BEFORE THE SOUTH CAROLINA
WORKERS' COMPENSATION COMMISSION APPELLATE PANEL

JOSEPH DELOACH, Claimant/Appellant, v. SC DEPARTMENT OF CORRECTIONS, Employer, and SOUTH CAROLINA STATE ACCIDENT FUND, Carrier, Defendants/Respondents.	W.C.C. FILE NO. 1218305 **DECISION & ORDER**

Statement of the Case

This matter originally came before Hearing Commissioner Aisha Taylor, pursuant to the Defendants/Respondents' Form 21. The Form 21 requests a credit for the overpayment of benefits pursuant to § 42-9-210 and a determination of permanency pursuant to § 42-9-10. The Claimant/Appellant relies on opinions from Dr. Dean V. Moesch, a radiologist, and Dr. Peter Frank, a family osteopath, to allege that he is entitled to future medical treatment and lifetime compensation due to severe physical brain damage under § 42-9-10(C) and Crisp v. Southco, Inc., 401 S.C. 627 (2013), and Sparks v. Palmetto Hardwood, Inc., 406 S.C. 124 (2013).

The Respondents deny that the Appellant sustained a severe physical brain damage as contemplated by § 42-9-10(C) and Crisp and Sparks, which is intended to

apply to only the most catastrophic cases. The Respondents contend that the Appellant suffered, at best, a mild brain injury and rely on the opinions of Dr. Jerry Pruitt, Dr. Daniel Nagelberg, and Dr. L. Randolph Waid. The Respondents also rely on the opinion of Dr. Paul B. Pritchard, a board-certified neurologist with MUSC, who even opines that the Appellant is capable of performing suitable alternative employment. Under such circumstances, the Respondents argue that the greater weight of the evidence supports a finding that the Appellant is not entitled to lifetime compensation under § 42-9-10(C).

Hearing Commissioner Taylor agreed with the Respondents and found that the Appellant was not entitled to lifetime compensation for severe physical brain damage. Instead, Commissioner Taylor found the Appellant is permanently and totally disabled as a result of his migraine headaches and depression and is entitled to the lump sum payment of the commuted value of 500 weeks of benefits less any amount previously paid in the form of temporary benefits pursuant to S.C. Code Ann. § 42-9-10(A). The sole issue on appeal is whether Commissioner Taylor erred in finding that the Appellant was not entitled to lifetime compensation under §42-9-10(C).

Hearing Commissioner Taylor's findings were, *inter alia*, as follows:

> *16. Dr. Pruitt opined Claimant's variable deficits in attention and concentration are likely caused by several different factors operating simultaneously including the active psychological reaction to the injury, medication effects, and "possibly" some lingering primary effects of the brain injury. Dr. Pruitt went on to note that improvement in Claimant's psychological status may also have a positive effect on cognition and the Claimant's complaints. (Clt's APA #14, 525). There was no opinion stated to a reasonable degree of medical certainty that Claimant had brain damage that was permanent or severe.*
>
> *17. On March 6, 2015, Dr. Shissias prepared correspondence addressed "To Whom it May Concern" wherein he opined that Claimant continues to have attentional/cognitive memory deficits complicated by depression, anxiety, features of PTSD, and sleep disturbance that are persistent "due to the*

permanent brain injury he has suffered." Dr. Shissias went on to state that Claimant was in need of continuing neurologic and psychiatric care. (Clt's APA #16, 564).

18. *I find Dr. Shissias' letter is inconsistent with the results and conclusions of the neuropsychological testing as outlined by Dr. Pruitt. I give greater weight to the findings of Dr. Pruitt during the neuropsychological evaluation.*

19. *Claimant and his wife testified at the hearing. I find the hearing testimony was cumulative in that much, if not all, of the testimony was referenced throughout the medical and expert evidence.*

20. *I find Claimant has failed to meet his burden of proving permanent and severe physical brain damage as contemplated by S.C. Code Ann. § 42-9-10(C) and the case law as outlined in Crisp and Sparks. I find the IME and questionnaires by Dr. Moesch and the opinion letters and questionnaires from Dr. Shissias were not persuasive in light of the detailed findings of Dr. Pruitt, who performed Claimant's initial neuropsychological testing. I therefore find based upon the record as a whole that the Claimant has not sustained severe and permanent brain damage, and therefore, is not entitled to a lifetime award under § 42-9-10.*

21. *I do find Dr. Shissias' opinion regarding Claimant's headaches to be reliable and as such I find Claimant's headaches are severe and disabling from an employment standpoint. Likewise, I find all of the medical evidence supports a finding of psychological overlay in the form of depression.*

22. *I find Claimant is permanently and totally disabled as a result of his migraine headaches and depression pursuant to S.C. Code Ann. § 42-9-10(A). This finding is based on the medical evidence as a whole and the employability opinions offered by Dr. Shissias, Dr. Moesch, Dr. Frank, and Vocational Economics, Inc.*

23. *I find Claimant is entitled to lifetime medical treatment for his headaches and depression pursuant to S.C. Code Ann. § 42-15-60.*

24. *I find Claimant is entitled to a lumpsum payment of the commuted value of 500 weeks of benefits less any amount previously paid to the Claimant in the form of temporary benefits.*

25. *The Defendants paid to the Claimant inmate assault leave benefits December 30, 2012, through June 30, 2013. The Defendants paid to the Claimant annual leave benefits July 1, 2013, through February 21, 2014. However, I find the Defendants are not entitled to a credit for the inmate assault leave or annual leave paid.*

26. *I further find the Claimant is entitled to James v. Anne's, Inc. apportionment of the lump sum award to be allocated over his statutory lifetime.*

By his Form 30, the Appellant raised the following issues on appeal:

1. *Did the Commissioner err in Finding of Facts number 16 "Dr. Pruitt opined Claimant's variable deficits in attention and concentration are likely caused by several different factors operating simultaneously including the active psychological reaction to the injury, medication effects and "possibly" some lingering primary effects of the brain injury. Dr. Pruitt went on to note that improvement in Claimant's psychological status may also have a positive effect on cognition and the Claimant's complaints. (Clt's APA #14, 525). There was no opinion stated to a reasonable degree of medical certainty that Claimant had brain damage that was permanent or severe." As such finding is against the greater weight of the evidence and controlled by Error of Law.*

2. *Did the Commissioner err in Finding of Facts number 18 "I find Dr. Shissias' letter is inconsistent with the results and conclusions of the neuropsychological testing as outlined by Dr. Pruitt. I give greater weight of the findings of Dr. Pruitt during the neuropsychological evaluation." As such finding is against the greater weight of the evidence and controlled by Error of Law.*

3. *Did the Commissioner err in Find of Facts number 20 "I find 'Claimant has failed to meet his burden of proving permanent and sever [sic] physical brain damage as contemplated by S.C. Code Ann. § 42-9-10(C) and the case law as outlined in Crip and Sparks. I find the IME and questionnaires by Dr. Moesch and the opinion letters and questionnaires from Dr. Shissias were not persuasive in light of the detailed findings of Dr. Pruitt, who performed Claimant's initial neuropsychological testing. I therefore find based upon the record as a whole that the claimant has not sustained sever [sic] and permanent brain damage, and therefore, is not entitled to a lifetime award under § 42-96-10 [sic]." As such finding is against the greater weight of the evidence and controlled by Error of Law.*

4. *Did the Commissioner err in Findings of Facts number 23 "I find Claimant is entitled to lifetime medical treatment for his headaches and depression pursuant to S.C. Code Ann. § 42-15-60." As such finding is against the greater weight of the evidence and controlled by Error of Law.*

5. *Did the hearing Commissioner err in the Conclusion of Law number 5 "Under S.C. Code Ann. § 42-9-10(C) and Crisp and Sparks, the claimant failed to meet his burden of proving permanent and sever [sic] physical brain damage. Thus, the Claimant is not entitled to lifetime compensation, and instead, is subject to the 500-week limitation of compensation as*

provided in § 42-9-10(A)." as [sic] such the conclusion is against the greater weight of the evidence and controlled by Error of Law.

6. *Did the hearing Commissioner err in the Conclusion of Law number 5 "Under S.C. Code Ann. § 42-9-10(C) and Crisp and Sparks, the claimant failed to meet his burden of proving permanent and sever [sic] physical brain damage. Thus, the Claimant is not entitled to lifetime compensation, and instead, is subject to the 500-week limitation of compensation as provided in § 42-9-10(A)." as [sic] such the conclusion is against the greater weight of the evidence and controlled by Error of Law.*

7. *Did the hearing Commissioner err in the Conclusion of Law number 5 [sic] ". . . the Claimant is entitled to a lump sum payment of the commuted value of 500 weeks of benefits less any amount previously paid to the Claimant in the form of temporary benefits." as [sic] such the conclusion is against the greater weight of the evidence and controlled by Error of Law.*

8. *Did the hearing Commissioner err in the Conclusion of Law number 5 [sic] "Under S.C. Code Ann. § 42-15-60, the Claimant is entitled to lifetime medical treatment for his headaches and depression only." as [sic] such the conclusion is against the greater weight of the evidence and controlled by Error of Law.*

9. *Did the hearing Commissioner err in characterizing Dr. Pruitt as "independent."*

After reviewing the briefs filed by the parties and the Record in this matter, and after consideration of the oral arguments of the parties, the Appellate Panel finds that Commissioner Taylor's Decision and Order is supported by the greater weight of the evidence and contains no error of law or fact. Therefore, Hearing Commissioner Taylor's Decision and Order is hereby AFFIRMED.

Evidence Summary

The record includes the hearing testimony of the Appellant, Joseph DeLoach, and the hearing testimony of his wife of nine years, Renee DeLoach. (Hr'g. Tr. 16:25-17:2). Together, the couple has three children and the youngest child was born years following the Appellant's work injury. (Hr'g. Tr. 17: 3-17, 57:18-20). Both parties submitted APA

submissions, which included medical records and opinion reports from Dr. Jerry Pruitt, Dr. Daniel Nagelberg, Dr. L. Randolph Waid, Dr. Paul B. Pritchard, Dr. Devin J. Troyer, Dr. Charles Shissias, Dr. Peter Frank, and Dr. Dean V. Moesch. The APA submissions are reflected on the Notice of Submissions that were timely and properly submitted prior to the hearing.

After earning a bachelor's degree in criminology, the Appellant served as a prison captain for more than eighteen years. (Hr'g. Tr. 57:2-6; 51:2-3). On December 29, 2012, the Appellant was assaulted by an inmate while working at the Department of Corrections. (Hr'g. Tr. 7:11-14). As a result of the assault, the Appellant sustained injuries to his head, face, and left eye. (Hr'g. Tr. 7:13-14).

On the day of the assault, the Appellant was transported and admitted to the emergency room at the Medical College of Georgia ("MCG") and was observed to have a "large ecchymosis with swelling left eye," a "transient" loss of consciousness, headaches, some memory loss, but no dizziness or confusion. (Clt's APA #14, 129-30). Although a CT of the cervical spine was negative, a CT of the head revealed extensive facial fractures, a small epidural hematoma, and multiple small hemorrhagic contusions. (Def's APA #1, 9-14).

On January 3, 2013, the Appellant received a plastic surgery consultation for "comminuted maxillary sinus fracture, left orbital blowout fracture and left mandibular ramus fracture." (Clt's APA #14, 150). At that time, the Appellant's neurologic status was "alert, oriented" and his psychiatric status was "cooperative." (Clt's APA #14, 150). Appellant's plastic surgery was scheduled for a week later and the Appellant was discharged. (Clt's APA #14, 146; Def's APA #1, 7).

As planned, the Appellant underwent an orbital ORIF, Zygomatic quadripod fracture ORIF, and left mandible fracture ORIF on January 9, 2013. (Clt's APA #14, 175-77). On January 29, 2013, the Appellant stated during a follow-up appointment that he was improving. (Clt's APA #14, 238). Moreover, on February 25, 2013, although the Appellant still had mild diplopia on extreme lateral gaze, he reported that the sensation over his left face had improved and his upper lip sensation had greatly improved. (Clt's APA #14, 240-43; Def's APA #1, 17-19). On May 13, 2013, the Appellant observed further improvement in facial numbness. (Def's APA #1, 22-25).

Meanwhile, the Appellant presented to Dr. Charles Shissias with Low Country Medical Group on April 17, 2013, complaining of constant daily headaches over the left orbital and temporal regions. (Clt's APA #16, 547-49). Dr. Shissias documented sleeping and mood issues as well as subjective memory difficulties. (Clt's APA #16, 549). On July 22, 2013, the Appellant reported a 20 percent improvement in headaches but continued complaining of dizziness, memory difficulty, and "split second intoxication" which clarifies as a "brief wobble." (Clt's APA #16, 550). Dr. Shissias assessed the Appellant with memory loss, post-traumatic migraine headache, insomnia, and depression; and prescribed Neurontin and Ambien. (Clt's APA #16, 551). The Appellant continued to treat with Dr. Shissias through September 19, 2013. (Clt's APA #16, 553).

On December 6, 2013, almost one year after the initial injury, Appellant presented again to MGC with complaints of dizziness ("like I drank a 6-pack"), double vision, disorientation, frequent stumbles and falls, and memory loss. (Def's APA #5, 42-43). During a later appointment on January 24, 2014, the Appellant continued to

complain of double vision, light headedness, headaches, confusion, and memory loss. (Clt's APA #14, 491-95). His wife also remarked during the visit that he was irritable and short-tempered. (Clt's APA #14, 491). As a result, the Appellant was referred for a neuropsychiatric evaluation and prescribed Cognitive Behavioral Therapy. (Clt's APA #14, 495).

On February 27, 2014, Appellant underwent a neuropsychological evaluation by Dr. Jerry Pruitt at MCG Department of Neurology. (Def's APA #5, 48). Dr. Pruitt's assessment results were as follows: (1) variable impairment in simple attention and concentration in an "otherwise normal cognitive examination" within the context of preserved intellectual functioning "in the average range"; (2) patient and his wife complained of poor memory and problems working with memory and emotional control; (3) the remainder of the exam was essentially normal functioning and average nonverbal intellectual functioning; and (4) a disturbance of personality functioning characterized by depression and somatization as well as moderate symptoms of subjective depression. (Def's APA #5, 49).

During testing, Dr. Pruitt observed that:

> "During the examination, the patient was alert, responsive, and cooperative. Attentional capacity was average. Rate of mentation and psychomotor status were normal. While the patient described this as a significant symptom, no slowing was observed." (Def's APA #5, 49).

Similarly, despite the Appellant's complaints of stuttering, none was observed:

> "Speech was characterized by fluent, goal-directed sentences." (Def's APA #5, 49).

Dr. Pruitt further found no evidence of delusions, hallucinations, or formal thought disorder:

> "Affect was appropriate with a wide range of expression. Mood appeared normothymic. Manner of relating was appropriate. Sense of humor was adequate." (Def's APA #5, 49).

Dr. Pruitt opined that the Appellant's variable deficits in attention and concentration are likely caused by several different factors operating simultaneously, including the active psychological reaction to the injury, medication effects, and "possibly" some lingering primary effects of the brain injury. (Def's APA #5, 49). Dr. Pruitt further noted that improvement in Appellant's psychological status may also have a positive effect on cognition and the Appellant's complaints. (Def's APA #5, 49). Notably, Dr. Pruitt did not opine that the Appellant had brain damage that was permanent or severe. (Def's APA #5, 48-54).

Later in 2014, Dr. Daniel Nagelberg performed another neuropsychological evaluation at the request of Appellant's attorney and concluded that he exhibited only ***mild*** cognitive impairment, "presumably" secondary to the brain injury. (Def's APA #8,

94). Cognitive impairment was noted as a commonly observed symptom of depression alone. Dr. L. Randolph Waid performed a psychological evaluation—also at the request of Appellant's attorney—but agreed with Dr. Nagelberg that the Appellant merely suffered from a mild cognitive impairment. (Def's APA #10, 107).

In a letter "To Whom it May Concern" dated March 6, 2015, Dr. Shissias stated that the Appellant continued to have "attentional/cognitive memory deficits complicated by depression, anxiety, features of PTSD, and sleep disturbance" that are persistent "due to the permanent brain injury he has suffered." (Clt's APA #16, 564). Dr. Shissias further stated that the Appellant needed continued neurologic and psychiatric care. (Clt's APA #16, 564). However, Dr. Shissias later opined in January 2016 that he agreed with Dr. Waid's opinion above, which concluded that the cognitive impairment was only mild. (Clt's APA #16, 565).

In August 2015, Respondents scheduled another independent medical examination with Dr. Devin J. Troyer, who specializes in physical medicine and rehabilitation. (Def's APA #11, 109-111). Dr. Troyer's impression was multiple trauma with traumatic brain injury. (Def's APA #11, 109-110). However, Dr. Troyer found the Appellant was alert, his speech was intelligible, and he had reached maximum medical improvement. (Def's APA #11, 109-110). Taking the Appellant's vision issues, decreased attention, and facial disorder into account, Dr. Troyer assigned a total of 60 percent whole person impairment rating but assigned only a 10 percent impairment rating for the effects of the Appellant's traumatic brain injury, decreased attention, and decreased memory. (Def's APA #11, 111).

On January 8, 2016, Appellant underwent another independent medical examination with Dr. Peter Frank, this time scheduled by Appellant's attorney. (Clt's APA #19, 680-81). Dr. Frank, a family osteopath in Hardeeville, South Carolina, concluded that the Appellant could not engage in activities necessary to maintain substantial gainful employment because of his traumatic brain injury. (Clt's APA #19, 681). At the same time, however, Dr. Frank assigned only a 25 percent impairment rating to the whole person due to the traumatic brain injury and assigned a Class 2 rating for cerebral impairments. (Clt's APA #19, 681). Pursuant to the AMA Guides, a Class 2 impairment is defined merely as "***mild***." (See AMA Guidelines, 5th ed., Tables 13.5, 13.6, at 320).

On January 13, 2016, the Appellant underwent a yet another independent medical examination with Dr. Paul B. Pritchard, a board-certified neurologist with MUSC. (Def's APA #12, 112-16). Dr. Pritchard agreed that the Appellant had reached maximum medical improvement and specifically noted:

> "His neurological deficits from the brain injury are ***relatively mild***." (Def's APA #12, 112-16) (emphasis added).

Dr. Pritchard also noted that:

> "his educational attainment and experience should qualify him for alternative employment." (Def's APA #12, 116).

In a questionnaire from the Appellant's attorney dated July 22, 2016, Dr. Dean V. Moesch, a radiologist, opined that the Appellant's headaches and migraines were a direct result of his traumatic brain injury and that, on days when he is suffering from such a headache, the Appellant would not be expected to be capable of engaging in gainful employment. (Clt's APA #17, 568-69). Dr. Moesch had conducted an independent medical examination of the Appellant the previous November. (Clt's APA #17, 574-75). The Appellant's attorney also sent a questionnaire to Dr. Neal L. Shealy, who opined on December 1, 2015, that the Appellant will not be capable of gainful employment in the future due to his physical and psychological conditions. (Clt's APA #18, 582-83).

During the hearing, both the Appellant and his wife testified at great length to the Appellant's persistent symptoms. (Hr'g. Tr. 22:5-35:17; 45:1-51:21). The testimony given largely comported with the aforementioned medical records, which already well-documented the Appellant's injury, hospitalization, and recovery.

When the record is reviewed as a whole, the greater weight of the evidence shows the Appellant has not suffered severe physical brain damage as contemplated by § 42-9-10(C). The greater weight of the evidence in the record, including the opinions of Dr. Pruitt, Dr. Nagelberg, Dr. Waid, and Dr. Pritchard, indicate the Appellant suffered, at best, a mild brain injury. A mild brain injury falls markedly short of the permanent physical brain damage required by § 42-9-10(C) and Crisp and Sparks to warrant lifetime compensation benefits. Accordingly, we find no error by Hearing Commissioner Taylor.

Discussion

I. The greater weight of the evidence and applicable law support Hearing Commissioner Taylor's findings and conclusion that the Appellant did *not* sustain a severe and permanent physical brain injury, which would entitle him to lifetime compensation under § 42-9-10(C).

In this *de novo* review, the Appellate Panel can make its own findings of fact and conclusions of law consistent or inconsistent with those of Hearing Commissioner Taylor. Here, the greater weight of the evidence unquestionably supports Commissioner Taylor's findings that the Appellant does ***not*** have severe brain damage and, therefore, is not entitled to lifetime compensation. Accordingly, we decline to make findings inconsistent with the single commissioner on review.

Precedent places the onus upon the Appellant to meet the burden of proving facts that will bring his alleged brain injury within the purview of the Act. See, e.g., Clade v. Champion Labs., 330 S.C. 8, 11 (1998).

Pursuant to § 42-9-10(C), lifetime compensation is strictly limited to claimants sustaining only the most catastrophic of compensable injuries which render each "a paraplegic, a quadriplegic, or [one] who has suffered physical brain damage." § 42-9-10(C). However, this Panel fully acknowledges that "the mere presence of any physical brain injury or damage, regardless of degree," does not automatically "trigger[] the operation of section 42-9-10(C)." Crisp, 401 S.C. at 641 (observing to hold otherwise would be contrary not only to legislative intent but also to the way in which our courts have awarded compensation for brain injuries). Rather, we find § 42-9-10(C) applicable "only in the most serious cases of injury to the brain." Id. at 642. As our Supreme Court has already

made abundantly clear, § 42-9-10(C) exemplifies the General Assembly's intent "to require severe, permanent impairment of normal brain function." Sparks, 406 S.C. at 129. Our "legislature was contemplating a brain injury so severe that the person could not subsequently return to suitable gainful employment." Crisp, 401 S.C. at 643. In conclusion, even if permanent damage is shown, "the severity of the injury is the lynchpin of the analysis." Id. at 642.

In the instant case, the greater weight of objective medical evidence demonstrates that the Appellant did not sustain a catastrophic brain injury that was either permanent and severe as the aforementioned caselaw requires for an award of lifetime benefits. First, Dr. Pruitt with the Medical College of Georgia, Department of Neurology, specifically observed:

> "During the examination, the [Appellant] was alert, responsive, and cooperative. Attentional capacity was average. Rate of mentation and psychomotor status were normal. While the patient described this as a significant symptom, no slowing was observed." (Def's APA #5, 49).

We further note that, contrary to the Appellant's subjective complaints, Dr. Pruitt did not observe any slowed thinking or stuttering. (Def's APA #5, 49). Moreover, Dr. Pruitt found no evidence of delusions, hallucinations, or formal thought disorder. (Def's APA #5, 49). Thus, Dr. Pruitt concluded the Appellant's variable deficits in attention and concentration are likely caused by several different factors operating simultaneously, including the active psychological reaction to the injury, medication effects, and

"possibly" some lingering primary effects of the brain injury. (Def's APA #5, 49). Importantly, we note that brain damage that was either permanent or severe was excluded. (Def's APA #5, 49).

Second, bolstering Dr. Pruitt's assessment, board-certified neurologist Dr. Pritchard with MUSC, Department of Neurosciences, opined that the Appellant had reached maximum medical improvement and that:

> "His neurological deficits from the brain injury are ***relatively mild***." (Def's APA #12, 112-16) (emphasis added).

Likewise, Dr. Nagelberg performed a neuropsychological evaluation at the request of Appellant's attorney and concluded that he exhibited only mild cognitive impairment, "presumably" secondary to the brain injury. (Def's APA #8, 94). Notably, cognitive impairment is commonly observed as a symptom of depression alone. Later, Dr. Waid performed a psychological evaluation—also at the request of Appellant's attorney—but still agreed with Dr. Nagelberg that the Appellant merely suffered from a mild cognitive impairment. (Def's APA #10, 107). In turn, Dr. Shissias opined that he agreed with Dr. Waid's opinion that the cognitive impairment was only mild. (Clt's APA #16, 565). But, a "mild" cognitive impairment plainly does not meet our Supreme Court's threshold requirement that the injury fall among "the most serious cases of injury to the brain." Thus, we conclude that any one of the above opinions is sufficient to support Hearing Commissioner Taylor's Decision and Order.

Third, while physical medicine specialist Dr. Troyer did not explicitly state that the Appellant's brain damage was "mild," he only assigned a 10 percent impairment rating for the effects of the Appellant's traumatic brain injury, decreased attention, and decreased memory—clearly indicative of a mild injury. (Def's APA #11, 111). In fact, the only medical professional who seems to agree with the Appellant is Dr. Moesch, a radiologist we conclude is not nearly as qualified to provide an opinion on the matter. (Clt's APA #17, 571). Thus, Commissioner Taylor did not abuse her discretion in giving his opinion little weight in comparison to the other physicians.

By the same logic, Dr. Frank is a family osteopath and not a neurologist, neurosurgeon, or neuropsychologist. Nevertheless, Dr. Frank assigned the Appellant to only a Class 2 rating for cerebral impairments. (Clt's APA #19, 681). Pursuant to the AMA Guides, a Class 2 impairment is defined as "mild." (See AMA Guidelines, 5th ed., Tables 13.5, 13.6, at 320).[1] Thus, this Panel concludes that the medical evidence overwhelmingly evidences the Appellant's brain injury was "mild"—not severe. Additionally, Commissioner Taylor heard the Appellant's live testimony and personally observed his evident cognitive abilities. Thus, his mild brain injury falls far outside the purview of "the most serious cases" to which lifetime compensation is limited.

Finally, the medical record includes opinions that the Appellant's mild brain injury has not even rendered him incapable of participating in the workforce as he contends. For example, board-certified neurologist Dr. Pritchard opined that the "[Appellant's] educational attainment and experience should qualify him for alternative employment." (Def's APA #12, 116). Indeed, the Appellant earned a bachelor's degree

[1] This Appellate Panel takes judicial notice of the AMA Guides, 5th Edition, as a learned treatise and established reliable authority.

in criminology and obtained more than eighteen years or work experience prior to his injury. (Hr'g. Tr. 57:2-6; 51:2-3). Similarly, physical medicine specialist Dr. Troyer specifically noted the Appellant was able to work at a computer, which is a primary component of numerous jobs. (Def's APA #11, 109-11). In fact, in response to the Appellant's questionnaire, Dr. Shissias and radiologist Dr. Moesch indicated that *only* on days when he is suffering from such a headache, would the Appellant not be *expected* to be capable of engaging in gainful employment. (Clt's APA #16, 566-67; #17, 568-69). However, Dr. Moesch, again, we note is merely a radiologist.

Accordingly, the Appellant's presumed mild brain injury is insufficient to "trigger[] the operation of section 42-9-10(C)." The medical evidence manifests the Appellant sustained only a mild brain injury at worst. Even the opinions secured by his own attorney evidence as much. Therefore, this Appellate Panel affirms Hearing Commissioner Taylor's Decision and Order finding that Appellant did not sustain severe physical brain damage under § 42-9-10(C) and limiting the Appellant to an award of the commuted value of 500 weeks under § 42-910(A).

II. Hearing Commissioner Taylor did not err in giving greater weight to Dr. Pruitt's opinion as credibility determinations and weighing of evidence is integral to the Hearing Commissioner's role as fact finder.

It is well-settled that the Commissioner serves as the fact finder, evaluates the credibility of the witnesses, and assigns weight to the evidence. Shealy v. Aiken Co., 341 S.C. 448, 455 (2000). As fact finder, the Commissioner may freely disregard certain medical evidence in favor of other competent evidence. Tiller v. Nat'l Health Care Ctr., 334 S.C. 333, 340 (1999). For example, in the case *sub judice*, Hearing Commissioner Taylor

found in Findings of Fact number 18 that "Dr. Shissias' letter is inconsistent with the results and conclusions of the neuropsychological testing as outlined by Dr. Pruitt. I give greater weight to the findings of Dr. Pruitt during the neuropsychological evaluation." Commissioner Taylor further found in Findings of Fact number 20 that "the IME and questionnaires by Dr. Moesch and the opinion letters and questionnaires from Dr. Shissias were not persuasive in light of the detailed findings of Dr. Pruitt, who performed Claimant's initial neuropsychological testing."

After thorough review of the record as a whole and Hearing Commissioner Taylor's findings, we conclude Commissioner Taylor properly gave the most weight to the detailed opinion rendered by Dr. Pruitt with the Medical College of Georgia, Department of Neurology. This was a proper exercise of her discretion as the fact finder and her decision is supported by the greater weight of the evidence. Likewise, Commissioner Taylor properly allocated far less weight to the opinions of Dr. Shissias and Dr. Moesch, who is merely a radiologist and *not* a neurologist like Dr. Pruitt. Moreover, Dr. Pruitt's opinions are bolstered by the remainder of the evidentiary record, including the opinions of Dr. Waid, Dr. Nagelburg, and board-certified neurologist Dr. Pritchard with MUSC, Department of Neurosciences.

In sum, this Appellate Panel wholly rejects the Appellant's contention that Commissioner Taylor made findings "based upon erroneous legal conclusions." Commissioner Taylor's findings of fact and rulings of law are supported by the greater weight of the evidence and the applicable law.

Findings of Fact

1. All parties to this proceeding are subject to and bound by the terms and provisions of the South Carolina Workers' Compensation Act.
2. The Appellant was an employee of the South Carolina Department of Corrections on December 29, 2012 and had an average weekly wage of $912.82, resulting in a compensation rate of $608.58. The State Accident Fund is the liable carrier.
3. The Appellant sustained compensable work-related injuries to his face and head on December 29, 2012 after being assaulted by an inmate while working at the Department of Corrections.
4. Initial medical records from MCG noted the Appellant was "beaten about face and head" plus loss of consciousness at time of beating. At the time of the initial medical visit, the Appellant had "large ecchymosis with swelling left eye" and "transient" loss of consciousness. The Appellant was also noted to have headaches and some memory loss, but no dizziness or confusion. The Appellant's formal diagnoses on the date of injury were traumatic subdural hemorrhage with loss of consciousness, traumatic cerebral parenchymal hemorrhage, temporal cone fracture, closed fracture of mandible, multiple fracture of facial bones, facial laceration, and subarachnoid hemorrhage following injury without open intracranial wound and with brief loss of consciousness (less than one hour). (Clt's APA #14, 129-32).
5. The Appellant was admitted to the emergency room on December 29, 2012 and was discharged on January 3, 2013. At the time of discharge, the Appellant was not reported to have any headaches or additional loss of consciousness. The

Appellant also had a plastic surgery consultation for "comminuted maxillary sinus fracture, left orbital blowout fracture and left mandibular ramus fracture." At that appointment, the Appellant's neurologic status was noted as "alert, oriented" and his psychiatric status was noted as "cooperative." The Appellant was deemed stable with "stable CT, neurologic exam, and evolution of contusions." The Appellant's plastic surgery was scheduled for January 9, 2013. (Clt's APA #14, 144-50).

6. The Appellant had surgery on January 9, 2013 to consist of orbital ORIF, Zygomatic quadripod fracture ORIF, and left mandible fracture ORIF. (Clt's APA #14, 175-77).
7. On January 29, 2013, in follow-up from undergoing surgery for his facial fractures, the Appellant stated he was improving but still had issues with pain along with blurry and double vision intermittently. (Clt's APA #14, 238).
8. On February 25, 2013, the Appellant still had mild diplopia on extreme lateral gaze. The Appellant reported sensation over his left face had improved since his last visit. The Appellant also indicated his upper lip sensation was greatly improved, but his left lower lip sensation had not. The Appellant was released to follow-up in three months. (Clt's APA #14, 240-43).
9. On April 17, 2013, the Appellant presented to Dr. Shissias with Low Country Medical Group with a primary complaint of constant daily headaches over the left orbital and temporal regions. At that visit, the Appellant felt as though the headaches were causing problems with sleeping and his mood. Subjective memory difficulties were also documented at that visit. (Clt's APA #16, 549).

10. The Appellant returned to Dr. Shissias on July 22, 2013, reporting a 20% improvement in headaches but continued complaints of dizziness, memory difficulty, and "split second intoxication" which clarifies as a "brief wobble." Dr. Shissias assessed the Appellant with memory loss, post-traumatic migraine headache, insomnia, and depression. The Appellant was prescribed additional medications to include Neurontin and Ambien. (Clt's APA #16, 551).
11. The Appellant returned to Dr. Shissias on September 19, 2013 with the same complaints; however, Dr. Shissias noted Appellant's "subjective memory difficulty" in the comments section of his medical note. (Clt's APA #16, 553).
12. On December 6, 2013, almost one year after the initial injury, the Appellant presented to MGC with complaints of dizziness, double vision, and disorientation. In that visit, Appellant complained of double vision that made him dizzy ("like I drank a 6-pack"). The Appellant reported falling due to dizziness and memory loss as well. (Clt's APA #14, 513-17).
13. On January 24, 2014, over one year after the initial injury, the Appellant presented to MCH Health with chief complaints of light headedness, confusion and diplopia. In that visit, Appellant complained of double vision, headaches, confusion, and memory loss. The Appellant's wife noted he was irritable and short-tempered. The Appellant was referred for a neuropsychiatric evaluation, the Appellant's Neurontin was continued and the Appellant was prescribed Cognitive Behavioral Therapy. (Clt's APA #14, 491-95).
14. On February 27, 2014, the Appellant underwent a neuropsychological evaluation by Dr. Pruitt at MCG Department of Neurology. As a result of the Appellant's

evaluation and testing, the Appellant was noted to have: (1) variable impairment in simple attention and concentration in an "otherwise normal cognitive examination" within the context of preserved intellectual functioning "in the average range"; (2) patient and his wife complained of poor memory and problems working with memory and emotional control; (3) the remainder of the exam was essentially normal functioning and average nonverbal intellectual functioning; and (4) a disturbance of personality functioning characterized by depression and somatization as well as moderate symptoms of subjective depression. (Clt's APA #14, 524-525).

15. Dr. Pruitt's observations during the neuropsychological testing indicated the Appellant was alert, responsive, and cooperative and his attentional capacity was average. Dr. Pruitt noted that the Appellant rate of mentation and psychomotor status were normal and that, while the Appellant had significant complaints of this symptom ("slowed thinking"), no slowing was observed. Additionally, Dr. Pruitt noted the Appellant's speech was characterized by fluent, goal-directed sentences and that again, while the Appellant complained of stuttering, it was not observed during the examination. (Clt's APA #14, 525).

16. Dr. Pruitt opined the Appellant's variable deficits in attention and concentration are likely caused by several different factors operating simultaneously including the active psychological reaction to the injury, medication effects, and "possibly" some lingering primary effects of the brain injury. Dr. Pruitt went on to note that improvement in the Appellant's psychological status may also have a positive effect on cognition and the Appellant's complaints. (Clt's APA #14, 525). There

was no opinion stated to a reasonable degree of medical certainty that the Appellant had brain damage that was permanent or severe.

17. On March 6, 2015, Dr. Shissias prepared correspondence addressed "To Whom it May Concern" wherein he opined that [the Appellant] continues to have attentional/cognitive memory deficits complicated by depression, anxiety, features of PTSD, and sleep disturbance that are persistent "due to the permanent brain injury he has suffered." Dr. Shissias went on to state that the Appellant was in need of continuing neurologic and psychiatric care. (Clt's APA #16, 564).

18. We find Dr. Shissias' letter is inconsistent with the results and conclusions of the neuropsychological testing as outlined by Dr. Pruitt. We give greater weight to the findings of Dr. Pruitt during the neuropsychological evaluation.

19. The Appellant and his wife testified at the hearing. We find the hearing testimony was cumulative in that much, if not all, of the testimony was referenced throughout the medical and expert evidence.

20. We find the Appellant has failed to meet his burden of proving permanent and severe physical brain damage as contemplated by S.C. Code Ann. § 42-9-10(C) and the case law as outlined in Crisp and Sparks. We find the IME and questionnaires by Dr. Moesch and the opinion letters and questionnaires from Dr. Shissias were not persuasive in light of the detailed findings of Dr. Pruitt, who performed the Appellant's initial neuropsychological testing. We therefore find based upon the record as a whole that the Appellant has not sustained severe and

permanent brain damage, and therefore, is not entitled to a lifetime award under § 42-9-10.

21. We find Dr. Shissias' opinion regarding the Appellant's headaches to be reliable and as such we find the Appellant's headaches are severe and disabling from an employment standpoint. Likewise, we find all of the medical evidence supports a finding of psychological overlay in the form of depression.

22. We find the Appellant is permanently and totally disabled as a result of his migraine headaches and depression pursuant to S.C. Code Ann. § 42-9-10(A). This finding is based on the medical evidence as a whole and the employability opinions offered by Dr. Shissias, Dr. Moesch, Dr. Frank, and Vocational Economics, Inc.

23. We find the Appellant is entitled to lifetime medical treatment for his headaches and depression pursuant to S.C. Code Ann. § 42-15-60.

24. We find the Appellant is entitled to a lumpsum payment of the commuted value of 500 weeks of benefits less any amount previously paid to the Appellant in the form of temporary benefits.

25. The Respondents paid to the Appellant inmate assault leave benefits December 30, 2012, through June 30, 2013. The Respondents paid to the Appellant annual leave benefits July 1, 2013, through February 21, 2014. However, we find the Respondents are not entitled to a credit for the inmate assault leave or annual leave paid.

26. We further find the Appellant is entitled to James v. Anne's, Inc. apportionment of the lump sum award to be allocated over his statutory lifetime.

Order

IT IS, THEREFORE, HEREBY ORDERED that the Decision and Order of Hearing Commissioner Taylor is AFFIRMED in its entirety as the greater weight of the evidence in the record supports a finding and ruling that the Appellant did not suffer severe physical brain damage.

IT IS FURTHER ORDERED that the Appellant's request for lifetime compensation due to severe physical brain damage under § 42-9-10(C) is DENIED as the greater weight of the evidence supports a finding that the Appellant did not suffer severe physical brain damage.

IT IS FURTHER ORDERED that the Appellant is permanently and totally disabled as a result of his migraine headaches and depression, and thus, is entitled to the commuted value of 500 weeks of benefits at the compensation rate of $608.58 less any amount previously paid to him in the form of temporary total benefits.

IT IS SO ORDERED!

Gene McCaskill, Commissioner

Date: 8/11/17

WE CONCUR:

R. Michael Campbell, II, Commissioner

Melody L. James, Commissioner

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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 on August 15, 2017