not necessarily rule out a finding of total disability or require that it be reduced to partial." *Colvin v. E.I. DuPont deNemours Company*, 227 S.C. 465, 88 S.E.2d 581 (1955). I find that determining disability involves more than simply listing jobs which theoretically an injured worker may be able to do. This has never been the standard and is but one factor to be considered. Other factors, such as age, education, past relevant work, special training, ability to transition, job availability in the locale, state and national economies, local and regional unemployment rates, general health, degree of medical impairment and other factors are critical to the determination of disability.

16. Pursuant to §42-15-60, Claimant is entitled to causally-related medical treatment and lifetime medicals.

17. Claimant is entitled to a lump sum award of 500 weeks, less previous payments by the Defendants.

18. The indemnity proceeds to August 1, 2016 of $165,374.25 shall be allocated as follows: $55,124.75 as attorneys' fees of (33-1/3%) of the permanent and total disability award pursuant to written contract between the Claimant/Employee and his attorney; $3,995.49 for costs pursuant to the same written contract; $106,254.01 in compromise settlement of disputed future lost earnings at the rate of $152.66 per week, commencing on August 1, 2016, and continuing thereafter for a period of 696 weeks. *Utica-Mohawk v. Orr*, 227 S.C. 226, 87 S.E.2d 589 (1955); *Sciarotta v. Bowen*, 837 F.2d 135 (3d Cir. 1988); POMS 52001.55(c)(4).

19. The AWW of $695.00 and a corresponding CR of $463.33, reflected on the Form 20, are correct.

SINGLE COMMISSIONER'S CONCLUSIONS OF LAW

1. Under Sec. 42-1-160, Claimant sustained an admitted injury to his neck by accident arising out of and in the course of his employment. The additional body parts of left shoulder, left arm, left hand and fingers are causally-related to his admitted work injury.

2. Under Sec. 42-15-20, proper notice of the injury was given. Also, jurisdiction and venue are proper and are agreed to by the parties.

3. Under Sec. 42-15-40, the claim was filed in a timely manner.

4. Under Sec. 42-1-40, Claimant's compensation rate as determined in this Decision and Order is $463.33.

5. Under Sec. 42-9-10(B), Claimant is totally and permanently disabled.

6. Under Sec. 42-9-301, Claimant is entitled to a lump sum award of 500 weeks, less previous payments by the Defendants.

7. Under Sec. 42-15-60, Claimant is entitled to causally-related medical treatment and as a result of being permanently and totally disabled, to causally-related lifetime medical care and treatment for his neck, left shoulder, left arm, left hand and fingers. Lifetime medical care and treatment shall include, but is not limited to, all causally-related, reasonable and necessary nursing services, prescription medications, medicines, prosthetic devices, sick travel, pain management, medical, hospital, and other authorized treatment and care, including mileage.

8. Under Regulation Rule 67-1205, Claimant's attorney is entitled to an attorneys' fee of thirty-three and one-third percent (33-1/3%) of Claimant's award of permanent and total disability from the date of this Decision and Order.

SINGLE COMMISSIONER'S AWARD

IT IS HEREBY ORDERED that Claimant is entitled to a lump sum award of 500 weeks, less previous payments by the Defendants.

IT IS FURTHER ORDERED that, pursuant to §42-15-60, Claimant is entitled to causally-related medical treatment and lifetime medical care and treatment for his neck, left shoulder, left arm, left hand and fingers.

IT IS FURTHER ORDERED that the indemnity award to August 1, 2016 of $165,374.24 shall be allocated as follows: $55,124.75 as attorneys' fees of (33-1/3%) of the gross settlement amount pursuant to written contract between Claimant/Employee and his attorney; $3,995.49 for costs pursuant to the same written contract; $106,254.01 in compromise settlement of disputed future lost earnings at the rate of $152.66 per week, commencing on the date of this award and continuing thereafter for a period of 696 weeks. *Utica-Mohawk v. Orr*, 227 S.C. 226, 87 S.E.2d 589 (1955); *Sciarotta v. Bowen*, 837 F.2d 135 (3d Cir. 1988); POMS 52001.555(c)(4).

Defendants timely appealed the Single Commissioner decision raising, among other issues, whether the Single Commissioner erred in finding that the average weekly wage and compensation rate as reflected on the Form 20 are correct. The parties briefed their arguments and were heard by the undersigned on October 10, 2016. The following is the Decision of the Commission:

EVIDENCE OF THE CASE/ANALYSIS

The Form 20 previously filed in this matter was based upon Claimant's limited 13 weeks of wages earned while working for the Defendants prior to his work related accident. In light of the limited time worked prior to the accident, the Form 20 was initially calculated by taking the

total wages earned divided by the total number of weeks worked pursuant to S.C. Code Ann. §42-1-40. This section provides, in pertinent part, that "[w]hen the employment, prior to the injury, extended over a period of less than 52 weeks, the method of dividing the earnings during that period by the number of weeks and parts thereof during which the employee earned wages shall be followed, ***as long as results fair and just to both parties will be obtained.***" (emphasis added)

During the course of discovery, Defendants learned that Claimant was receiving Social Security retirement benefits, having voluntarily retired from employment in January of 2012. Despite his voluntary retirement and receipt of Social Security retirement benefits, Claimant continued to work on a part-time basis in order to supplement his income. Further discovery revealed Claimant intended not to earn more than $15,000.00 per year following his retirement so as to avoid the Social Security retirement offset and, in fact, had not earned wages in excess of the earnings cap since his retirement. Pursuant to the Social Security Administration, a retired worker could earn up to $15,480.00 in 2014 prior to having an offset of his retirement benefits.

Claimant reported his plan to limit his earnings in 2014 to Defendants' vocational evaluator, George Page, during his interview with Claimant on January 22, 2016. Mr. Page included this conversation in his vocational report dated February 2, 2016. In that report, Mr. Page stated: "Mr. Herndon retired at age 62 and began working part-time and revealed he could make up to $15,000.00 per year. He noted he would work until he reached the $15,000.00 and not work the rest of the year. He noted G & G Logging was aware." (Claimant's APA p. 106) Defendants were first aware of Claimant's plan to limit his earnings up to the Social Security offset cap of $15,000.00 in 2014 upon receipt of the vocational evaluator's report dated February 2, 2016.

Based upon this new information, Defendants obtained Claimant's tax records for 2012, 2013, and 2014 to determine whether Claimant had earned greater than $15,480.00 in any year he worked following his retirement. In 2012, Claimant earned $7,780.00 while working for Bootle Logging Company. In 2013, Claimant earned $8,806.50 while working for Bootle Logging Company. In 2014, Claimant earned $9,285.00 while working for G & G Logging, Inc. (Defendants' APA No. 13 and No. 15) Based upon the wage records and tax returns obtained by Defendants, it is clear Claimant did not exceed the Social Security cap of $15,480.00 of wages earned during any year of part-time work following his voluntary retirement and receipt of retirement benefits.

Claimant testified before the Single Commissioner concerning his plan and intention to limit his income following his retirement in 2012. Specifically, Claimant testified as follows:

Q: You then went to work for G & G in 2014; is that correct?

A: Yes, sir. I did.

Q: And you worked approximately 13 weeks or so?

A: Yes, sir, until the accident in May.

Q: Okay. And -- and during that time period while you were working for G & G you earned about $9,285; does that sound right?

A: Yes, sir. That's close.

Q: **And was it your intention in 2014 then to earn as much as you could without reducing your retirement benefits?**

A: **Yes, sir.**

(Hrg. Tr. p. 59, ll. 10-22) (emphasis added)

Furthermore, George Page, vocational expert, testified before the Single Commissioner

as follows:

Q: And did Mr. Herndon have a conversation during your evaluation regarding his retirement status?

A: Yes.

Q: And what did Mr. Herndon say about his retirement benefits and his plan to earn wages?

A: In our conversation he indicated he had retired at age 62 and that he -- he needed to work and that he could make up to $15,000.00 a year without being penalized.

Q: And was this -- was it relayed to you that this was his plan?

MR. HETRICK: Object to the form of question Commissioner, leading.

THE COURT: Can you please rephrase?

Q: I'll rephrase. Did Mr. Herndon discuss his current situation -- current employment situation with you with G & G Logging?

A: Yes.

Q: Did Mr. Herndon have any plan for working for G & G Logging with regard to the restrictions -- I am sorry, the limitation on earnings?

A: Yes.

Q: And what is your understanding based on your conversation with Mr. Herndon as to his plan while working for G & G Logging?

A: On page 3 of my report I -- I'll just read what I said. "Mr. Herndon retired at age 62 and began working part-time and revealed he could make up to $15,000.00 per year. He noted he would work until he reached $15,000.00 and not work the rest of the year. He noted G & G Logging was aware."

(Hrg. Tr. p.80, ll. 3-25, p. 81, ll. 1-9)

The Workers' Compensation statute which sets forth several different methods for calculating the Claimant's average weekly wage provides an elasticity and flexibility with a view toward always achieving the ultimate objective of reflecting fairly Claimant's probable future earning loss. *Bennett v. Gary Smith Builders*, 271 S.C. 94 (1978). The Appellate Panel of the Full Commission finds that exceptional reasons exist to recalculate Claimant's average weekly wage as it would be unfair and unjust to Defendants to find Claimant has an average weekly wage of $695.00 and further find that an alternative method for computing the average weekly wage must be resorted to in order to most nearly approximate the amount which Claimant would have earned were it not for his injury.

As such, The Appellate Panel finds the average weekly wage as calculated in this claim is unfair and unjust as it does not fairly reflect Claimant's probable future earning loss. Rather, it provides a windfall for Claimant to receive fulltime wages in excess of any wages he was planning to earn by his own admission in light of the Social Security offset. In that regard, The Appellate Panel finds Claimant's average weekly wage of $695.00, which the Single Commissioner found to be accurate, equates to a salary or earnings totaling $36,140.00 per year. Based upon the Social Security office that cap of $15,480.00 in earnings for 2014 and Claimant's assertion that he did not plan to exceed that cap, The Appellate Panel finds that awarding an average weekly wage as originally calculated which represents earnings that are more than double the amount Claimant advised he would not exceed is grossly unjust and unfair to Defendants. Moreover, based upon Claimant's reported income following his retirement in 2012 and 2013, the two years prior to his accident where he supplemented his income working part-time, it is clear Claimant did not intend to earn more than $15,480.00 per year and established a pattern of supplementing his income with wages well below the $15,480.00 cap. In that regard,

as noted above Claimant earned $7,780.00 in 2012, $8,806.50 in 2013 while working for Bootle Logging. Claimant's current average weekly wage of $695.00 as reported on the Form 20 represents more than 4.5 times the wages he actually earned in those two years following his retirement. The Appellate Panel finds an average weekly wage based upon purported earnings 4.5 times greater than Claimant's history of earnings following his retirement is grossly unfair and unjust to the Defendants and supports the conclusion that an alternative method for calculating Claimant's average weekly wage must be used in this instance.

This conclusion is supported by the South Carolina Supreme Court's decision in *Bennett v. Gary Smith Builders*, 271 S.C. 94 (1978). That decision is on four corners with the fact pattern presented in this case. In the *Bennett* decision, Bennett worked for the employer while drawing Social Security retirement. Bennett worked each year for the employer until he received the maximum he was permitted to earn without penalty while drawing Social Security payments. Bennett would then quit work and not work the rest of the year. Bennett's plan and pattern of work is the exact same plan and pattern of work as Claimant's in the present matter. While working for his employer, Bennett was injured on the job and filed a Workers' Compensation claim. Due to the short duration of time Bennett worked in the year of his accident, Bennett's average weekly wage was initially computed by dividing his total earnings by the number of weeks worked. This is the same method of calculating Claimant's average weekly wage that Defendants initially used in the present case.

The Supreme Court analyzed this issue and found that the average weekly wage used by dividing total wages by actual numbers of weeks worked resulted in a salary almost twice as much as Bennett actually earned during any one of the previous years following his retirement and resulted in an unjust and unfair calculation. In the present case, calculating Claimant's

average weekly wage by dividing total wages by actual number of weeks worked resulted in a salary greater than four times as much as Claimant actually earned in the previous years following his retirement. The Supreme Court found in the *Bennett* case that an alternative method to calculate the average weekly wage was proper in order to compute an average weekly wage which would be fair and just to both parties based upon Bennett's work history and retirement status. The Supreme Court stated that based upon Bennett's previous earning indicating he earned $2,500.00 per year (the maximum he could earn prior to his retirement benefits being offset), "it is grossly unfair to the employer to require payments of almost twice the amount." *Bennett*, 271 S.C. at 98. The Supreme Court further reasoned that "failure to receive any amount over and above that figure in the past or future is not attributable to the injury he has sustained, but rather is attributable to the pattern of work activity he has voluntarily assumed." *Id.* Finally, the Supreme Court stated, "[t]he calculation we hereby approve brings about a result fair to the employee and to the employer. It neither rewards the employee for working less than fulltime, nor punishes the employer for having given Bennett part-time employment..." *Id. at 99.*

FINDINGS OF FACT AS AMENDED BY THE APPELLATE PANEL

After a careful, deliberate and thoughtful review of the complete record, and arguments and briefs of counsel, the Appellate Panel affirms in part and reverses in part the Decision and Order from the Hearing Commissioner dated July 26, 2016 with amendment to the Findings of Fact and Conclusions of Law as follows:

1. Jurisdiction, venue and notice are proper and stipulated by the parties.

2. Claimant voluntarily retired from employment in 2012. Following his voluntary retirement, Claimant returned to the workforce working part-time in order to supplement his income. This finding is based upon the testimony of Claimant.
3. In 2012, following Claimant's voluntary retirement, Claimant returned to work for Bootle Logging and earned $7,780.00 in 2012. In 2013 Claimant continued to work part-time for Bootle Logging and earned $8,806.50. This finding is based upon the testimony of Claimant as well as Defendants' APA No. 13 and No. 15.
4. In 2014, Claimant was hired part-time by G & G Logging, Inc. Prior to Claimant's work accident on May 12, 2014, Claimant earned $9,285.00 while working part-time for G & G Logging. This finding is based upon Claimant's testimony as well as Defendants APA No. 13 and No. 15.
5. Claimant testified that it was his intention in 2014 following his voluntary retirement to limit his earnings up to the Social Security retirement offset cap of $15,480.00 so as to avoid his retirement benefits being offset. This finding is based upon the testimony of Claimant, specifically Hrg. Tr. p. 59, ll. 10-22.
6. Claimant presented for a vocational evaluation with George Page, at which time during that evaluation Claimant advised that it was his plan to limit his earnings up to the Social Security retirement offset amount of $15,000.00 so his retirement benefits would not be reduced. This finding is based upon the vocational report of George Page (Claimant's APA p. 106) as well as the hearing testimony of George Page at Hrg. Tr. pp. 80-81.
7. The Appellate Panel finds that exceptional reasons exist in this claim which require recalculation of Claimant's average weekly wage to obtain a result that is fair and just to both parties.

8. The Appellate Panel finds Claimant's correct average weekly wage is $297.63 with a corresponding compensation rate of $198.47 which is calculated using the maximum allowable yearly earnings totaling $15,480.

9. Defendants are entitled to a credit of overpaid weekly compensation paid at the incorrect compensation rate. As of January 16, 2017 Defendants have paid a total of $64,313.62 in weekly compensation since the date of accident. During that same time period, Claimant was entitled to only $27,785.80 (140 weeks x $198.47). Defendants' credit therefore equals $36,527.82 which shall be deducted from the total award.

10. Claimant sustained an admitted injury by accident to his neck arising out of and in the course and scope of his employment on 5-12-2014.

11. Claimant alleged additional causally-related injuries to his left shoulder, left arm, left hand, and fingers. Dr. Donald Johnson, II, in his narrative report of 6-30-2015, opined that "The patient has decreased functional use of his left arm secondary to radiculopathy with residual numbness and weakness of the left arm and hand." Also, Claimant was initially diagnosed by Dr. Bryan Tompkins on 5/27/2014 and 6/10/2014 with "neck pain and left shoulder pain" starting after a motor vehicle accident while working. It is noted that the left shoulder pain improved significantly throughout the course of treatment, although the left arm radiation continued even following Claimant's anterior discectomy and fusion at C6-7 by Dr. Artur Pacult on 1/13/2015.

12. Claimant underwent various evaluations and treatment for his alleged work-related injuries as provided in detail in the medical evidence section of this Decision and Order as set forth herein and incorporated herein by reference.

13. On 4/27/2015 the ATP Dr. Artur Pacult of Neurosurgery and Spine Specialists of Charleston, placed Claimant at MMI, recommending no further treatment and referred him to another specialist for an impairment rating. (APA 3, P. 42)
14. On 6/11/2015, on a Form 14B, Dr. James E. Gee of Tuomey Internal Medicine and Wellness placed Claimant at MMI as of 04/27/2015, assigned a 9% medical impairment to the whole person, assigned work restrictions to limit heavy work and strain, and opined Claimant will not need future medical treatment. (APA 1, P. 1)
15. On 6/30/2015, in an IME for the Claimant, Dr. Donald R. Johnson, II of Southeastern Spine Institute opined, to a reasonable degree of medical certainty, that before Claimant closes his case he should update his cervical MRI scan because of concerns about the levels above the previous cervical fusion. In addition, Dr. Johnson assigned a 26% impairment to the whole person and opined Claimant has decreased functional use of his left arm secondary to radiculopathy with residual numbness and weakness of the left arm and hand. Dr. Johnson recommended future medical treatment and opined Claimant may not return to his previous vocation and assigned work restrictions. Specifically, Dr. Johnson noted that Mr. Herndon has "complaints of neck pain with radiating pain, paresthesias and numbness down the left arm to the left hand." Dr. Johnson's evaluation was after Claimant was seen and rated by Dr. Gee on June 11, 2015, when Dr. Gee noted that "He (Claimant) does not have radicular pain and paresthesias in the left arm as he did prior to surgery." The records of Dr. Johnson and Dr. Gee appear to contradict one another, but Dr. Johnson's records are more current in time than Dr. Gee's. Dr. Johnson noted that Claimant's "pain is typically 6 out of 10," and the "pain is made better by medication and worse by driving, riding, and lifting or straining." On physical

examination, Dr. Johnson found that the "Spurling's maneuver is provocative on the left side," while Dr. Gee noted that "Spurling's sign is not present." Also, Dr. Johnson noted that "His numbness interestingly is in the C5-6 distribution. He has symptoms down into the index and forefinger. He also has some symptoms along the brachioradialis. He has pain with range of motion of the neck." The surgery performed by Dr. Pacult was to Claimant's C6-7 disc, and the "C5-6 distribution" is the disc above this. Based on his review of Claimant's cervical MRI scan, Dr. Johnson noted that "the patient has multi-level pathology at 3-4, 4-5, 5-6, and 6-7. Indeed, in regards to left-sided pathology, the 6-7 level looks to be worse. However, I am concerned the patient has pathology at the adjacent levels above." Dr. Johnson was "concerned about the levels above the previous cervical fusion," at C6-C7 performed by Dr. Pacult. He believed that Claimant needed an updated cervical MRI scan and would need future medical treatment. (APA 6, P. 87-89)

16. On 01/07/2016, in deposition testimony, Dr. Pacult testified he did not recommend Claimant returning to work as a logging truck driver. At the time of his deposition, he was asked:

> Q. I'm looking at it from an objective standpoint, if there's a greater risk of further injury to his back (neck) by going back to work in the logging woods.
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> A. Uh-huh.
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> Q. Would you recommend – if he came back in today and said, you know, "Going out in the logging woods, I bounce around all the time. I don't want to do further damage to my neck," would you recommend to him, "Well, you need to go back to work" or "You need to go back to work as a log truck driver?"
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> A. No, I don't ...
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17. Claimant underwent vocational evaluations/assessments by George Page and Dixon Pearsall, Ph.D. Dr. Pearsall, in his private interview with Claimant, determined that Claimant "does consider himself to be depressed and anxious." He determined that "unfortunately, (Claimant) cannot meet the basic expectations and requirements of competitive employment (work) at any exertion or skill level. This would include but not be exclusive to SEDENTARY positions."

Dr. Pearsall concludes as follows:

> In consideration of current medical and functional residual capacity, and consideration of age (65) and prior work experience, and incorporating the absence of readily transferrable skills to "Light" and/or "Sedentary" work; it is "highly likely" and "probable" that Mr. Herndon will not return to competitive employment. This is true of all full-time competitive positions represented in significant numbers in the national economy at all exertion and skill levels.

Dr. Pearsall went on to opine that "I am confident to a reasonable degree of professional assurance that my analyses and opinions accurately represent Mr. Herndon's vocational capacity and vocational access (employability)."

18. Claimant's alleged additional body parts, left shoulder, left arm, left hand and fingers are causally-related to his admitted work injury.

19. We give the greatest weight to Dr. Johnson and little weight to Dr. Gee. We find no reason for Claimant to be rated by Dr. Gee in Sumter, South Carolina when all of Claimant's medical treatment was provided in the Walterboro/Charleston area.

20. We give greater weight to the vocational assessment of Dixon Pearsall.

21. Claimant is at MMI as of 04/27/2015.

22. Based on Claimant's sworn testimony, which we find to be credible based on the record and the observations of the Single Commissioner, in which he found the Claimant to be very credible, and the evidence as a whole, we find the Claimant is totally and permanently disabled pursuant to §42-9-10(B). We incorporate by reference the lay testimony of Claimant and his wife as previously set forth herein, which corroborates the medical and vocational evidence herein. In *McCollum v. Singer Company*, 300 S.C. 103, 386 S.E.2d 471 (Ct. App. 1989), the South Carolina Court of Appeals, citing our Supreme Court opinion in *Coleman v. Quality Concrete Products, Inc.*, 245 S.C. 625, 142 S.E.2d 43 (1965), stated a guideline for determining permanent and total disability under the general disability criteria for loss in earning capacity. The court stated that "Under workers' compensation law 'total disability' does not require complete, abject helplessness. Rather, it is an inability to perform services other than those that are so limited in quality, dependability, or quantity that no reasonably stable market exists for them." *McCollum*, Id. at 474. Continuing, "Evidence that the Claimant has been able to earn occasional wages or perform certain kinds of gainful work does not necessarily rule out a finding of total disability or require that it be reduced to partial." *Colvin v. E.I. DuPont deNemours Company*, 227 S.C. 465, 88 S.E.2d 581 (1955). We find that determining disability involves more than simply listing jobs which theoretically an injured worker may be able to do. This has never been the standard and is but one factor to be considered. Other factors, such as age, education, past relevant work, special training, ability to transition, job availability in the locale, state and national economies, local and regional unemployment rates, general health, degree of medical impairment and other factors are critical to the determination of disability.

23. Pursuant to §42-15-60, Claimant is entitled to causally-related medical treatment and lifetime medicals.
24. Claimant is entitled to a lump sum award of 500 weeks, less previous payments by the Defendants.
25. Claimant's average weekly wage equals $297.63 with a corresponding compensation rate of $198.47.

CONCLUSIONS OF LAW AS AMENDED BY THE APPELLATE PANEL

After careful, deliberate and thoughtful review of the complete record, and the arguments and briefs counsel, the Appellate Panel affirms in part and reverses in part the Hearing Commissioner's Decision and Order dated July 26, 2016 with amendments to the following Conclusions of Law:

1. Pursuant to S.C. Code Ann. §42-1-160, Claimant sustained an admitted injury to his neck by accident arising out of and in the course of his employment. The additional body parts of left shoulder, left arm, left hand and fingers are causally related to his admitted work injury.
2. Pursuant to S.C. Code Ann. §42-15-20, proper notice of the injury was given. Also, jurisdiction and venue are proper and are agreed to by the parties.
3. Pursuant to S.C. Code Ann. §42-15-40, the claim was filed in a timely manner.
4. Pursuant to S.C. Code Ann. §42-1-40, and *Bennett v. Gary Smith Builders*, 271 S.C. 94 (1978), Claimant's correct average weekly wage equals $297.63 with a corresponding compensation rate of $198.47.
5. Pursuant to S.C. Code Ann. §42-9-10(B), Claimant is totally and permanently disabled.

6. Pursuant to S.C. Code Ann. §42-9-31, Claimant is entitled to a lump sum award of 500 weeks less previous payments by the Defendants.
7. Pursuant to S.C. Code Ann. §42-9-210, Defendants are entitled to a credit of overpaid weekly compensation paid at the incorrect compensation rate. As of January 16, 2017 Defendants have paid a total of $64,313.62 in weekly compensation since the date of accident. During that same time period, Claimant was entitled to $27,785.80 (140 weeks x $198.47). Defendants' credit therefore equals $36,527.82 which shall be deducted from the total award.
8. Pursuant to S.C. Code Ann. §42-15-60, Claimant is entitled to causally related medical treatment and as a result of being permanently and totally disabled, to causally related lifetime medical care and treatment for his neck, left shoulder, left arm, left hand and fingers, lifetime medical care and treatment shall include, but is not limited to, all causally related, reasonable and necessary nursing services, prescription medications, medicines, prosthetic devices, sick travel, pain management, medical, hospital, and other authorized treatment and care, including mileage.
9. Pursuant to Reg. 67-1205, Claimant's attorney is entitled to an attorney's fee of (33-1/3%) of Claimant's award of permanent and total disability.

ORDER AND AWARD

IT IS THEREBY ORDERED that Claimant is entitled to a lump sum award of 500 weeks less previous payments by Defendants.

IT IS FURTHER ORDERED that pursuant to S.C. Code Ann. §42-15-60 Claimant is entitled to causally related medical treatment and lifetime medical care and treatment for his neck, left shoulder, left arm, left hand and fingers.

IT IS FURTHER ORDERED that the indemnity award July 26, 2016 equaled $71,181.23 (commuted value of 385 weeks equals 337.8687 x $198.47), and shall be allocated as follows: $23,727.07 as attorney fees of 33-1/3% of the gross permanent disability award pursuant to written contract between the claimant/employee and his attorney; $3,995.49 as costs and expenses pursuant to the same written contract; $43,458.67 in compromise settlement of disputed lost earnings at the rate of $62.44 per week, commencing on the date of the original Award and continuing thereafter for a period of 696 weeks. ***Utica-Mohawk v. Orr, 227 S.C. 226, 87 S.E.2d 589 (1955); Sciarotta v. Bowen, 837 F.2d 135 (3d Cir. 1988); POMS 52001.555 (c) (4).*** However, it is noted that Claimant continued to receive weekly compensation in this claim through January 16, 2017. As of, January 16, 2017 Claimant received $64,313.62 in weekly benefits over the course of 140 weeks since the date of his accident. Based upon the correct compensation rate of $198.47, Claimant was only entitled to payment of $27,785.81, resulting in an overpayment of weekly compensation totaling $36,527.82. The commuted value of the total award for permanent and total disability as of January 16, 2017 equals $66,711.37. After deducting Defendants' credit for overpaid weekly compensation, Claimant's total award equals $30,183.55.

AND IT IS SO ORDERED by the Appellate Panel.

Commissioner Melody L. James
For the Appellate Panel

WE CONCUR:

Commissioner Aisha Taylor

Commissioner Susan S. Barden

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 23, 2017