THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM SOUTH CAROLINA WORKERS' COMPENSATION COMMISSION

Appellate Case No. 2017-000692

Billy Wayne Herndon, Employee/Claimant .....Appellant-Respondent,

v.

G & G Logging, Inc., Employer, and
Palmetto Timber S.I. Fund c/o Walker,
Hunter & Associates, Inc., Carrier.....Respondents-Appellants.

SUPPLEMENTAL RECORD ON APPEAL

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Pleadings

Exhibits

South Carolina Workers' Compensation Commission
1333 Main Street, Suite 500
Post Office Box 1715
Columbia, South Carolina 29202-1715
(803) 737-5739 www.wcc.sc.gov

PRE-HEARING BRIEF
WCC File No: 1406130

Claimant's Name: Billy Wayne Herndon SSN: [redacted]
Address: [redacted]
Home Phone: [redacted] Work Phone:
Preparer's Name: Benjamin T. Cruse

Employer's Name: G & G Logging, Inc.
Address: 269 Rigby Road, Bowman, South Carolina 29018
Carrier: Palmetto Timber S.I. Fund c/o Walker, Hunter & Associates, Inc.
Preparer's Phone #: (843) 576-2937

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

☒ Injury ☐ Illness ☐ Repetitive Trauma

1. Comp. Rate: $463.36 2. AWW: $ 695.00 **Date of Injury:** 05/12/14

3. Type of injury and body part(s): Admitted neck.

4. Facts in controversy: Defendants admit Claimant sustained an injury arising out of and in the course and scope of his employment on or about May 12, 2014 to his neck. However, Defendants deny and dispute the nature and extent of Claimant's injury and resulting disability if any. Specifically, Defendants deny and dispute any alleged injury to the bilateral shoulders, back, chest, left upper extremity or left hand. Claimant received all appropriate and causally related medical treatment for the admitted cervical spine injury pursuant to S.C. Code Ann. §42-15-60 and was released at maximum medical improvement on April 27, 2015 and assigned a 9% medical impairment rating to the whole person pursuant to the authorized treating physician, Dr. Pacult. Therefore, the facts in controversy are as follows: (1) whether Claimant reached maximum medical improvement for the injury he sustained related to the May 12, 2014 work accident; (2) whether Claimant is entitled to any permanent partial disability for his cervical spine injury as a result of his work injury, and if so, in what amount; (3) whether Claimant is entitled to any further medical care or additional benefits under the Act related to his work injury of May 12, 2014; (4) whether Defendants are entitled to a credit of overpayment of temporary total disability benefits paid after the date of maximum medical improvement against any permanent partial disability award.

5. Legal issues involved: See No. 4 above; *Curiel v. Environmental Management Services*, 376 S.C. 23, 655 S.E.2d 482 (2007); *Morgan v. JPS Automotives*, 321 S.C. 201, 487 S.E.2d 457 (1996).

6. Unusual aspects: None anticipated by Defendants.

7. Witnesses (designate if expert):* Greg Gruber and/or other representatives of the employer and/or carrier may be called to testify; Defendants reserve the right to call any and all witnesses identified by Claimant, including Claimant.

8. Exhibits: Claimant's personnel and/or payroll records may be submitted in response to testimony; Claimant's deposition transcript may be submitted in response to testimony; deposition transcript of Dr. Pacult – Exhibit A; vocational evaluation from George Page upon receipt – Exhibit B; Defendants are currently in the process of scheduling a vocational evaluation for Claimant, however, the evaluation has yet to occur and Defendants reserve the right to supplement this brief with the vocational report George Page upon receipt pursuant to the *Morgan* decision.

9. Medical evidence (indicate report pursuant to R.67-612; deposition or appearance): Medical records from Dr. Gee at Tuomey Health Care Medicine dated 6/11/15 consisting of 3 pages; medical records from the Medical University of South Carolina dated 8/13/03 through 5/16/14 consisting of 28 pages; medical records from Dr. Pacult dated 10/27/14 through 4/27/15 consisting of 13 pages; medical records from Colleton Medical Center dated 6/20/14 consisting of 8 pages; medical records from Walterboro Family Practice dated 5/29/08 through 9/15/14 consisting of 34 pages.

10. Name, address, and specialty, if any, of the treating physician: Artur Pacult, M.D., Neurology and Neurosurgery Clinic, PA, 125 Doughty Street, Suite 570, Charleston, South Carolina 29403.

11. Impairment rating(s); body part(s); physician and date of opinion: 9% medical impairment to the whole person as a result of Claimant's cervical spine injury by Dr. Gee/Dr. Pacult on June 11, 2015.

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. 67-4803.
- ☐ 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 John R. Hetrick, Esquire, Hetrick, Harvin & Bonds
address Post Office Box 139, Walterboro, South Carolina 29488 **on the** 19th **day of** January **20** 16.

By ☒ first class postage ☐ certified mail ☐ personal service.

Signature: [signature] Email: ben.cruse@mgclaw.com

Date of Hearing: February 3, 2016 Time needed for hearing: 45 minutes

Questions about the use of this form should be directed to the Jurisdictional Commissioner. Refer to Regulations 67-204 through 67-211, 67-211, and Regulations 67-601 through 67-615; as well as Reg. 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.

NCC FORM # 58
Revised 7/13

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PRE-HEARING BRIEF

South Carolina Workers' Compensation Commission
1333 Main Street, Suite 500
Post Office Box 1715
Columbia, South Carolina 29202-1715
(803) 737-5739 www.wcc.sc.gov

AMENDED PRE-HEARING BRIEF
WCC File No: 1406130

Claimant's Name: Billy Wayne Herndon SSN: [redacted]
Address: [redacted]
Home Phone: [redacted] Work Phone:
Preparer's Name: Benjamin T. Cruse

Employer's Name: G & G Logging, Inc.
Address: 269 Rigby Road Bowman, South Carolina 29018
Carrier: Palmetto Timber S.I. Fund c/o Walker, Hunter & Associates, Inc.
Preparer's Phone #: (843) 576-2937

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

☒ Injury ☐ Illness ☐ Repetitive Trauma

1. Comp. Rate: $ In dispute 2. AWW: $ In dispute **Date of Injury:** 05/12/14

3. Type of injury and body part(s): Admitted neck; denied both shoulders, back, chest, left hand (numbness in fingers) and left arm.

4. Facts in controversy: Defendants admit Claimant was involved in an admitted motor vehicle accident arising out of and in the course and scope of his employment on May 12, 2014, involving a compensable injury to the cervical spine. However, Defendants deny and dispute the nature and extent of Claimant's injury as alleged and specifically deny any compensable injury to Claimant's bilateral shoulders, back, chest, left hand (numbness in fingers), and left arm. Claimant received appropriate and causally-related medical treatment for his admitted cervical spine injury and was released at maximum medical improvement (MMI) on April 27, 2015, with a 9% whole person medical impairment rating. Claimant was released to return to work with restrictions only to "limit heavy work and strain" and under the would not need future medical care related to his work-related injury. Therefore, the facts and controversy are as follows: (1) Whether and when Claimant reached MMI for his admitted cervical spine injury; (2) Whether Claimant is entitled to any permanent partial disability (PPD) as a result of his cervical spine injury and, if so, to what extent; (3) Whether Claimant is entitled to any further medical care or additional benefits under the Act; and (4) Whether Defendants are entitled to a credit of overpayment of TTD benefits paid after the date of MMI against any potential award for permanent disability. **(See attached Memorandum of Law).**

5. Legal issues involved: See number 4 above; *Curiel v. Environmental Management Services*, 376 S.C. 23, 655 S.E.2d 482 (2007); *Morgan v. JPS Automotives*, 321 S.C. 201, 487 S.E.2d 457 (1996); *Bennett v. Gary Smith Builders*, 271 S.C. 94, 245 S.E.2d 129 (1978); *Colonna v. Marlboro Park Hospital*, 404 S.C. 537, 745 S.E.2d 128 (2013); Section 42-1-40; Section 42-1-160; Section 42-9-35; Section 42-15-60.

6. Unusual aspects: On February 24, 2016, Defendants issued a subpoena served properly upon opposing counsel requesting Claimant's income/tax documentation for 2012, 2013, and 2014. On this same date, Defendants issued a second subpoena served properly on Bootle Logging requesting a complete copy of their employment file and wage records for Claimant. To date, Defendants are without a response from opposing counsel regarding Claimant's tax/income documentation or from Bootle Logging with regard to their employment file and wage records. Defendants reserve the right to amend or supplement this Pre-Hearing Brief with information or evidence obtained prior to the hearing pursuant to those subpoenas. In the event Defendants do not receive a response to the properly issued subpoenas, Defendants move to postpone this hearing pursuant to Reg. 67-215 and Reg. 67-613.

7. Witnesses (designate if expert):* Greg Gruber, George Page* (expert), and/or other representatives of the Employer and/or Carrier may be called to testify; Defendants reserve the right to call any and all witnesses identified by Claimant, including Claimant.

8. Exhibits: Ex. 12: Subpoenas dated February 24, 2016; Ex. 13: Wage records from the SC Department of Employment and Workforce; Ex. 14: Supplemental report from George Page; Claimant's personnel file and wage records from Bootle Logging, upon receipt; Claimant's income/tax documentation from opposing counsel, upon receipt; Claimant's personnel and/or payroll records may be submitted in response to testimony; Claimant's deposition transcript may be submitted in response to testimony; **Ex. 15: Excerpts from Claimant's tax records.**

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

Medical records from MUSC, dated 3/1/11 – 7/28/12, consisting of 12 pages; any and all medical records submitted on behalf of Claimant.

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

Artur Pacult M.D.
Neurology and Neurosurgery Clinic, PA
125 Doughty Street, Suite 570
Charleston, South Carolina 29403

11. Impairment rating(s); body part(s); physician and date of opinion: 9% medical impairment to the whole person as a result of Claimant's cervical spine injury by Dr. James G. Gee on June 11, 2015; 26% medical impairment to the whole person by Dr. Donald Johnson on June 30, 2015.

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. 67-4803.
- ☐ 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 John R. Hetrick, Esquire Hetrick, Harvin & Bonds Post Office Box 139 **address** Walterboro, South Carolina 29488 **on the** 28th **day of** April **20** 16 .
by ☒ **first class postage** ☐ **certified mail** ☐ **personal service.**

Signature: _____ Email: ben.cruse@mgclaw.com

Date of Hearing: May 3, 2016 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, 67-211, and Regulations 67-601 through 67-615; as well as Reg. 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

PRE-HEARING BRIEF

AMENDED **58**

SOUTH CAROLINA WORKERS' COMPENSATION COMMISSION

W.C.C. FILE NO: 1406130

BILLY WAYNE HERNDON,

Employee,

Claimant,

vs.

G & G LOGGING, INC.,

Employer,

AND

PALMETTO TIMBER S.I. FUND C/O WALKER, HUNTER & ASSOCIATES, INC.,

Carrier,

Defendants.

AMENDED NOTICE OF WITNESSES AND WRITTEN MEDICAL REPORTS TO BE INTRODUCED AS DIRECT EVIDENCE ON BEHALF OF DEFENDANT

TO: SOUTH CAROLINA WORKERS' COMPENSATION COMMISSION AND JOHN R. HETRICK, ESQUIRE:

YOU ARE NOTIFIED that the Defendants, pursuant to the provisions of the South Carolina Workers' Compensation Act and Section 1-23-330 of the South Carolina Code of Laws (Cum. Supp. 1988) submit the following medical records and other documents as evidence:

APA#	DOCTOR	PRACTICE	DATES	PAGES
11		Medical University of South Carolina	03/01/11 to 07/28/12	186-197
12		Subpoenas	02/24/16	198-203
13		Wage records from the SC Department of Employment and Workforce	03/08/16	204-206
14		Supplemental report from George Page	04/22/16	207-211

15		Excerpts from Claimant's tax records		212-220

YOU ARE FURTHER NOTIFIED that you have the right to cross-examine or otherwise oppose this evidence and, should you desire to exercise this right, you are to promptly schedule the deposition of any provider whose records are submitted, for the purposes of cross-examination, or otherwise promptly submit opposing medical records into evidence.

YOU ARE FURTHER NOTIFIED that these records, or photocopies of the same, will be provided to the South Carolina Workers' Compensation Commission for insertion in their file and for consideration as evidence on behalf of the Defendants.

YOU ARE FURTHER NOTIFIED that the following witnesses may be called on behalf of the Defendants: Greg Gruber, George Page* (expert), and/or other representatives of the Employer and/or Carrier may be called to testify; Defendants reserve the right to call any and all witnesses identified by the Claimant, including Claimant.

BENJAMIN T. CRUSE
MCANGUS GOUDELOCK & COURIE, L.L.C.
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(843) 534-0101
Attorneys for the Employer/Carrier

Charleston, South Carolina
April 28, 2016

SOUTH CAROLINA WORKERS' COMPENSATION COMMISSION

W.C.C. FILE NO: 1406130

B ILLY WAYNE HERNDON, Employee, Claimant, vs. G & G LOGGING, INC., Employer, AND PALMETTO TIMBER S.I. FUND C/O WALKER, HUNTER & ASSOCIATES, INC. Carrier, Defendants.	**MEMORANDUM OF LAW**

TO: SOUTH CAROLINA WORKERS' COMPENSATION COMMISSION AND JOHN R. HETRICK, ESQUIRE:

ISSUE

The correct calculation for Claimant's average weekly wage and compensation rate and Defendants' credit for overpaid benefits

I. DEFENDANTS' CREDIT FOR TEMPORARY BENEFITS PAID AFTER THE DATE OF MMI.

Claimant was hired by Defendants in January of 2014. Pursuant to the wage records from the Employer and Form 20, Claimant worked 13 weeks prior to his work accident. Based upon the short duration of Claimant's work prior to his work accident, Defendants completed a Form 20 using his total wages earned divided by the number of weeks Claimant actually worked

for Defendants. (S.C. Code Ann. Section 42-1-40: "When 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 justice to both parties will be obtained.**") This calculation resulted in an average weekly wage of $695.00 with a corresponding compensation rate of $463.36.

Claimant has received temporary total disability (TTD) benefits from May 12, 2014 to the present. As of the date of the parties' hearing on May 3, 2016, Claimant will have received a total of 103 weeks of TTD benefits.

Claimant reached maximum medical improvement (MMI) on April 27, 2015, and a Form 14B was completed by Dr. Gee on June 11, 2015. A Form 17 was offered to Claimant on July 9, 2015, allowing Defendants to terminate TTD benefits based upon his release at MMI. Claimant refused to sign the Form 17. A Form 21 was originally filed on September 9, 2015; however Claimant alleged entitlement to permanent and total disability and the case was relegated to mandatory mediation. Mediation was ultimately held on February 19, 2016. As a result of the failed mediation this hearing was set. Claimant continued to receive post-MMI temporary benefits after his release from April 27, 2015 to the date of this hearing on May 3, 2016, totaling 53 weeks of post-MMI TTD benefits.

Pursuant to Curiel v. Environmental Management Services, 376 S.C. 23, 655 S.E.2d 482 (2007), temporary disability ends with MMI and no TTD benefits are owed or due to Claimant following MMI as Claimant's condition is now permanent and the proper benefit to be paid is permanent disability. (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. Smith v. NCCI, Inc., 369 S.C. 236, 631 S.E.2d 268 (Ct. App. 2006). Accordingly, **the date of maximum medical improvement signals the end of entitlement to temporary total benefits.** *Curiel*, 376 S.C. 23.)

As such, Defendants assert a credit for overpaid TTD benefits following MMI totaling $24,558.08, which accounts for 53 weeks of benefits paid at a compensation rate of $463.36.

II. CALCULATING CLAIMANT'S CORRECT AVERAGE WEEKLY WAGE AND COMPENSATION RATE

During the course of discovery, Defendants learned that Claimant was receiving Social Security retirement benefits having 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. 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. Pursuant to the Social Security Administration, a retired worker may earn up to $15,480 in 2014 prior to having an offset of his retirement benefits. Claimant reported his intention to Defendants' vocational evaluator, George Page. Mr. Page included this conversation in his vocational report dated February 2, 2106. ("Mr. Herndon retired at age 62 and began working part-time and revealed he could make up to $15,000 per year. He noted he would work until he reached the $15,000 and not work the rest of the year. He noted G&G Logging was aware.")

Based upon this 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 Bottle

Logging Company. In 2013, Claimant earned $8,806.50 while working for Bottle Logging Company. In 2014, Claimant earned $9,285.00 while working for G & G Logging, Inc.

Defendants assert that exceptional reasons exist as it would be unfair and unjust to the Employer to find Claimant has an average weekly wage of $695.00 and assert an alternative method for computing the average weekly wage must be resorted to in an effort to most nearly approximate the amount which Claimant would have earned were it not for his injury.

For starters, an average weekly wage of $695.00, which has been used in this claim, equals earnings of **$36,140.00 per year**. Based upon the Social Security offset cap of **$15,480.00** in earnings for 2014 and Claimant's assertion he did not plan to exceed that cap, Defendants assert an average weekly wage which represent earnings that are **more than double** the amount Claimant advised he would not exceed is grossly unjust and unfair to the Employer. Moreover, based upon Claimant's reported income following his retirement in 2012 and 2013, the two years prior to his accident, it is clear Claimant did not intend to earn more than $15,480.00 per year. In that regard, Claimant earned $7,780.00 in 2012, and $8,806.50 in 2013. 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. Again, 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 Employer and Defendants assert an alternative method for calculating Claimant's average weekly wage must be used in this instance.

Defendants' position 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 would work 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 for the rest of the year. This is the exact same plan as Claimant reported to vocational expert, George Page. While working for his employer, Bennett was injured on the job and filed a workers' compensation claim. Bennett's average weekly wage was initially computed by dividing his total earnings by the number of weeks Bennett worked. This is the same method for 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 actual number of weeks worked by total wages resulted in a salary **almost twice as much** as Bennett actually earned during any one of the previous years following his retirement. In the present case, Claimant's average weekly wage found by dividing actual number of weeks worked by total wages resulted in a salary **greater than 4 times as much** as Claimant actually earned in the previous years following his retirement. The Supreme Court found 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 on Bennett's work history and retirement status. The Supreme Court stated based upon Bennett's previous earnings 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 that amount."** *Bennett*, at 99. 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.*

Based upon the Supreme Court's decision in *Bennett* which mirror the facts of the case before you, it is Defendants' position that Claimant's average weekly wage cannot exceed the equivalent of $15,480.00 salary per year. As such the maximum average weekly wage Claimant could be entitled to is $297.69 with a compensation rate of $198.47.

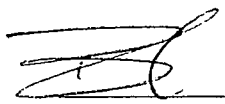
In order to achieve the most accurate, equitable, fair, and just calculation of Claimant's correct average weekly wage, despite two years of wages indicating Claimant only earned $7,780.00 and $8,806.50, Defendants assert the correct average weekly wage should be based upon $15,480.00 in earnings for 2014 as that is the cap as provided by the Social Security Administration and is the figure Claimant indicated he would not exceed. Moreover, Claimant earned slightly more while working for Defendants than he did with his previous employer and any alternative method for calculating the average weekly wage would be based in large part upon speculation by Defendants. Therefore the correct, average weekly wage should be $297.69 ($15,480.00/52 weeks) with a compensation rate of $198.47. Defendants assert this average weekly wage most accurately approximates Claimant's earning capacity would he not have been involved in a work accident. Moreover, this average weekly wage does not penalize Defendants for hiring a part-time employee nor does it prejudice Claimant as it represents the most he would have earned if not for his work accident by his own admission. Moreover, Claimant has received a windfall as he has collected TTD as if he were earning over $36,000.00 per year all while collecting his full Social Security retirement.

Based upon an average weekly wage of $297.69 and a compensation rate of $198.47, Defendants have grossly overpaid Claimant in TTD benefits. Claimant has received 50 weeks of TTD benefits at a compensation rate of $463.36 prior to his release at MMI. Using $198.47 as a

more accurate and fair compensation rate, Claimant was overpaid $264.89 per week. This overpayment over the past 50 weeks totals $13,244.50.

In total, Defendants assert a credit for overpaid temporary benefits equaling $37,802.58, which represents TTD benefits paid after the date of MMI at a compensation rate of $463.36, as well as a credit for TTD benefits paid from May 12, 2014 through the date of MMI based upon Claimant's unfair, unjust, and inaccurate average weekly wage.

Respectfully submitted,



BENJAMIN T. CRUSE
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Attorneys for the Employer/Carrier

Charleston, South Carolina
April 28, 2016

SOUTH CAROLINA WORKERS' COMPENSATION COMMISSION

W.C.C. FILE NO: 1406130

B ILLY WAYNE HERNDON, Employee, Claimant, vs. G & G LOGGING, INC., Employer, AND PALMETTO TIMBER S.I. FUND C/O WALKER, HUNTER & ASSOCIATES, INC. Carrier, Defendants.	**APPELLANTS' BRIEF TO FULL COMMISSION**

TO: SOUTH CAROLINA WORKERS' COMPENSATION COMMISSION AND JOHN R. HETRICK, ESQUIRE:

STATEMENT OF THE CASE

This matter came to be heard before the Hearing 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 12, 2014, involving injury to the cervical spine with an effect 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. Section 42-9-10. Claimant asserts that Social Security retirement benefits have no bearing on a workers' compensation case and should not be considered. Claimant contends he has an average weekly wage of $695.00 with a compensation rate of $463.36 based upon the Form 20 submitted in this claim.

It was Defendants' position at hearing that Claimant was involved in a work-related accident on May 12, 2014, involving injury to the cervical spine only. Defendants assert Claimant had failed to meet his burden of proof to establish any other injuries pursuant to *Colonna v. Marlboro Park Hosp.*, 404 S.C. 537, 745 S.E.2d 128 (2013), and asserted there was no opinion from any physician, including Claimant's Independent Medical Evaluation (IME), that Claimant sustained an injury or impairment to any other body part aside from the cervical spine. Defendants assert Claimant reached maximum medical improvement (MMI) pursuant to the authorized treating physician, Dr. Pacult, on April 27, 2015, and was assigned a 9% whole person medical impairment rating by Dr. Gee as Dr. Pacult does not in his practice provide medical impairment ratings of workers' compensation claims. Defendants assert as a single member injury to the back, Claimant is limited to the scheduled member section of Section 42-9-30 and any award for permanent disability should be limited to the back only. Defendants further assert Claimant's correct average weekly wage is $297.69, with a compensation rate of $197.47. This figure is based upon the Social Security retirement cap offset for wages earned in 2014, equaling a maximum of $15,480.00 earned wages per year and Claimant's admission that he planned to work up to the cap so as not to reduce his retirement benefits. Defendants sought a credit for overpayment of TTD benefits paid at the wrong compensation rate as well as following the date of MMI.

Following arguments from both sides and after consideration of the testimony and APA submissions of the parties, the hearing commissioner made the following findings, *inter alia*:

(1) Claimant's average weekly wage is $695.00 with a compensation rate of $463.36 as reflected on the Form 20;

(2) Claimant's alleged additional body parts to include the left shoulder, left arm, left

hand, and fingers are causally related to his admitted work accident; and

(3) Claimant is totally and permanently disabled pursuant to S.C. Code Ann. Section 42-9-10 (B).

From this Order, Defendants timely appealed filing a Form 30, Request for Commission Review, and assigning specific error to the Hearing Commissioner's Order. Defendants now submit this Brief in support of their position.

STANDARD OF REVIEW

The scope of review of the Full Commission is not limited. The Commission can, like the Single Commissioner, consider all of the evidence and reach its own findings of fact and conclusions of law. *Lowe v. Am-Can Transport Services, Inc.*, 283 S.C. 534, 324 S.E.2d 87 (Ct. App. 1984).

It is well-established that the Full Commission is the ultimate fact finder in workers' compensation cases and is not necessarily bound by the Single Commissioner's findings of fact. *Green v. Raybestos-Manhattan, Inc.*, 250 S.C. 58, 64, 156 S.E.2d 318, 321 (S.C. 1967). *See also Muir v. C.R. Bard, Inc.*, 336 S.C. 266, 281, 519 S.E. 2d 583, 591 (Ct. App. 1999). 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. *Id.* The final determination of witness credibility and the weight to be accorded evidence is reserved to the Full Commission. *Id.*

EVIDENCE OF THE CASE

Medical Evidence:

Claimant initially presented to his family physician, Dr. Bryan Tompkins, following his work-related accident for complaints of **cervical spine pain with radiating symptoms into his**

left upper extremity. Claimant received pain medication, as well as recommendation for physical therapy and other conservative measures under the care of Dr. Tompkins. (Claimant's APA. P. 53-68). A MRI of the cervical spine was obtained on June 20, 2014, which showed degenerative changes from C3-4 through C6-7 with multi-level bilateral foraminal stenosis and mild multi-level spinal cord compression with mild spinal canal stenosis. (Claimant's APA p. 76) Claimant then returned to Dr. Tompkins on June 23, 2014, following the diagnostic MRI at which time Dr. Tompkins notes "they feel that his [Claimant's] **C-spine issues may be the source of his pain**." (Claimant's APA p. 81) Claimant last presented to Dr. Tompkins on September 15, 2014, indicating he was approved for a neurosurgery evaluation for what Dr. Tompkins diagnosed as **neck pain with left upper extremity radiculopathy**. (Claimant's APA, p. 86)

Claimant then presented to Dr. Pacult for neurosurgical care on October 27, 2014. Dr. Pacult diagnosed Claimant with **cervical radiculopathy** and recommended an anterior cervical discectomy arthrodesis with plating at C6-7. (Claimant's APA p. 32-34) Claimant underwent surgical intervention and presented back to Dr. Pacult on February 2, 2015, for a first post-operative visit following Claimant's cervical discectomy and decompression of the nerve root at C6-7. Dr. Pacult notes Claimant's "**pain is markedly improved as well as numbness**" and further noted "**he essentially has normal neurological examination**." Dr. Pacult further notes, "In my opinion [in] a few weeks **patient will be able to return to his occupation [as] truck driver**." (Claimant's APA p. 36) Claimant continued to follow up with Dr. Pacult post-operatively as well as physical therapy to aid in his rehabilitation and returned to Dr. Pacult on April 27, 2015, at which time Dr. Pacult indicated Claimant's condition had plateaued and "I believe the patient agrees that he has reached MMI. According to him, he is not able to return to

work due to his persistent pain. **No objective findings however**."

Claimant was then referred to an impairment rating specialist for a rating regarding his condition. (Claimant's APA p. 41-42) Throughout his treatment with Dr. Pacult, Claimant's diagnosis has been cervical radiculopathy. In addition, Dr. Pacult notes no further treatment is suggested or recommended at that time. (Claimant's APA p. 42) Claimant then presented to Dr. Gee in Sumter, South Carolina who indicated Claimant's diagnosis was **radiculopathy** and noted the body parts injured as **cervical**. Dr. Gee confirmed Claimant's MMI date of April 27, 2015, and assigned a 9% medical impairment rating to the whole person. Dr. Gee further opined Claimant is able to return to work with restrictions to include "limit heavy work and strain" and indicated Claimant will not need future medical care related to his work-related injury (Claimant's APA p. 1-3).

Claimant then obtained his own IME with Dr. Donald Johnson at the Southeastern Spine Institute in Mt. Pleasant, South Carolina. Dr. Johnson notes Claimant's chief complaint is **neck and radiating left arm pain**. Furthermore, Dr. Johnson notes the Claimant "continues to have symptoms, **more neck than arm pain**." According to Dr. Johnson while using the *AMA Guides* as a reference, Claimant sustained 26% medical impairment to the whole person pursuant to p. 392, Table 15-5. Dr. Johnson also notes Claimant may not return to his previous occupation because Dr. Johnson was concerned that if he tries to do so, it is likely inevitable that Claimant will injure additional discs above his fusion. Based upon this notation it appears Dr. Johnson's opinion regarding Claimant's ability to return to work is based upon speculation that he may sustain another injury to anothr disc in his neck rather than any physical limitation on his current ability to return to work. Dr. Johnson opined Claimant is able to return to work with no lifting greater than 20 pounds. (Claimant's APA p. 87-89)

Vocational Evidence:

Claimant obtained a Vocational Assessment on August 31, 2015, performed by Dixon Pearsall. Mr. Pearsall indicates that substantial gainful employment (work) requires the capacity to work an 8-hour work day and 40-hour work week and to have the capacity to do so on an ongoing, consistent, and continuous basis. If an individual regardless of reason or cause is unable to meet the standards and expectations of competitive employment, they are unable to work. Mr. Pearsall notes Claimant did possesses viable vocational/occupational skills and potentially transferable vocational/occupational skills; however, concluded Claimant is completely incapable of returning to work, including any sedentary duty work as he did not have the capacity for substantial gainful employment which he defines as the capacity to work an 8-hour day and 40-hour week on an ongoing and continuous basis.

Mr. Pearsall notes, "it is well established and documented" that older workers (55 plus) have increased difficulty in obtaining or maintaining employment; however, Mr. Pearsall does not provide any citation to any supporting document, which would establish this assertion is well documented as alleged by Mr. Pearsall. Mr. Pearsall notes Claimant's current access to competitive employment is negligible (less than 1%) as there are no positions in the regional or national economies consistent with Claimant's functional/vocational capacities. However, it does not appear Mr. Pearsall conducted any form of labor market survey or even attempt to identify a position which might suit Claimant's restrictions.

Furthermore, Mr. Pearsall notes that any vocational rehabilitation activities such as additional education or training are not appropriate for Claimant as those activities would likely be unsuccessful, frustrating, and potentially detrimental. Again, there is no basis or support indicating that additional education or vocational training would, in any way, detrimentally affect

the Claimant. One is pressed to see or make sense of how additional education or classes would have a detrimental effect on Claimant.

Mr. Pearsall further notes, without any basis or support, that it is highly unlikely and probable that Claimant would not pass the physical examination required to obtain a CDL. (Claimant's APA p. 19) However, Claimant testified at hearing that he, in fact, took the physical test for the CDL following his work accident and passed that physical. (Hr. Tr. p. 61, ll. 18-25 and Hr. Tr. p. 62, ll. 1-12). Claimant's testimony is in direct contradiction to Mr. Pearsall's reasoning and findings in his vocational report.

Defendant obtained a vocational assessment with George Page on February 2, 2016. (Claimant's APA p. 104-109) During the course of the vocational evaluation, George Page noted Claimant's hobbies and interests include hunting and fishing and further noted Claimant killed four deer this year using a rifle and plans to participate in turkey hunts when the season opened. Mr. Page administered the wide-range achievement test, which indicated Claimant is reading at a 10.2 grade level and performing math on a 9.8 grade level, revealing Claimant can read most materials, including technical information with understanding. Mr. Page concluded Claimant should be able to follow any verbal instructions and complete any applications without difficulty. Furthermore, Claimant is capable of adding, subtracting, multiplying and dividing whole numbers and decimals and simple fractions.

With regard to Claimant's work history, Mr. Page noted Claimant retired at age 62 and began working part time and revealed he could make up to $15,000.00 per year to Mr. Page during the course of his interview. Mr. Page noted Claimant advised that he would work until he reached the $15,000.00 mark and then not work the rest of the year. Mr. Page further noted Claimant advised that his employer, G&G Logging, was aware of this plan. (Claimant's APA p.

106) Mr. Page concluded there were several jobs which Claimant could perform as they would be considered light or sedentary duty and well within the work restrictions from Dr. Gee as well as the work restrictions from Dr. Johnson of no lifting greater than 20 pounds. Mr. Page listed six jobs and provided the medium wage for each position, which the Claimant was physically and vocationally able to perform. Mr. Page indicated all the jobs listed can be performed on a full or part time basis and fit within Claimant's criteria of making no more than $15,000.00 per year due to his Social Security income. Furthermore, Mr. Page noted that if Claimant was motivated he could improve his opportunities and return to gainful employment by taking an entry level computer course, along with a key boarding course. Mr. Page further opined that within his own personal experience, he does not believe age is an important issue with regard to employment as employers are more interested in the individual's work ethic, appearance and positive motivation for returning to work. Finally, Mr. Page concluded Claimant is able to return to work for wages between $9.00 and $10.00 per hour. (Claimant's APA p. 109)

Claimant then obtained an updated vocational report from Dixon Pearsall dated April 5, 2016, to comment on Mr. Page's vocational assessment. (Claimant's APA p. 123-129) Mr. Pearsall seemed to be under the impression that Mr. Page did not address or consider the restrictions imposed by Dr. Johnson. However, as clearly indicated in the Vocational Report from Mr. Page, Dr. Johnson's medical notes and restrictions were recited verbatim. Mr. Pearsall goes on to indicate that the restrictions cited by Dr. Johnson indicate Claimant has a maximum vocational capacity of sedentary work per the U.S. DOL classifications. However, upon review of the U.S. DOL classifications as cited by Mr. Pearsall in his prior report, medium duty work is the equivalent of "exerting 20-50 pounds of force occasionally, and/or 10-25 of force frequently and/or up to 10 pounds of force constantly to move objects." Therefore, based on Dr. Johnson's

20 pound lifting restriction, it would appear Claimant's physical and vocational capabilities would fall within the medium category rather than sedentary or less as Mr. Pearsall seems to believe. Mr. Pearsall then notes that Mr. Page cites specific jobs at a light exertion level which, in the opinion of Mr. Pearsall, exceeds the physician-imposed return-to-work limitations. Although, pursuant to the U.S. DOL definition of medium duty work, all jobs listed at the light exertion level would fall well within the 20 pound lifting restriction indicated by Dr. Johnson and be classified as light or sedentary duty.

On April 22, 2016, Defendants obtained a Supplemental Vocational Report from George Page addressing Mr. Pearsall's criticism of his prior Vocational Report and explaining in detail the discrepancies noted and confirming his prior opinion that Claimant is capable of work pursuant to the identified jobs listed. (Defendants' APA No. 14)

Claimant's Hearing Testimony:

Claimant completed the 10th grade and has six years in the National Guard after being honorably discharged as a Sergeant. Claimant's prior work history consists of driving a truck, as well as prior work in the construction industry as a finisher carpenter for approximately six or seven years. (Hr. Tr. p. 55) Claimant testified prior to working for G&G Logging, Inc. he was working for Bootle Logging and voluntarily retired from that employment in January of 2012. At that point, Claimant testified he began receiving social security retirement; however, continued to work part-time for Bootle Logging to supplement his income. (Hr. Tr. p. 57, ll. 1-15) **Claimant testified when he went back to work while receiving social security retirement benefits he was aware of the limit on how much social security retirement would allow him to make before those benefits start to reduce due to his income.** (Hr. Tr. p. 57, ll. 16-21) Claimant testified that he could have indicated to someone that the cap for earning

income while receiving social security retirement benefits was $15,000.00. (Hr. Tr. p. 58, ll. 3-6) Claimant testified in 2012 after his retirement he earned approximately $7,700.00 while working for Bootle Logging. Claimant confirmed he continued working part-time for Bootle Logging in 2013 and earned approximately $8,800.00. (Hr. Tr. p. 58, ll. 7-22)

Claimant testified that he then went to work part-time for G&G Logging, Inc. in 2014 and worked approximately 13 weeks prior to the date of his accident. (Claimant's depo. p. 17, lines 12-14) During that time period, Claimant testified he earned approximately $9,285.00. (Hr. Tr. p. 58, ll. 10-18) **Claimant testified that it was his intention in 2014 to earn as much as he could without reducing his retirement benefits.** (Hr. Tr. p. 59, ll. 19-22) Claimant testified that he may have relayed this arrangement to George Page during his Vocational Evaluation although he could not specifically recall, but testified he did not have any reason to believe that Mr. Page fabricated the fact that he told Mr. Page he planned to earn $15,000.00 while working for G&G Logging, Inc. to avoid a social security retirement benefits offset and would stop working upon reaching the $15,000.00 limit. (Hr. Tr. p. 60, ll. 1-6) Claimant testified he had a discussion with his employer, Greg Gruber, regarding the $15,000.00 maximum income he could earn before his social security disability benefits would be offset and was working out an arrangement with his current employer regarding that cap on income. (Hr. Tr. p. 60, ll. 7-16) Claimant testified that while he has been out of work for this work-related accident **he has been receiving weekly benefits checks from the carrier in the amount of $463.36 per week and confirmed his social security retirement benefits have not been reduced.** (Hr. Tr. p. 61, ll. 1-10)

Claimant testified he passed all physical exams for the CDL prior to his accident and testified **he had a physical for his CDL following his work accident which he passed as well.**

(Hr. Tr. p. 61, ll. 18-25) Claimant testified he passed his physical; however, just did not take the written test as he no longer wished to hold his CDL. (Hr. Tr. p. 62, ll. 6-8) **Claimant testified that none of the doctors he has seen has provided any standing, walking, sitting, bending, stooping or squatting restrictions.** (Hr. Tr. p. 64, ll. 10-24) The only restrictions in this matter came from Dr. Gee during his impairment rating evaluation and Dr. Johnson during his IME obtained by Claimant.

Claimant testified that he has been deer hunting on a couple of occasions in 2016 and has been turkey hunting as well on two occasions in 2016. (Hr. Tr. p. 65-66) Claimant testified that since his work accident he has not looked for any work which he feels he is able to do and has not applied anywhere or even looked at the newspaper for any available jobs. (Hr. Tr. p. 67, ll. 9-20)

Testimony of George Page:

Mr. Page testified he has owned Page Rehabilitation for the past 18 years and has multiple certifications including certified vocation evaluator, certified disability management specialist, certified case manager, and professional vocation evaluator. Mr. Page also has his Master's Degree in rehabilitation education from the University of Tennessee. Mr. Page testified he has been doing Vocational Evaluations since 1982 and has participated in hundreds of evaluations. (Hr. Tr. p. 69-70) Mr. Page testified at length regarding his rational and process during his Vocational Evaluation and factors important to him in making his determination including medical records and personal interview with Claimant. Mr. Page testified that it was his opinion that Claimant had acquired the skill through his work history and his education that would be transferable to the open market and there were certainly jobs available within his restrictions. (Hr. Tr. p. 78) Mr. Page testified he did a Labor Market Survey and found several

jobs available in the geographical location of Claimant which would fit Claimant's restrictions and transferable skills. (Hr. Tr. p. 79)

Mr. Page testified that Claimant discussed his retirement status and noted Claimant retired at age 62 and that Claimant needed to work to supplement his Social Security Retirement benefits. Mr. Page testified Claimant advised he could make up to $15,000.00 per year without being penalized by an offset of his retirement benefits. Mr. Page further testified Claimant discussed his current employment situation with G&G Logging, Inc. and testified that Claimant had a plan for working for G&G Logging, Inc. with regard to the limitations on earnings not to exceed the cap. (Hr. Tr. p. 80)

Mr. Page testified regarding Mr. Pearsall's opinion that "regardless of cause or consideration, if an individual does not fully meet normal and expected standards of competitive employment (as defined as full time employment per Mr. Pearsall), they are unable to work." Mr. Page explained that he wholeheartedly disagreed with that statement as it flies in the face of what vocational rehabilitation was all about. Mr. Page explained that everybody has their shortcomings regardless of whether you have a disability or not and according to Mr. Pearsall in this statement if you have any kind of shortcomings you are completely unable to work. Mr. Page explained that the purpose of vocational rehabilitation is to try to identify the shortcomings of an individual and then assist in overcoming them. (Hr. Tr. p. 85-86)

Deposition Testimony of Dr. Pacult:

Dr. Pacult testified he was the authorized treating physician treating Claimant's cervical spine injury which included surgery at the C6-7 level. Dr. Pacult testified that following surgery Claimant's pain was markedly improved and the numbness into Claimant's left arm had also improved. (Deposition of Dr. Pacult p. 7-8) **Dr. Pacult testified that on examination**

Claimant had a normal neurological examination which means that while Claimant may still have had some pain he did not have any paralysis or numbness or weakness into the arm. Dr. Pacult testified that the only complaint was subjective pain. (Deposition of Dr. Pacult p. 9, ll. 1-13) Dr. Pacult confirmed that it was his opinion Claimant could return to work as a truck driver. (Deposition of Dr. Pacult p. 9, ll. 14-18) Dr. Pacult confirmed Claimant reached maximum medical improvement as of April 27, 2015 and further testified **there were no objective findings to corroborate Claimant's ongoing subjective pain complaints.** (Deposition of Dr. Pacult p. 11, ll. 17-20)

Dr. Pacult had an opportunity to review Dr. Gee's Form 14B and agreed with the assessment that Claimant was diagnosed with radiculopathy and the body parts injured are the cervical spine. (Deposition of Dr. Pacult p. 13, ll. 7-14) Dr. Pacult testified that through all of his evaluations and diagnostic studies he has performed for Claimant he **did not find any separate or distinct injury to his left arm or left upper extremity**. (Deposition of Dr. Pacult p. 22, ll. 4-8) **Dr. Pacult confirmed the 9% medical impairment rating assigned by Dr. Gee did not seem unreasonable and further testified he did not see any reason to undermine that opinion or question that rating.** (Deposition of Dr. Pacult p. 17-18) Dr. Pacult confirmed in his deposition that Mr. Herndon does not require any future medical treatment. (Deposition of Dr. Pacult p. 17, ll. 18-21) Dr. Pacult also confirmed Claimant was able to return to work as a truck driver medically; however, appeared to be limited by his subjective pain complaints. (Deposition of Dr. Pacult p. 23-24)

ARGUMENT

I. THE HEARING COMMISSIONER ERRED IN FINDING AS FACT THAT CLAIMANT'S CORRECT AVERAGE WEEKLY WAGE WAS $695.00 WITH A COMPENSATION OF $463.36 AS LISTED ON THE FORM 20 WHEN SUCH IS AGAINST THE GREATER WEIGHT AND PREPONDERANCE OF THE SUBSTANTIAL EVIDENCE IN THE RECORD AND IS BASED UPON ERRONEOUS LEGAL CONCLUSIONS.

The Form 20 in this matter was based upon Claimant's limited 13 weeks of wages earned while working for the Defendants prior to his work accident. In light of the limited time worked prior to the accident, the Form 20 was calculated by taking the total wages earned divided by the total number of weeks worked pursuant to S.C. Code §42-1-40. This section provides, "[w]hen the employment, prior to the injury, extended over a period of less than fifty-two 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."

During the course of discovery, Defendants learned that Claimant was receiving Social Security retirement benefits having 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. Pursuant to the Social Security Administration, a retired worker may earn up to $15,480 in 2014 prior to having an offset of his retirement benefits. Claimant reported his intention 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, 2106. ("Mr. Herndon retired at age 62 and began working

part-time and revealed he could make up to $15,000 per year. He noted he would work until he reached the $15,000 and not work the rest of the year. He noted G&G Logging was aware.") For the first time, Defendants were aware of Claimant's plan to work up to the Social Security offset cap of $15,000 upon receipt of the vocational evaluator's report dated February 2, 2016.

Based upon this 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 Bottle Logging Company. In 2013, Claimant earned $8,806.50 while working for Bottle Logging Company. In 2014, Claimant earned $9,285.00 while working for G & G Logging, Inc. (Defendants' APA #13 and#15) Based upon the wage records obtained by Defendants, it is clear Claimant did not exceed the Social Security cap of $15,480.00 in wages earned during any year following his retirement and receipt of retirement benefits.

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

Defendants assert the original 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 full-time wages in excess of any wages he was planning to earn by his own admission in light of the Social Security offset. Claimant's average weekly wage of $695.00, which the Hearing Commission found as accurate, equates to a salary or earnings totaling **$36,140.00 per year**. Based upon the Social Security offset cap of **$15,480.00** in earnings for 2014 and Claimant's assertion he did not plan to exceed that cap, Defendants assert an average weekly wage which represent earnings that are **more than double** the amount Claimant advised he would not exceed is grossly unjust and unfair to the Employer. Moreover, based upon Claimant's reported income following his retirement in 2012 and 2013, the two years prior to his accident, 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, Claimant earned $7,780.00 in 2012, and $8,806.50 in 2013 which working for Bottle 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. Again, 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 Employer and Defendants assert an alternative method for calculating Claimant's average weekly wage must be used in this instance.

Defendants' position is supported and confirmed 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 would work 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 for 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. Bennett's average weekly wage was initially computed by dividing his total earnings by the number of weeks Bennett worked as if he were a full-time employee. This is the same method for 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 actual number of weeks worked by total wages 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, Claimant's average weekly wage found by dividing actual number of weeks worked by total wages resulted in a salary **greater than 4 times as much** as Claimant actually earned in the previous years following his retirement. The Supreme Court found 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 on Bennett's work history and retirement status. The Supreme Court stated based upon Bennett's previous earnings 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 that amount."** *Bennett*, at 99. 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.* The Supreme Court held it was obvious the amount Bennet would have earned in the subsequent years was approximately $2,500.00 based upon the cap on wages earned before the Social Security retirement offset came

into play, and held Bennet's average weekly wage should be calculated based upon that figure. The 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 full time, nor punishes the employer for having given Bennett part-time employment..."** ***Bennett*****, at 99.**

Based upon the Supreme Court's decision in *Bennett* which are identical to the facts of the case before you, it is Defendants' position that Claimant's average weekly wage cannot exceed of $15,480.00 per year as that figure represents the most Claimant would earn in the subsequent years following his injury and is supported by Claimant's own admission and the wage records establishing a pattern of part-time work not exceeding that cap. As such the maximum average weekly wage Claimant could be entitled to is $297.69 with a compensation rate of $198.47. Any other calculation rewards Claimant for working less than full time while receiving full retirement benefits and punishes Defendants for having given Claimant part-time work.

Based upon an average weekly wage of $297.69 and a compensation rate of $198.47, Defendants have overpaid Claimant in temporary total disability benefits (TTD). Claimant received 50 weeks of TTD benefits at a compensation rate of $463.36 prior to his release at MMI. Utilizing $198.47 as a more accurate and fair compensation rate, Claimant was overpaid $264.89 per week. This overpayment over the past 50 weeks totals $13,244.50. In total, Defendants asserted a credit at the hearing for overpaid temporary benefits equaling $37,802.58, which represented TTD benefits paid after the date of MMI at a compensation rate of $463.36, as well as a credit for TTD benefits paid from May 12, 2014 through the date of MMI based upon Claimant's unfair, unjust, and inaccurate average weekly wage.

Defendants respectfully request the Appellate Panel of the Full Commission vacate the

Hearing Commissioner's findings regarding Claimant's average weekly wage calculations and find Claimant's average weekly wage to be $297.69. This figure is equitable to both parties and the calculation in this scenario has been directly addressed by the Supreme Court in the *Bennett* decision. *Regions Bank v. Wingard Props., Inc.*, 394 S.C. 241, 254, 715 S.E.2d 348, 355 (Ct. App. 2011) (Holding a court may not ignore statutes, rules, and other precedent when providing an equitable remedy).

II. THE HEARING COMMISSIONER ERRED IN FINDING AS FACT CLAIMANT IS PERMANENTLY AND TOTALLY DISABLED WHEN SUCH IS AGAINST THE GREATER WEIGHT AND PREPONDERANCE OF THE SUBSTANTIAL EVIDENCE IN THE RECORD AND IS BASED UPON ERRONEOUS LEGAL CONCLUSIONS

A. Claimant's injury limited to one scheduled member and an award based upon S.C. Code Ann 42-9-10 is not supported by the record

Defendants assert the Hearing Commissioner erred in finding Claimant permanently and totally disabled pursuant to S.C. Code Ann. §42-9-10(B) which provides entitlement to permanent and total disability benefits for the loss of more than one scheduled injury. Defendants assert this claim is limited to the low back only and any award for general disability pursuant to §42-9-10 is based upon legal error and not supported by a preponderance of the substantial evidence in the record.

Claimant is alleging additional injuries based upon his cervical radiculopathy. The medical record indicates Claimant sustained a cervical spine injury at the C6-7 level **with radicular symptoms** into his left upper extremity and relies on the holding of *Singleton v. Young Lumber Co.*, 236 S.C. 454 (1960) for the proposition that if an injury to on scheduled member has any affect on another member then a Claimant can proceed under general disability. (Hr. Tr. p. 4, ll. 8-15) Defendants assert this is a misreading of the *Singleton* decision as has been further

analyzed by the Courts under more recent precedent on the issue.

Defendants contend that simply an affect to another member is not sufficient to support an award for general disability under §42-9-10(B). The *Singleton* decision itself requires more than any "affect" to another member holding, "[w]here any injury is confined to a scheduled member, and there is no ***impairment*** of any other part of the body because of such injury, the employee is limited to the scheduled compensation." *Singleton*, at 471. Affect to another member is not sufficient and rightfully so. It is obvious that an injury to the shoulder will affect the arm, and also affect the use of the hand and fingers. Similarly, an injury to a tow will affect the use of the foot and leg. The individual members of our bodies are intertwined and connected. They are not stand alone body parts. As such, any injury to one scheduled member will inevitable affect another. The more recent case of Colonna v. Marlboro Park Hosp., 404 S.C. 537, 745 S.E.2d 128 (2012) elaborates on the two body part rule and is controlling in the present case.

The *Colonna* Court sites the *Singleton* rule and states "*Singleton* stands for the exclusive rule that a claimant with one scheduled injury is limited to recovery under section 42-9-30 alone. The case also stands for the rule than an individual is not limited to scheduled benefits under section 42-9-30 if he or she can show **additional injuries beyond the lone scheduled injury.**" *Colonna*, at 545. "As the aforementioned case law demonstrates, Colonna's ability to recover under section 42-9-10 is premised on her **ability to establish an additional injury or impairment to a second body part.**" *Colonna*, at 550. In the present case, Claimant did not sustain an additional injury to the left upper extremity. There is also no impairment rating to the left upper extremity. As such, Claimant's injury is confined to the cervical spine and limited to benefits under §42-9-30.

The medical record establishes Claimant sustained a neck injury only with radicular symptoms stemming from his cervical spine injury which were improving and may have even resolved. Dr. Thompkins opines Claimant experiences neck pain with left upper extremity radiculopathy and after review of a cervical MRI that the source of Claimant's pain is likely stemming from the cervical spine. (Claimant's APA p. 81 and 86) Dr. Pacult notes during his treatment of Claimant that Claimant's **pain and numbness are markedly improved** and further noted Claimant **essentially has normal neurological examination**. Dr. Pacult testified that a normal neurological exam means Claimant does not have paralysis, does not have numbness and does not have weakness in the left arm. The only complaint was subjective pain complaints. (Dr. Pacult depo. p 9, ll. 4-13) Dr. Pacult also opined there were no objective findings. (Dr. Pacult Depo) Dr. Pacult further elaborated and testified "[s]ame in this situation. Patient comes, says, 'I have pain,' but objectively there is no weakness, there is no numbness, there is no change of reflex. So **subjectively he has radiculopathy; objectively he does not have.** " (Dr. Pacult Depo. p. 26, ll1-13) Dr. Pacult testified directly on the issue and stated Claimant "**did not have an injury to his left arm, no, to the extremity itself, no.**" (Dr. Pacult Depo. p. 22, ll. 4-8) Dr. Gee notes Claimant's diagnosis of cervical radiculopathy and assigned a 9% whole person rating. (Claimant's APA p. 1) Dr. Gee specifically notes Claimant "does not have radicular pain or paresthesias in the left arm as he did prior to surgery." (Claimant's APA p. 2) Claimant's own IME with Dr. Johnson did not find an additional injury or impairment to the left upper extremity. Rather Dr. Johnson notes claimant was having "more neck than arm pain." Dr. Johnson provides only a 26% impairment rating to the whole person finding no medical impairment or additional injury to the left upper extremity. (Claimant's APA pp. 87-89) Rather, all mentions of the left upper extremity in the record represent symptoms of Claimant's cervical spine injury.

As Claimant has failed to prove an additional injury or impairment to the left upper extremity any award for benefits must be attributed to the cervical spine injury under §42-9-30(21). Defendants respectfully request the Appellate Panel of the Full Commission vacate the Hearing Commissioner's award under §42-9-10(B) as Claimant sustained a single member injury and the proper award lies under the scheduled member section of the Act at §42-9-30(21)

B. Claimant is not permanently and totally disabled pursuant to S.C. Code Ann. 42-9-30(21)

As a single scheduled injury to the cervical spine, consideration must be given to the two impairment ratings and vocational evidence in awarding permanent disability benefits. Dr. Pacult stated in his medical narrative that he believed Claimant would be able to **return to his occupation as truck driver**. (Claimant's APA p. 36) Dr. Pacult further notes that according to Claimant he is not able to return to work due to his persistent pain, but noted no objective findings to support this claim. According to Dr. Pacult, medically claimant is capable of returning to work. Subjectively, Claimant states he cannot.

The Hearing Commissioner relied on a very specific portion of Dr. Pacult's testimony, quoted twice in the Hearing Commissioner's Decision and Order, which Defendants assert is completely taken out of context and does not support the proposition Claimant cannot return to work. The Hearing Commissioner relied on a hypothetical question posed by Claimant's attorney, "if there's a greater risk of further injury to his back (neck) by going back to work in the logging woods...would you recommend...you need to go back to work as a log truck driver?" This hypothetical question is not based in the facts of this claim and contradicts prior testimony from Dr. Pacult. Specifically, Dr. Pacult was asked if there was a greater risk to other discs in Claimant's neck after having undergone a fusion procedure to which Dr. Pacult testified,

"[t]he question is how do you prove that this is due to the fusion or is it because of the primary condition of the spine worsens with time and age...we don't have an answer for that." (Dr. Pacult's Depo p. 30, ll. 21-25; p. 31, ll. 1-11) Furthermore, Dr. Pacult was asked:

Q. If you're driving a truck over rough road, driving a log truck over a rough road that has logs in it and bumps and whatever, is there a risk there with somebody that has a fusion at C6-7, has a bad spine above, in three disc levels above that, has basically four bad discs, ***is there a greater risk in an individual like that to herniate a disc above the one you did the fusion at***?

A. I think it makes perfect sense. It's very logical. ***But would you ask me that in a reasonable degree of medical certainty, I would say no.***

(Dr. Pacult Depo. p. 35, ll 7-18)

Based upon this testimony which came just one question prior to the testimony relied on by the Hearing Commissioner, it is plan to see Dr. Pacult does not believe, to a reasonable degree of medical certainty, that Claimant is at any greater risk of further injury to his back by going back to work driving a truck. Therefore the hypothetical question which the Hearing Commissioner relied on based upon the premise posed "if there's a greater risk of further injury to his back" is flawed and not supported by the prior testimony. In other words, since Dr. Pacult testified he does not believe there is a greater risk of further injury to his neck by going back to work, then the following hypothetical based upon a greater risk of further injury by going back to work is baseless and not evidence which can be relied on for the proposition that Dr. Pacult believes Claimant should not return to work.

Dr. Gee from Sumter, South Carolina assigned a 9% whole person rating and Dr. Johnson from Mt. Pleasant, South Carolina assigned a 26% whole person rating. (Claimant's APA p. 1,

p. 88) Dr. Gee restricted Claimant to limited heavy lifting and strain while Dr. Johnson limited Claimant to 20 lbs. lifting. Dr. Pacult testified he did not have any reason to undermine or question either opinion with regard to the impairment rating assigned. Both physicians met with Claimant for approximately the same amount of time. Both physicians' offices are approximately 1 hour and 15 minutes from Walterboro, South Carolina where Claimant resides. Nevertheless, the Hearing Commission gave more weight to Dr. Johnson's report than Dr. Gee and specifically found there was "no reason" for Claimant to be seen by Dr. Gee in Sumter, South Carolina. It appears the only basis for the specific weight to be afforded the medical opinions in this case is the fact that Dr. Gee practices in Sumter rather than Mt. Pleasant. This is an arbitrary distinction especially in light of the same or similar travel time to Dr. Gee's office and Dr. Johnson's office and there was no undue burden put on Claimant for Dr. Gee's evaluation.

In addition two vocational experts were retained. George Page was retained by Defendants and concluded Claimant was certainly capable of gainful employment in light of his work experience, transferrable skill, education and restrictions of light to medium duty work. (Claimant's Exhibit B) Dixon Pearsall was retained by Claimant and concluded that any individual who cannot meet the minimum standard of working 8 hour days and 40 hour weeks competitively is permanently and totally disabled. (Claimant's Exhibit C) At the hearing, Mr. Pearsall was not present to testify and provide the Commission with any additional basis for his opinions or clarification on his reports. Mr. Page was presented by Defendants at the hearing to testify to the Hearing Commissioner regarding the discrepancies between the two vocational opinions. Mr. Page rejected Mr. Pearsall's definition of competitive employment and definition of permanently and totally disabled and set forth the notion that vocational rehabilitation is

designed to identify shortcomings in individuals and assist them in overcoming those shortcomings to return to the work force. Furthermore, Mr. Page disagreed with Mr. Pearsall's indication that any form of education or training would be detrimental to Claimant and recommended Claimant participate in some adult classes in computer technology or keyboarding to assist in his recovery. Finally, Mr. Pearsall did not conduct a labor market survey in any effort to identify potential sedentary jobs available for Claimant. Mr. Page did conduct a labor market survey and identified several jobs available within the geographic location of Claimant which meet his sedentary to light duty restrictions.

Despite testimony presented by George Page providing a well thought out structure for his analysis and the seemingly obtuse statements concerning continued education and any injured worker's ability (or lack thereof) to work limited duty, the Hearing Commissioner gave greater weight to the Dixon Pearsall's report. Defendants assert this was in error and not supported by the preponderance of the substantial evidence including testimony presented at hearing.

Based upon the medical evidence as a whole, including the testimony from Dr. Pacult, along with the vocational evidence presented by George Page and testimony of Mr. Page at hearing, Defendants assert the Hearing Commissioner erred in finding Claimant permanently and totally disabled as such an award is not supported a preponderance of the substantial evidence in the record and is based upon erroneous legal conclusions.

CONCLUSION

Based upon the foregoing, Defendants respectfully request the Appellate Panel of the Full Commission vacate the Hearing Commissioner's Order concerning Claimant's average weekly wage and compensation rate and find the correct calculation to be an average weekly wage of $297.69 and a compensation rate of $198.47. Defendants also respectfully request the Appellate

Panel of the Full Commission vacate the Hearing Commissioner's finding that Claimant is permanently and totally disabled and award permanency in line with the medical record and testimony presented.

Respectfully submitted,

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Charleston, South Carolina
September 16, 2016

SOUTH CAROLINA WORKERS' COMPENSATION COMMISSION

W.C.C. FILE NO: 1406130

BILLY WAYNE HERNDON, Employee, Claimant, vs. G & G LOGGING, INC., Employer, AND PALMETTO TIMBER S.I. FUND C/O WALKER, HUNTER & ASSOCIATES, INC., Carrier, Defendants.	**CERTIFICATE OF SERVICE**

The undersigned certifies that she is an employee at MCANGUS GOUDELOCK & COURIE, and that she has served, on the date set forth below, a copy of the document described below, in the above entitled action to the following persons, pursuant to Section 15-9-930 and Section 15-9-940 of the Code of Laws of South Carolina, 1976, by depositing a copy of same in the United States Mail, postage prepaid, addressed to:

TO:	John R. Hetrick, Esquire Hetrick, Harvin & Bonds Post Office Box 139 Walterboro, South Carolina 29488 S.C. Workers' Compensation Commission PO Box 1715 Columbia, SC 29202-1715
DOCUMENT:	Appellant's Brief
DATE OF MAILING:	September 19, 2016

Kelly G. Arrigo
Legal Assistant to Benjamin T. Cruse

BEFORE THE FULL COMMISSION OF THE
SOUTH CAROLINA WORKERS' COMPENSATION COMMISSION
WCC FILE NO.: 1406130

Billy W. Herndon, Claimant-Respondent, Vs. G&G Logging, Inc., Defendant-Appellant, And Palmetto Timber Fund, c/o Walker, Hunter & Associates, Inc., Defendant-Appellant.	**RESPONDENT'S BRIEF TO THE FULL COMMISSION**

TO: THE SOUTH CAROLINA WORKERS' COMPENSATION COMMISSION AND BENJAMIN T. CRUSE, ESQUIRE, MCANGUS GOUDELOCK & COURIE, L.L.C., ATTORNEYS FOR DEFENDANTS-APPELLANTS

STATEMENT OF THE CASE

On May 12, 2014, claimant was seriously injured in a work-related, motor vehicle accident in Orangeburg County near Rowesville. Claimant was driving a log truck on U.S. Hwy. 21, and was involved in a near head-on collision on his right shoulder of the highway. He was working for G & G Logging Company and was acting within the course and scope of his employment. Claimant's injuries arose out of his employment. Claimant felt immediate pain across both shoulders and in his neck, his left arm and into his left hand. He sustained injuries to his shoulders, neck, back, chest, left arm and left hand with numbness and weakness in the left arm and hand,

secondary to radiculopathy. Defendants admitted only a scheduled injury to claimant's neck under Sec. 42-9-30 (21).

Procedurally, the case was heard before a single Commissioner on May 3, 2016, based upon the issues raised in claimant's Form 50 and defendants' Form 51. Claimant sought an award of permanent and total disability under Sec. 42-9-10, based on the admitted work accident. Relying on ***Singleton v. Young Lumber Company***, 236 S.C. 454, 114 S.E.2d 837 (1960), claimant brought a wage loss claim for general disability for an injury to one body part, his cervical spine, which **affected** another body part, his left upper extremity, as supported by the diagnosis of radiculopathy provided by Dr. Donald R. Johnson, II. (APA 6, pp. 87-89) Claimant retained the services of Dr. Dixon Pearsall who provided a vocational report and supplemental vocational report, analyzing significant vocational factors such as claimant's age, education, residual functional capacity and past relevant work experience. (APA 9, pp. 110–122; APA 10, pp. 123–129) In support of permanent and total disability, claimant relied on ***McCollum v. Singer Company***, 300 S.C. 103, 386 S.E.2d 471 (Ct.App. 1989), which defined permanent and total disability as not requiring abject helplessness but rather an inability to perform services other than those which are so limited in quality, dependability and quantity that no reasonable market exists. Claimant sought future medicals under ***Dodge v. Bruccoli, Clark, Layman, Inc.***, 334 S.C. 574, 514 S.E.2d 593 (Ct.App. 1999); and Sec. 42-15-60 of the Act. At the time of the hearing, claimant had determined the net present value of the permanent and total disability through the date of the hearing, May 3, 2016, as $170,954.26, based on 368.9687 weeks at a compensation rate of $463.33 a week.

Defendants sought to limit disability to a single body part, the neck or spine only. They relied on ***Colonna v. Marlboro Park Hospital,*** 404 S.C. 537, 745 S.E.2d 128 (Ct.App. 2013), which

denied that claimant sustained an injury to any body parts other than the neck and contended he reached MMI on April 27, 2015, when he was released by Dr. Pacult. The defendants believed claimant was entitled to a scheduled award of 9% to the whole person based on the impairment rating of Dr. Gee, the defendants' rating doctor. The defendants retained the vocational services of Mr. George Page who found that claimant was capable of returning to gainful employment and was not permanently and totally disabled. In the experience of Mr. Page "age is not an issue with regard to employment...." The defendants disputed claimant's average weekly wage and corresponding compensation rate relying on ***Curiel v. Environmental Management Services***, 376 S.C. 23, 655 S.E.2d 482 (2007). They sought to establish an average weekly wage of $297.69 and a compensation rate of $198.47. Based on this adjusted compensation rate, the defendants sought an overpayment credit of TTD in the amount of $37,802.58.

The case resulted in the Decision and Order of the single Commissioner, dated July 26, 2016, which found claimant to be permanently and totally disabled and awarded to him lump sum benefits of 500 weeks less previous payments by defendants, reduced to present value, and causally related lifetime medical care and treatment for his neck, left shoulder, left arm, left hand and fingers pursuant to Sec. 42-15-60. Claimant's average weekly wage was $695.00, and his corresponding compensation rate was $463.36 as determined by the defendants in their Form 20. From this Decision and Order the defendants timely filed their Form 30 Request for Commission Review, assigning specific error to the Hearing Commissioner's Decision and Order of July 26, 2016. Claimant-Respondent now submits his Respondent's Brief in full support of the Decision and Order of the single Commissioner in all particulars and in opposition to the assignments of error of the Defendants-Appellants.

EVIDENCE

Biographical:

Billy Wayne Herndon, Sr. is age 66 with a DOB: [redacted]. (Hrg. Tr., p. 27) He was 64 at the time of his accident on May 12, 2014. (Hrg. Tr., p. 27) Claimant has lived at [redacted], Walterboro, South Carolina with his wife, [redacted], for the past 30 years. (Hrg. Tr., p. 27) Claimant and Mrs. Herndon have been married for 46 years and have three grown children. (Hrg. Tr., p. 28) Claimant was in general good health before the accident. Claimant is right handed and has a valid South Carolina driver's license. (Hrg. Tr., p. 29) He had a valid commercial driver's license (CDL) until December, 2015. On the advice of Dr. Donald R. Johnson, II, he did not renew his CDL. He can drive comfortably for about 30 minutes; he limits his driving because the medicine he takes makes him sleepy and groggy. (Hrg. Tr., p. 29) Claimant finished the tenth grade but never completed his GED. (Hrg. Tr., p. 31) He served in the National Guard for six years and was Honorably Discharged as an E-5. (Hrg. Tr., p. 32) His ability to read and write is fair, and he can do basic math. He has no computer training and limited skills. (Hrg. Tr., p. 32)

Claimant's past work included carpentry work, construction, and commercial driving 18-wheel trucks. (Hrg. Tr., pp. 34, 35) He has worked as a log truck driver for about the last 30 years. Driving a log truck, is hard and dangerous work; it requires constant alertness. (Hrg. Tr., p. 34, 35) Log truck work requires throwing straps across the load, binding the loads, and trimming loads with a chain saw. The driver is constantly bouncing up and down over uneven ground. Work involves climbing in and out of the truck and doing maintenance under the truck, such as greasing the truck and lowering the gear. (Hrg. Tr., p. 35) Driving requires constant twisting and turning, looking in

the mirrors and paying close attention to surroundings. After his accident, claimant did not feel he could safely return to truck driving. (Hrg. Tr., p. 36)

Lay Evidence:

Deborah Herndon testified that before the accident of May 12, 2014, claimant was able to work 12 to 15 hours a day. (Hrg. Tr., p. 13) He was in relatively good health. (Hrg. Tr., pp. 13, 14) After his accident, he was a "totally different man." (Hrg. Tr., p. 13) Since the accident he has had a hard time with his nerves and with depression. (Hrg. Tr., p. 16) He takes Zoloft which makes him sleepy, and he does not want to do anything. He sleeps a lot. (Hrg. Tr., p. 17) He takes medicine in the morning which makes him drowsy; this lasts "pretty much most of the day." He sits in his recliner all day and does not get out of bed before 11:00. (Hrg. Tr., p. 19) He has no patience and did not like to be around people. The grandchildren get on his nerves; (Hrg. Tr., p. 20) "he has lost interest in life." (Hrg. Tr., p. 21)

Claimant testified that prior to his MVA of May 12, 2014, he did not have any problems with his neck. After the accident he had problems with his neck and left arm with "tingling in my (left) hand." He could not drive a log truck because of the twisting and turning and bouncing of the rough truck. (Hrg. Tr., p. 36) Claimant's average work day driving a log truck was 12 to 15 hours; sometimes he worked 60 to 65 hours a week. He normally hauled four loads a day and was paid by the load. (Hrg. Tr., p. 39) He retired in January, 2012, but had to go back to work because there "just wasn't enough money to get by." (Hrg. Tr., p. 39) He went to work for G & G Logging Company in January, 2014, (Hrg. Tr., p. 37) and had worked for G & G about 13 weeks when the accident happened. (Hrg. Tr., P. 59) He had earned about $9,285 or $714.23 per week with G & G before the accident. (Hrg. Tr., p. 59) It was his intention when he came out of retirement "to work

when he was needed." No decisions or arrangements had been made to limit or cap his earnings with G & G Logging in 2014. (Hrg. Tr., pp. 59, 60)

Work with G & G involved heavy lifting and moving things out of the road. (Hrg. Tr., p. 37) Walking and standing were frequent while the truck was being loaded; sitting was constant while the truck was being driven which was most of the time. Frequent bending, stooping and squatting were required to bind the load and maintain the truck; climbing was required to get in and out of the truck. Claimant was required to climb on the back of the truck to trim the load with a chainsaw. Pushing and pulling were required with the chainsaw and with putting on the straps. Reaching, twisting and turning were also required. (Hrg. Tr., pp. 37, 38) Claimant was required to take a CDL physical every year to keep his commercial driver's license. Before the accident, he passed the physical with no problem. After the accident, in June, he had chest pains and went to the ER at Colleton Medical Center, thinking he had a heart condition. The ER doctor was advised of the prior MVA and ordered an MRI to check the nerves in claimant's neck. It was determined that the pain was coming from the neck, and claimant was referred to a neurosurgeon, Dr. Artur Pacult, who eventually performed neck surgery. (Hrg. Tr., pp. 43, 44) Claimant was prescribed medications which make him sleepy for 2 or 3 hours a day. (Hrg. Tr., p. 47) He was prescribed narcotic medication for pain such as Oxycodone and Hydrocodone but prefers to take Tylenol because he did not want to become drug dependent. (Hrg. Tr., p. 47) Zoloft was prescribed for depression which occurs when he thinks about the wreck. (Hrg. Tr., p. 48) He has problems with patience and irritability, the grandchildren get on his nerves, and he does not want to be around anyone. (Hrg. Tr., p. 49) He has trouble concentrating and focusing when he takes his medication. (Hrg. Tr., p. 52) Mostly he feels lethargic and has lost interest in things. He constantly feels jittery and has "the

shakes." (Hrg. Tr., p. 49)

Claimant's functional capacities post-accident include standing for about 10 minutes and walking a couple of hundred yards. Sitting for more than 30 minutes bothers him; he cannot sit still. Bending and stooping are limited. He can lift and carry ten pounds with his left hand, but reaching with his left arm bothers him, and twisting and turning hurts his neck. He can turn his head a little; then he must turn his whole body. (Hrg. Tr., pp. 50, 51) The side effects of the medications impair his ability to safely operate a truck; even driving a car is more difficult. (Hrg. Tr., pp. 51, 52) He has tried to help his wife with cleaning the house, but after a little while he will have to sit down. (Hrg. Tr., p. 53) During a typical day, he gets off his feet for 5 or 6 hours. (Hrg. Tr., p. 54)

Medical Evidence:

Claimant was seen initially by Dr. Bryan Tompkins of Walterboro Family Practice on the day of his accident, May 12, 2014. He was in pain, and Dr. Tompkins noted "tenderness primarily in the left upper arm with some limited range of motion on the left shoulder." (APA 5, p. 65) On May 27, 2014, Dr. Tompkins saw claimant again and noted "tenderness primarily on the C-spine paraspinal muscles on the left trapezius area and into the left shoulder. He does have decreased strength in the left arm... related to pain." (APA 5, p. 67) Dr. Tompkins saw claimant a third time on June 10, 2014, for continued neck pain with left-sided shoulder and arm radiation. He noted "tenderness again left side of the C-spine paraspinal muscles and into the (left) shoulder. Describes radiation into the left arm and does appear to have decreased grip strength and decreased flexion and extension on the left today." Dr. Tompkins ordered an MRI of the C-spine. (APA 5, p 68)

On June 19, 2014, claimant was admitted to Colleton Medical Center complaining of chest pain. The ER physician noted that "the patient complains of neck pain with tingling down the (left)

arm ever since a motor vehicle accident 6 weeks ago." An "MRI of the neck was ordered to rule out spine disease," and on June 20, 2014, an MRI of the cervical spine without contrast was done with the following results:

> "Impression: Large disc osteophyte complexes with uncovertebral joint hypertrophy from C3/C4 through C6/C7, overall, left greater than right. There is severe multilevel bilateral foraminal stenosis left greater than right as detailed above. There is also mild multilevel spinal cord compression and mild spinal canal stenosis." (APA 4, pp. 45, 46)

On June 23, 2014, claimant returned to Dr. Tompkins, who reviewed the cervical MRI and concluded with findings of "Musculoskeletal/C-spine: Tenderness primarily on the left side with left upper extremity radiation." (APA 5, p. 82) On October 27, 2014, Dr. Tompkins referred claimant to Dr. Artur Pacult, a neurosurgeon, who became the authorized treating physician. Dr. Pacult determined that claimant had a "cervical radiculopathy at C7, left." The "MR(I) of the cervical spine shows significant disc degeneration at multiple levels, and on the left C6/C7 there is a foraminal stenosis with impressive left-sided osteophyte formation compressing as expected C7 nerve root." (APA 3, p. 33) Spinal surgery was recommended and agreed to, and Dr. Pacult "scheduled an anterior cervical discectomy arthrodeses with plating at C6-C7 with Synthes system." (APA 3, p. 33) Dr. Pacult performed neck surgery on January 13, 2015.

Claimant returned to Dr. Pacult on February 2, 2015, after his "cervical discectomy and decompression of the nerve root at C6-C7." He still "complains of numbness at night and tightness in his neck and especially when he drives and looks straight." (APA 3, p. 36) Dr. Pacult's assessment was "cervical radiculopathy at C7, left." He prescribed physical therapy for the cervical spine and left shoulder. (APA 3, p. 37) Claimant followed-up with Dr. Pacult on March 16, 2015. He was "complaining of cervical pain into the shoulder and into the arm on the left side." (APA 3,

p. 39) On April 27, 2015, Dr. Pacult saw claimant a final time. Physical therapy was completed, and claimant's condition had plateaued. Claimant described his job to Dr. Pacult and said that the truck vibration from driving causes "severe neck pain and left shoulder pain," which precluded him from returning to his prior occupation. Claimant believed he could not return to work because of his persistent pain. (APA 3, p. 41) He was found to be at MMI, but Dr. Pacult did not do impairment ratings. (APA Exhibit A, p. 92/Depo. p. 12) He agreed to refer claimant to an impairment rating specialist in order to close the workers' compensation case. (APA 3, pp. 41, 42) Before he could do this, the defendants sent claimant to be evaluated and rated by Dr. James E. Gee, an Industrial Medicine and Wellness doctor, with Tuomey Medical Professionals in Sumter, South Carolina. This was arranged solely by the defendants without any input from Dr. Pacult. Dr. Pacult did not even know Dr. Gee (APA Exhibit A, p. 92/Depo. p. 12) and never recommended him. Dr. Pacult opined that "Patient has reached maximum medical improvement and no further treatment is suggested and recommended and the patient is according to him due to pain unable to return to truck driving." (APA Exhibit A, p. 92/Depo. pp. 10, 11)

Dr. Gee, the defendants' rating doctor, saw claimant on referral from the defendants on June 11, 2015, for the sole purpose of rating him. Dr. Gee practices industrial and wellness medicine in Sumter even though Dr. Pacult practices medicine in Charleston, and all of the claimant's medical treatment was in the Walterboro-Charleston area. Dr. Gee had not participated in any of claimant's treatment. Dr. Gee completed a Form 14B, and signed the 14B "Dr. Pacult/James E. Gee" on the line to be signed by the "Treating Physician." (APA 1, p. 1) This gave the distinct impression that Dr. Pacult agreed with Dr. Gee's findings and/or that Dr. Gee was the "Treating Physician," both of which impressions were incorrect. Dr. Pacult stated in his deposition that he did not refer claimant

to Dr. Gee, that he did not know Dr. Gee and that to his knowledge he had never met Dr. Gee. (APA Exhibit A, p. 101/Depo. pp. 42, 43)

In his 14B Dr. Gee finds that the nature of claimant's injury is a "radiculopathy,'" and that the injured body part is "cervical." He does not document any other body parts which are "affected," by the radiculopathy. Dr. Gee placed claimant at MMI on April 27, 2015, and assigned a 9% impairment rating to the whole person with assigned work restrictions to limit heavy work and strain. He opined that claimant will not need future medical treatment. (APA 1, p. 1)

Claimant was referred on June 30, 2015, for an IME with Dr. Donald R. Johnson, II, a spinal surgeon with Southeastern Spine Institute in Mt. Pleasant, for evaluation of injuries to his "neck and radiating left arm pain." Dr. Johnson noted that claimant presents with "complaints of neck pain with radiating pain, paresthesias and numbness down the left arm to the left hand." **Dr. Johnson's IME 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."** (APA 6, pp. 87-89) Although the medical records of Dr. Johnson and Dr. Gee appear to contradict one another, Dr. Johnson's medical 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, lifting or straining." On physical examination, Dr. Johnson found that the "Spurling's maneuver is provocative on the left side," (APA 6, p. 87) while Dr. Gee noted that "Spurling's sign is not present." (APA 1, p. 2) 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-C7 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 multilevel pathology at 3-4, 4-5, 5-6 and 6-7. Indeed, in regards to left-sided pathology, the 6-7 level looks the 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. 88)

Dr. Johnson assigned "a 26% impairment to the whole person, per page 392, table 15-5 of the **Fifth Edition, AMA Guides**." This constitutes a cervical category IV impairment based on disc pathology at four different levels. He noted 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." (APA 6, p. 88) Dr. Johnson went on to address the issue of claimant's ability to return to work. He stated that "In regards to work, the patient may not return to his previous vocation. If he tries to do so, I think it is inevitable that he will injure a disc above his cervical fusion. Work restrictions of avoiding heavy lifting and strain are impossible in the line of work this gentleman is currently employed by." (APA 6, p. 88) In conclusion, Dr. Johnson noted that "Most probable to a reasonable degree of medical certainty the patient's work injury of 05-12-14 exacerbated a pre-existing asymptomatic degenerative condition. All opinions given above are most probable to a reasonable degree of medical certainty." (APA 6, p. 88)

The deposition of Dr. Pacult, the authorized treating neurosurgeon, was taken at his Charleston office on January 7, 2016. Dr. Pacult confirmed that Mr. Herndon should not go back to work as a log truck driver as supported in his deposition. (Tr. 36, L 6-22)

Q. Well, the reason I ask that is because you said the reason that Mr. Herndon should not go

back to work or would not be able to go back to work was because of his pain, and only he can determine the pain.

A. Correct.

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 –

A. Uh-huh.

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 back," 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. ....

Regarding Dr. Johnson's professional qualifications to provide an impairment rating for claimant, Dr. Pacult states as follows: (Tr. 39, L. 23-25; Tr. 40, L. 1-10)

Q. Okay. Are you familiar with Don Johnson?

A. Yeah, I know Dr. Johnson, yes.

Q. You have practiced in the Charleston area a long time, and, of course, you've got a good reputation Dr. Pacult, but I wanted to ask you, are you familiar with Dr. Johnson's reputation?

A. Yes.

Q. Does he have a good reputation?

A. Yes.

Q. Do you feel that Dr. Johnson would be a competent individual to give an impairment rating

in a particular case?

A. Absolutely.

Vocational Evidence:

Based on claimant's belief that he could not return to work as a log truck driver because of the severe neck pain and left upper extremity pain caused by the vibration and based on Dr. Johnson's opinion that return to work as a truck driver or any work involving heavy lifting or strain would likely injure adjacent disc levels above the level of claimant's cervical fusion (C6-C7), claimant retained the services of Dixon Pearsall, Ph.D., a vocational expert with Pearsall Vocational Services, to provide a Vocational Assessment and Residual Vocational Capacity (Employability) Opinion relating to Mr. Herndon's employability capacity. Dr. Pearsall noted that as regards prior work experience, "Mr. Herndon's primary work for the course of 30+ years has been as a heavy truck operator/driver." Further, his "prior work as a truck driver/operator (all positions), per the USDOL/DOT, are at the exertion level of "Medium," with a "specific vocational preparation (SVP) or 'skill' level is 4." (APA Exhibit C, p. 113)

Dr. Pearsall then reviewed the medical records and noted several significant medical findings with "Vocational Implications." The MRI scan showed "severe multilevel bilateral foraminal stenosis left greater than right as detailed above. There is also mild multilevel spinal cord compression and mild spinal canal stenosis." Dr. Johnson noted that claimant has "decreased functional use of his left arm secondary to radiculopathy with residual numbness and weakness of the left arm and hand." Dr. Gee noted that claimant "indicates at times that the 'vibration' while driving causes cervical pain."

In his Vocational Assessment Update, dated April 5, 2016, Dr. Pearsall, while noting that the

"minimum wage in South Carolina is consistent with the national minimum wage of $7.25 per hour," goes on to opine at page 5 of his report as follows:

> "Mr. Herndon has no transferable skills to 'semi-skilled' or 'skilled' sedentary work (SVP levels 4-8). He is limited by physician return to work (r-t-w) conditions to 'unskilled' sedentary positions. Mr. Herndon is limited and restricted to 'unskilled' sedentary positions.
>
> Unskilled sedentary work is exceptionally and extraordinarily limited in the United States economy. Unskilled sedentary positions encompass less than 1% of the national economic base. This may also be stated that greater than 99% of all positions (part-time or full-time) represented in the United States economy base are not available or accessible to Mr. Herndon based upon physician return-to-work conditions, limitations, and restrictions."
> (APA Exhibit D, pp. 126, 127)

Mr. George H. Page was retained as a vocational expert by the defendants. He is the owner of Page Rehabilitation for the last 18 years, and the majority of their work is workers' compensation in North and South Carolina. Mr. Page stated that in his experience "age is not an issue with regard to employment..." (APA Exhibit B, p. 109) He believed that claimant was capable of performing "light duty work" in comparison to the "unskilled sedentary work" determined by Dr. Pearsall. Mr. Page concluded that "there are abundant work options available to Mr. Herndon within his physical restrictions," and his "return to gainful employment in any capacity depends largely on his motivation." Mr. Page then listed certain jobs for Mr. Herndon which he found "utilizing *indeed.com* in a time limited survey."

Net Present Value of Indemnity:

Claimant was injured on May 12, 2014, and received temporary total benefits from this time. The net present value for permanent and total disability from August 1, 2016, is 357.7877 weeks, using a "Net Present Value Table – 2% per annum,." which is multiplied by claimant's compensation

rate of $463.33 and results in an amount of $165,773.77.

FINDINGS OF FACT

Based upon the stipulations of the parties, a review of the evidence in the record in its entirety, sworn testimony of witnesses received at the hearing and personal observations of the witnesses, by a preponderance of the evidence, the single Commissioner made the following Findings of Fact:

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. Further, the defendants have failed to show any fraud or misrepresentation on the part of claimant in withholding wage information as alleged by the defendants. This allegation is without merit.

3. Claimant sustained an admitted injury by accident to his neck arising out of and in the course and scope of his employment on 05/12/2014.

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, opines 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 treatments 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, recommended no further treatment and referred him to another specialist for an impairment rating. (Claimant's APA 3, p. 42)

7.. On 6/11/2015, on a 14B, Dr. James E. Gee of Toumey 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. (Claimant's 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 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, 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-C7 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 multilevel pathology at 3-4, 4-5, 5-6 and 6-7. Indeed, in regards to left-sided pathology, the 6-7 level looks the 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. (Claimant's APA 6, pp. 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 –

A. Uh-huh.

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 back," 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. ....

(Claimant's 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) can not 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 concluded as follows:

"In consideration of current medical and functional residual capacity, in consideration of age (65) and prior work experiences, and incorporating the absence of readily transferable 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 legitimate reason to refer claimant to 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 of 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 De Nemours Company, 227 S.C. 465, 88 S.E.2d 581 (1955).*** Determining disability involves more than simply listing jobs which theoretically an injured worker may be able to do. This has never been the standard for determining disability or lack thereof. Factors, such as age,

education, past relevant work, special training, ability to transition, job availability in the local, 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. In the instant case claimant has lost access to greater than 99% of all available positions (part-time or full-time) "represented in the United States economy base." Any jobs (less than 1%) which are available "are so limited in quality, dependability, or quantity that no reasonably stable market exists for them." Also, re-training a 66 year old individual with a tenth grade education and 30 years of truck driving experience to do other work is unrealistic and improbable.

16. Pursuant to 42-15-60, Claimant is entitled to lifetime medicals.

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

18. The indemnity proceeds through July 31, 2016 of $165,773.77 shall be allocated as follows: $55,257.92 as attorney's 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; $106,520.36 in compromise settlement of disputed future lost earnings at the rate of $153.04 per week, commencing on the date of this settlement 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).

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

ARGUMENT

I. THE HEARING COMMISSIONER'S FINDING OF FACT #2 THAT CLAIMANT'S CORRECT AVERAGE WEEKLY WAGE WAS $695.00 WITH A COMPENSATION RATE OF $463.36 AS LISTED ON THE FORM 20 IS SUPPORTED BY THE GREATER WEIGHT AND PREPONDERANCE OF THE SUBSTANTIAL EVIDENCE IN THE RECORD IN ITS ENTIRETY AND IS BASED UPON SOUND LEGAL CONCLUSIONS.

Defendants' rely on the 1978 case of ***Bennett v. Gary Smith Builders***, 271 S.C. 94, 245 S.E.2d 129 (S.C. 1978) to support their contention that claimant's compensation rate is incorrectly determined and should be decreased to the annual amount of $15,480.00. This would provide an average weekly wage of $297.69 and corresponding compensation rate of $197.47. Claimant believes this would grossly underestimate his **probable future earnings loss**. Defendants reliance on ***Bennett*** is misplaced. Factually, the ***Bennett*** case is clearly distinguishable from the instant case. The defendants would have this Commission apply the vagaries of the social security law to reach the outcome they seek. This would require the Commission to compare the 1966 social security law with current social security law. To do so the Commission would need to speculate on what claimant's intentions were compared with Bennett's.

Factually, Bennett had worked for Smith Builders for 16 to 18 years, presumably before he quit his full time job at age 62 and began drawing social security. He continued to work for the same employer, Smith Builders, on a part-time basis from the time he became 62 until his work-related accident on May 6, 1975, nine years later. Bennett would have reached age 62 in or about 1966 or nine years before his accident. Based on this, the 1966 social security law would apply and would continue with revisions until Bennett's injury in 1975.

After Bennett retired in 1966, he continued to limit his earnings to approximately $2,500.00

per year. This was about one-third of the annual $7,876.96 he could have earned at his average weekly wage of $151.48. However, of critical importance, this pattern went on for nine years despite the fact that Bennett reached 65, his full retirement age, in 1969 and could have returned to full-time work with no penalty offset against his social security, at least under current rules. Bennett continued earning $2,500.00 and working three or four months a year for six years after his full retirement age despite the fact that no work penalty applied. Also, his employer permitted this part-time work over a period of nine years, presumably because of the long standing employment relationship of 16 to 18 years. One can surmise that Bennett was a skilled carpenter and valued employee having worked for Smith Builders for 16 to 18 years. Bennett may have controlled the employment relationship and dictated the terms of his employment. Depending on the labor market, Smith Builders may have been glad to retain the services of their skilled carpenter for whatever amount of time he wanted to work. Clearly and unequivocally, Bennett's voluntary conduct over nine years, acquiesced in by the same employer, demonstrated that Bennett never intended to work more than three or four months a year **based on his lifestyle** and not on any desire to minimize the social security penalty. It is noted that Bennett was age 71 when his disabling accident occurred.

Language in ***Bennett*** provides a policy framework for determining an average weekly wage and compensation rate in a particular case. The ***Bennett*** court states that "an elasticity or flexibility is permitted with a view toward always achieving the ultimate objective of reflecting fairly a claimant's **probable future earning loss**." The court then stated "the objective of wage calculation is to arrive at a **fair approximation of the claimant's future earning capacity. His disability reaches into the future not the past; his loss as a result of injury must be thought of in terms of its impact on probable future earnings."**

Distinguishing the instant case, claimant had worked for G & G Logging Company for about 13 weeks at the time of his accident on May 12, 2014. Like Bennett, claimant had retired at age 62, but unlike Bennett, he needed to return to work because his social security was not enough for his family to live on. In his words, "there just wasn't enough money to get by." (D&O, p. 8) His return to the work force was not strictly voluntary; it was compelled by financial need. When his injury occurred, claimant had earned about $9,285.00 in 2014, about $714.23 a week. He testified it was his intention after coming out of retirement "to work when he was needed." While he may have considered working to the social security penalty threshold of $15,480.00, no definite decision or arrangements had been made at the time of his injury. (D&O, p. 8) Unlike Bennett, claimant had a new employer. It is likely the employer controlled the employment relationship. Claimant may have needed to work as much as his employer required in order to keep his job. The single Commissioner found claimant's testimony was credible. (D&O, FOF #14, p. 22) Claimant should be taken at his word that "his intention was to work when he was needed." (D&O, p. 8) Even if claimant had earned less than social security's penalty threshold in 2012 and 2013, this is not conclusive evidence he would have capped his earnings at $15,480.00 in 2014. In 2012 and 2013, claimant was working for a different employer, Bootle Logging Company. In 2014, he was working for a new employer, G & G Logging, Inc. He may have worked all the hours provided by his new employer just to protect his job.

Arguendo, would claimant have stopped working in 2014 upon reaching the social security penalty threshold of $15,480.00? This is the contention of the defendants, although it is speculative and not supported by the greater weight of evidence in the record. However this alternative is considered in the context of claimant's **probable future earnings loss**. As stated in ***Bennett***

"disability reaches into the future not the past; his loss as a result of injury must be thought of in terms of its impact on probable future earnings." What then is the impact on claimant's **probable future earnings**? Review of the applicable social security law is necessary. Claimant was born on [redacted] On May 12, 2014, the date of his accident, he was age 64 and would turn 65 on December 11, 2014. The next year, claimant would reach his full retirement age of 66 on December 11, 2015. After age 66 claimant would be able to draw his full retirement and continue working without any penalty. However, in 2014 after earning $15,480.00, if claimant had continued working, his social security benefits would have been reduced $1.00 for each $2.00 earned above this amount. It should be recognized that this money above the limit is only withheld by social security; it is not lost or forfeited. Claimant's social security benefit would be increased at his full retirement age of 66, and the previous benefits withheld would be replaced in full at this time. This fact may have encouraged claimant to work as much as needed. Again, the decreased benefits are simply deferred, not lost. Also, in 2015 claimant reached his full retirement age. In that year the penalty threshold increased to about $41,000.00; it was $41,880.00 in 2016. After approximately $41,000.00, social security would deduct $1.00 of benefits for every $3.00 earned. Based on an average weekly wage of $695.00, as determined by the defendants, claimant would have "a salary or earnings totaling $36,140.00 per year." (Defs. Br., P. 16) Since $36,140.00 is less than $41,000.00, it likely that claimant would not have paid any penalty for full-time work in 2015.

The social security regulations are complicated. The regulations create a "donut hole," in which earnings in excess of a predefined penalty threshold, limit entitlement to social security benefits until full retirement age is reached. At that time withheld benefits are returned to the beneficiary as increased future benefits. How does this impact "**probable future earnings**?" It is likely, taking

claimant at his word, that "he would have worked when he was needed." But even if he had stopped working at the penalty threshold in 2014, it would have been for less than six months. In 2015 it would not have mattered since claimant's projected earnings of $36,140.00 would have been less than the penalty threshold of about $41,000. After December, 2015, claimant could earn any amount without penalty based on his full retirement age. So what is a fair projection of claimant's **probable future earnings loss**? It is clearly the amount of earnings which claimant could earn working full-time. This is $36,140.00 per year as determined by the defendants; it amounts to $695.00 per week.

The defendants would have the Commission speculate in two ways. First, the defendants speculate that claimant would not have elected to earn more than $15,480.00 in 2014. This assumes claimant did not want to work more than the social security penalty threshold and his new employer, G & G Logging, Inc. would have allowed him to work part-time. This speculation is inconsistent with claimant's credible testimony that he returned to the work force because his social security alone was not enough to live on and he intended "to work when he was needed." Second, the defendants speculate that it is probable claimant never would have returned to full time employment, and his **"probable future earnings loss"** would be limited to his reduced 2014 earnings. This does not account for the fact that any reduced social security benefits would be returned to claimant after age 66, and this fact likely would have influenced claimant's decision to continue working "when he was needed."

In summary, the ***Bennett*** case is factually distinguishable from the case now before this Commission. Bennett was a long-term employee of 16 to 18 years. Claimant had worked for G & G Logging for about 13 weeks. Bennett for nine years after retiring at age 62 worked 3 to 4 months a year and earned $2,500.00. Three of the nine years before Bennett reached his full retirement age

of 65, he may have reduced his hours and earnings to avoid a reduction in his social security benefits. However, after age 65 there would have been no reduction. Bennett voluntarily chose to continue working 3 to 4 months a year and earning $2,500.00 a year for the next six years until he was injured in May, 1975. Claimant retired at age 62 in December, 2011. He had returned to the work shortly after retiring because his social security benefits were not enough to live on. Claimant worked for Bootle Logging Company in 2012 and 2013. In those years he earned less than the social security penalty threshold. He changed employers and began working for G & G Logging in January, 2014. Maybe he left Bootle to earn more money. He worked for G & G Logging for about 13 weeks until he was seriously injured in a truck wreck while working on May 12, 2014. When he was injured in 2014, he had earned about $9,285.00 which was below the social security penalty threshold of $15,480.00 for that year. When he was injured in 2014, he had earned more than in either 2012 or 2013. It was claimant's intention after coming out of retirement "to work when he was needed." Claimant would have reached his full retirement age of 66 on December 11, 2015, the year following his accident. During 2015, the social security penalty threshold would have increased to about $41,000.00 which exceeded claimant's full-time annual income. Claimant would have worked full-time in 2015 without incurring a penalty. After turning 66, claimant would have continued to work full-time and earn any amount without incurring a penalty.

Claimant submits there is a preponderance of evidence in the record to support the single Commissioner's Finding of Fact #2 (D&O, p. 18) that claimant has an average weekly wage of $695.00 with a compensation rate of $463.36 based on the Form 20 submitted by the defendants. These amounts were determined by the defendants; they were determined to be correct; they have been the basis for payment of temporary total compensation in the case for more than two years; and

they have not been contested by the defendants for more than two years. (D&O, p. 18) Claimant's sworn testimony was found to be very credible by the single Commissioner. (D&O, p. 22) Incorporating the lay testimony of claimant and his wife as set forth in the Decision and Order, (D&O, p. 22) "Claimant tried to retire in January, 2012, but he had to go back to work because there 'just wasn't enough money to get by.'" Further, "Claimant went to work for G & G Logging Company in January, 2014. He had worked for them about 13 weeks when the accident occurred in early May, 2014. He had earned about $9,285 or about $714.23 per week on average at that point. It was claimant's intention after he came out of retirement to work when he was needed. No decisions or arrangements had been made on the date of claimant's accident which would limit or cap his earned income with G & G Logging Company in 2014." (D&O, p. 8)

The single Commissioner's decision on the average weekly wage of $695.00 and compensation rate of $463.36, as determined in the Form 20 which the defendants prepared and failed to contest for two years, is supported by the greater weight and preponderance of the substantial evidence in the record and should be allowed to stand.

II. THE HEARING COMMISSIONER'S FINDING OF FACT THAT CLAIMANT IS PERMANENTLY AND TOTALLY DISABLED IS SUPPORTED BY THE GREATER WEIGHT AND SUBSTANTIAL EVIDENCE IN THE RECORD IN ITS ENTIRETY AND IS BASED UPON SOUND LEGAL CONCLUSIONS.

A. Claimant's injury is not limited to one scheduled member but is controlled by the "two-body part" rule established in *Singleton v. Young Lumber Company* and an award of permanent and total disability based on S.C. Code Ann. 42-9-10 is supported by the greater weight and preponderance of the substantial evidence in the record in its entirety.

Defendants now seek to extend the factually narrow Court of Appeal's holding in ***Colonna v. Marlboro Park Hospital***, 404 S.C. 537, 745 S.E.2d 128 (S.C.App. 2013) to limit the efficacy of the

much broader South Carolina Supreme Court holding in ***Singleton v. Young Lumber Company***, 236 S.C. 454, 114 S.E.2d 837 (S.C. 1960). ***Singleton*** has stood the test of time for more than 50 years. The ***Singleton*** court held that "where the injury is confined to a scheduled member, and there is no impairment of any other part of the body because of such injury, the employee is limited to the scheduled compensation, even though other considerations such as age, lack of training, or other conditions peculiar to the individual, effect a total or partial industrial incapacity." Further, **"To obtain compensation in addition to that scheduled for the injured member, claimant must show that some other part of the body is affected."** ***Singleton***, 236 S.C. at 471. This has been, is, and continues to be the embodiment of the **"two-body part" rule** established in ***Singleton.***

In ***Wigfall v. Tideland Utilities, Inc.***, 354 S.C. 100, 580 S.E.2d 100 (S.C. 2003) the court defined 'impairment,' holding that "the ***Singleton*** Court intended 'impairment' to encompass a physical deficiency." ***Wigfall***, 580 S.E.2d at 104. Claimant contends that the holding in ***Colonna*** does not equate "impairment" defined in ***Wigfall*** as a "physical deficiency"with the need for or requirement of an "impairment rating," as the defendants incorrectly suggest. (See, Defs. Br. , P. 20) Impairment is defined in general terms as a "physical deficiency," as opposed to mental or emotional deficiency. There is nothing in ***Singleton, Wigfall*** or ***Colonna*** that mandates an impairment rating for an impairment of another body part other than the one injured or for a second body part affected by an injury to a first body part. Nothing requires an impairment as referred to in ***Singleton*** and defined in ***Wigfall*** to be quantified as an impairment rating. Nothing requires an effectuation of a second body part by an injury to a first body to be quantified as an impairment rating. This is a blatant attempt by the defendants to rewrite the law in ***Singleton, Wigfall*** and ***Colonna*** based on at best dictum in the ***Colonna*** case. Clearly, the holding in ***Colonna*** does not mandate this interpretation. However, any

confusion of this interpretation needs to be clarified once and for all. If ***Colonna*** does modify the "two-body part" rule in ***Singleton*** by requiring an impairment rating for a second body part **impaired** or **affected** by injury to a first body part, then this needs to be so stated in clear and unequivocal language for the appellate courts to decide.

Factually, in ***Colonna***, the claimant, Colonna, was treated by a pain management and neurology specialist, Dr. Pasi, who "diagnosed her with Reflex Sympathetic Dystrophy (RSD), which caused chronic pain to Colonna's right foot and ankle (right lower extremity). The compensable injury was to Colonna's right foot and ankle; the injury to her right lower extremity was the single scheduled member in the case. Dr. Pasi then undertook to implant a spinal cord stimulator into her spine for her RSD. Again, it is factually significant that the RSD was to Colonna's right lower extremity (right foot and ankle) and did not affect or impair a second and separate body part. Colonna had argued that the implementation of the spinal cord stimulator into her spine in and of itself affected her spine. The ***Colonna*** court held that although the spinal cord stimulator was implanted in claimant's back, "the spine was merely the site for the treatment modality that would serve to improve the functioning in her right leg." Further, "the spinal cord stimulator was implanted for the sole purpose of deriving a benefit to nerve deficits in her (Colonna's) right leg" and "was not implanted to diagnose, remedy or treat any condition in her spine..." The court went on to hold that "...implantation of a spinal cord stimulator, without evidence of causally-related symptoms, pain or ill effects in the spine, does not render the body part 'affected' under the Act and therefore, there are no additional body parts, including the back, which were affected by (Colonna's) work injury or subsequent treatment of the same." Again, the court focussed on the initial injury to one body part, the right lower extremity, and determined that no additional body parts were injured, impaired or affected. Only if the claimant had suffered RSD in her

spine or other part of her body (other than her right lower extremity) as a result of implantation of the spinal cord stimulator, could she then argue that a second body part was involved.

Admittedly, there is dictum in ***Colonna*** that "despite Dr. Pasi's diagnosis of RSD and acknowledgement of Colonna's complaints of chronic pain, she did not assign Colonna with an impairment rating for her RSD." This is dictum and not the holding in ***Colonna.*** Also, this begs the question of whether RSD should be treated as a disease or condition in and unto itself or is it ancillary to the body part if affects? The defendants rely on this dictum in asserting that an impairment rating is required to establish an impairment to a second body part. Their conclusion is unfounded and erroneous. Even if Dr. Pasi had given Colonna an impairment rating for her RSD, the RSD was to the right foot and ankle which was the single body part initially injured. There still would have existed an injury to only a single body part, claimant's right foot and ankle, and the RSD pain to the right foot and ankle (right lower extremity) would not have established a second body part. Since RSD pain relates to a member or region of the body, it is hard to argue that the RSD pain in and of itself is a second body part for purposes of the "two-body part rule in ***Singleton.*** The better analysis is to associate the RSD pain with the body part it affects in determining the number of body parts 'affected' consistent with the ***Singleton*** holding.

Claimant contends that under ***Singleton*** and the "two-body part" rule, a claimant may establish a general disability under Sec. 42-9-10, greater than the presumptive scheduled disability of Sec. 42-9-30, in one of three ways. 1) He may establish an injury to two or more body parts, either scheduled or non-scheduled. 2) He may establish an injury to a scheduled member and an "impairment" to another part of the body because of such injury. Here, impairment is defined by ***Wigfall*** as a "physical deficiency." 3) He may sustain an injury to one part of his body that "affects" some other body part.

Injury to one body part which affects a second body part permits an injured worker to support a wage loss claim for permanent and total disability based on loss in earning capacity as provided in Sec. 42-9-10. Otherwise, in the case of injury to a single body part, claimant is relegated to a scheduled member injury under Sec. 42-9-30.

Typically, an injury to one part of the body which "affects" another body part occurs in spine injury cases involving disc injuries with radiculopathy into an upper or lower extremity. The American Medical Association recognizes the degree of impairment to the spine based in part on the existence, degree and severity of any associated radiculopathy in one or more of the extremities. However, the AMA Guides to the Evaluation of Permanent Impairment does not recognize radiculopathy into an extremity as a separate and distinct injury; and therefore, does not provide a separate impairment rating for the extremity affected by the radiculopathy, even though the effect on this body part may be significant. The defendants' interpretation of ***Colonna***, coupled with the AMA's inclusion of radiculopathy affecting a body part into an impairment rating for the spine only, would eliminate the ability of a claimant to bring a general disability, wage loss claim for a spinal injury with radiculopathy affecting an extremity or extremities. Clearly, this is what the defendants seek to do. They would have this Commission require that spinal injuries with radiculopathy not be presented as a general disability, wage loss claim in typical cases where the injury to the spine results in radiculopathy which 'affects' an extremity. Following the AMA Guides, medical providers would rate the injury to the spine only and not provide a separate and distinct impairment rating to the extremity 'affected' by the radiculopathy. Again, the defendants' interpretation of ***Colonna*** would effectively eviscerate the ***Singleton*** "two-body part" rule, permitting a general disability determination based on loss in earning capacity in cases where an injury to one body part 'affects' another body part. This was never the

intention of the court which has consistently and correctly recognized the nuances and differences between the medical impairment guidelines and the common sense provisions of the workers' compensation law. It has never been the intention of the courts to strip away an injured worker's right to bring a wage loss claim for general disability in spine injury cases where more that a single body part is impaired or affected, typically an extremity impaired or affected by radiculopathy. They would have this Commission require that spinal injury claims with radiculopathy in which the only impairment rating is to the spine (neck or back) be considered under Sec. 42-9-30 **only** and not as a general disability, wage loss claim under Sec. 42-9-10, **unless a separate, independent impairment rating to the second body part "impaired" or "affected" is provided.** This has never been the law; it is not now. ***Singleton*** has not been overruled or limited by ***Colonna.***

Claimant contends that, 'affects' as used in the context of the ***Singleton*** decision is not a hyper-technical term which must be quantified. It is a common sense term which can be determined easily in deciding whether one or more body parts are involved in a particular claim, that is, whether the "two-body part" rule applies. In his Finding of Fact #3 (D&O, FOF #3, p.18), the single Commissioner determined "claimant had sustained an admitted injury by accident to his neck arising out of and in the course and scope of his employment on 05/12/2014." In Finding of Fact #4 (D&O, FOF #4, p. 18), he continues to find that "claimant alleged additional causally related injuries to his left shoulder, left arm, hand and fingers. Dr. Donald Johnson, II, in his narrative report of 6/30/2015, opines 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 **tenderness,** 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." Here, it is evident that claimant sustained an injury to his neck in the motor vehicle accident of May 12, 2014 while he was working. Dr. Johnson determined that he had "decreased functional use of his left arm secondary to radiculopathy with residual numbness and weakness in the left arm and hand." Clearly, under the ***Singleton*** "two-body part" rule, the injury to the neck **affected** the left arm and hand. For the benefit of the defendants, this is elementary. One plus one make two. The **injured neck** and the **affected left arm** equal two body parts and are consistent with the decision in ***Singleton*** which claimant submits is still good law.

There is a plethora of evidence to support the single Commissioner's determination that under Sec. 42-9-10 (B) and the "two body-part" rule in S***ingleton***, claimant is permanently and totally disabled. (D&O, FOF #14, p. 22) Dr. Donald Johnson, II, a highly experienced, practicing spinal surgeon with Southeastern Spine Institute in Mount Pleasant, rated claimant with a 26% permanent impairment to the whole person based on a causally related injury to claimant's neck with decreased functional use of his left arm secondary to radiculopathy with residual numbness and weakness of the left arm and hand. This is a category IV impairment to the cervical spine resulting from multilevel (4-level) disc pathology at 3-4, 4-5, 5-6 and 6-7 and residual to surgery by Dr. Pacult at C6-C7. (D&O, FOF #7, pp. 19-20) The single Commissioner gave greatest weight to Dr. Johnson's 26% impairment rating and little weight to Dr. Gee's 9% whole person impairment rating. (D&O, FOF #11, p. 22) It is noted that Dr. Artur Pacult, the authorized treating physician, did not do impairment ratings and therefore did not rate the claimant. The neck injury resulted in a radiculopathy which **affected** the left upper extremity and left hand and fingers. Both Dr. Johnson and Dr. Artur Pacult, the authorized

stated that "a guideline for determining permanent and total disability under the general disability criteria of loss in earning capacity," and 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." 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 De Nemours Company,*** 227 S.C. 465, 88 S.E.2d 581 (1955). See, also, ***Coleman v. Quality Concrete Products, Inc.,*** 245 S.C. 625, 142 S.E.2d 43 (1965). (D&O, FOF #14, pp. 22-23).

B. <u>Claimant is permanently and totally disabled pursuant to S.C. Code Ann. 42-9-30(21).</u>

Claimant relies substantially on his prior argument in Argument II, Subpart A of Respondent's Brief herein. The single Commissioner gave little weight to the 9% impairment rating of Dr. Gee compared to the greatest weight to the 26% whole person impairment rating of Dr. Johnson. (D&O, FOF # 11, p. 22) Dr. Artur Pacult, the authorized treating physician, did not give impairment ratings, but he was personally familiar with Dr. Donald Johnson, II, of Southeastern Spine Institute in Mount Pleasant; he believed that Dr. Johnson has a good reputation; and Dr. Pacult believed that Dr. Johnson was qualified to give an impairment rating in a particular case. (D&O, pp. 15-16) Dr. Pacult testified in his deposition that he did not know Dr. Gee, to his knowledge had never met Dr. Gee and did not refer claimant to Dr. Gee for an impairment rating. (D&O, p. 13) This was all arranged by the defendants who sent claimant to their "rating doctor," and this fact was not lost on the single Commissioner who noted that "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." (D&O, FOF #11, p. 22) It is noted that the single Commissioner, and indeed, the Full Commission, is tasked with judging the credibility of the witnesses, including expert witnesses, based on all the evidence in the record in its entirety. Dr. Johnson's 26% whole person impairment based on the injury to claimant's neck is a very significant impairment and equates to a "DRE Cervical Category IV 25%–28% Impairment of the Whole Person," as found on page 392, table 15-5 of the AMA Guides to the Evaluation of Permanent Impairment, Fifth Edition. (APA 6: Medical Records of Dr. Donald R. Johnson, II, dated 6-30-2015, pp. 87-89; see, also, D&O, p. 3 and p. 14). Both Dr. Johnson and Dr. Pacult were of the opinion that claimant could not return to work as a log truck driver although Dr. Pacult based his opinion on the pain experienced by claimant in driving the log truck (D&O, p. 15) and Dr. Johnson based his opinion on the physical demands of claimant's prior employment. (D&O, p. 14) Even Dr. Gee noted that claimant "indicates at times that the 'vibration' while driving causes cervical pain." (D&O, p. 17)

Because of the high (26%) whole person impairment rating of Dr. Johnson and the opinion of both Drs. Johnson and Pacult that claimant could not return to his previous occupation of log truck driver, claimant retained the services of Dixon Pearsall, Ph.D. to provide a vocational opinion relating to employment. As noted, Dr. Pearsall determined that claimant was "limited and restricted to 'unskilled' sedentary positions," which "encompass less than 1% of the national economic base." (D&O, p. 17) These positions are so limited in quantity that no reasonably stable market exists in the national economy or in South Carolina.

CONCLUSION

In conclusion, based upon the foregoing arguments of the Claimant-Respondent, the

Respondent now respectfully requests the Appellate Panel of the Full Commission to affirm the single Commissioner's Decision and Order dated July 26, 2016, in all particulars, as reiterated herein in the Findings of Fact and as set forth in the Conclusions of Law and Award of the Decision and Order. Specifically, Respondent now seeks to affirm his average weekly wage of $695.00 and his corresponding compensation rate of $463.36; to affirm that he is permanently and totally disabled; to affirm that he is entitled to a lump sum award of 500 weeks less any indemnity previously paid by the defendants, all commuted to present value; and to affirm his entitlement pursuant to Sec. 42-15-60 to causally related medical treatment and lifetime medical care and treatment for his neck, left shoulder, left arm, left hand and fingers.

Respectfully submitted,

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Walterboro, South Carolina

October 3, 2016

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM SOUTH CAROLINA WORKERS' COMPENSATION COMMISSION

Appellate Case No. 2017-000692

Billy Wayne Herndon, Employee/Claimant .....Appellant-Respondent,

v.

G & G Logging, Inc., Employer, and
Palmetto Timber S.I. Fund c/o Walker,
Hunter & Associates, Inc., Carrier.....Respondents-Appellants.

Certificate of Counsel

The undersigned hereby certifies that the Record on Appeal contains all material proposed to be included by any of the parties and not any other material.

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