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

Jennie Cox, Employee, vs. Palmetto State Transportation, Employer, and Cherokee Insurance Company, Carrier, Defendants.	WCC FILE NO: 1206236 **FULL COMMISSION DECISION AND ORDER**

HEARING DATE: February 2, 2017, in Columbia, South Carolina.

APPEARANCES: Claimant represented by Juliette B. Mims, Esquire of the Mims Law Firm and Adrianne Turner, Esquire of Columbia, South Carolina.

Defendants represented by Robert E. Horner, Esquire of Columbia, South Carolina.

PANEL: Commissioner Susan S. Barden, Chair
Commissioner Avery B. Wilkerson
Commissioner R. Michael Campbell

FILED: May 21, 2018

This matter came before the South Carolina Workers' Compensation Full Commission on appeal by the Defendants from the Decision and Order of the Hearing Commissioner Aisha Taylor. In the Order dated May 23, 2017, the Hearing Commissioner found Claimant to be

permanently and totally disabled from a compensable injury that occurred on May 31 , 2012. For the reasons set forth below, we reverse and remand.

STATEMENT OF THE CASE

This claim arose out of an admitted injury to the Claimant, employed as tractor trailer driver for Defendant, Palmetto Transportation Company. On May 30, 2012, the claimant suffered compensable injuries after a machine fell on her causing injuries to her face and shoulder. Her injuries to her face included the removal of her remaining teeth and dental implant replacements, surgery to her upper and lower mandibles, and physical therapy for her shoulder.

The case went to a hearing on the Claimant's Form 50 on the issue of permanency. Per her Form 58, Claimant alleged, "head, neck, cognitive brain and traumatic brain dysfunction, jaw, teeth, soft tissue, nerves, left shoulder, chest, mid back and low back problems, breathing problems, depression and severe weight loss." Claimant alleged she was permanently and totally disabled due to fatigue which she contended was caused by malnutrition caused by injuries to her jaw and teeth. Defendants admitted that Claimant had suffered the loss of teeth, suffered an impairment to her jaw per the authorized treating physician's Form 14B, and suffered a 6% impairment to her shoulder.

In determining that Claimant was permanently and totally disabled, the Hearing Commissioner relied on the medical opinions of Dr. Ellis, the claimant's family physician, and Dr. Brabham, a psychiatrist who performed a one-time physiological and vocational evaluation of Claimant. The Hearing Commissioner determined that Claimant was entitled to lump-sum payment of the commuted value of five hundred weeks of benefits less any amount previously paid by Defendants in the form of temporary compensation. The Hearing Commissioner also found that pursuant to S.C. Code Ann. § 42-15-60, Claimant was entitled to lifetime benefits for

causally related medical expenses including, but not limited to lifetime repair, replacement and/or removal of any retained hardware and causally related medical treatment for her teeth, mandible, left shoulder, neck, facial nerve, and depression.

Defendants timely filed the Form 30, Request for Appeal, respectfully submitting the following errors of law:

1. That the Hearing Commissioner committed an error of law when she found the Claimant was permanently and totally disabled without requiring the Claimant to establish, by medical evidence stated to a reasonable degree of medical certainty, that Claimant's alleged fatigue, or any other alleged debilitating condition, in March 2016 was related to her work-related accident that occurred in May 2012.

2. That the Hearing Commissioner erred as a matter of law when she found that the testimony of Dr. Brabham supported the Claimant's position that she was permanently and totally disabled, as Dr. Brabham is not a medical doctor who was qualified to establish, to a reasonable degree of medical certainty, that Claimant's alleged fatigue in 2016 was causally related to her work-related injury suffered in May 2012.

3. That the Hearing Commissioner erred in finding the Claimant permanently and totally disabled because the Claimant failed to establish to a reasonable degree of medical certainty that any alleged symptoms she was having in March 2016 for which she took herself out of work were related to malnutrition which was related to her work-related injury.

4. That the Hearing Commissioner erred as a matter of law when she found that the report of Dr. Brabham supported the Claimant's position that she was permanently and totally disabled, as Dr. Brabham's report failed to meet the required standard for medically complex cases.

5. That the Hearing Commissioner erred as a matter of law in relying upon Dr. Brabham's report to support the conclusion that the Claimant was permanently and totally disabled, as Dr. Brabham's report contained erroneous information regarding the Claimant's ability to work—namely, Dr. Brabham reported that after her work related accident, the Claimant attempted to work for one week but was unable to continue when, in fact, the Claimant worked from November 2012 until March 2016 when she took herself out of work.

6. That the Hearing Commissioner erred as a matter of law in relying upon the records of Dr. Ellis to support the Claimant's position that she was permanently and totally disabled, as Dr. Ellis never establish in any form that the Claimant was permanently and totally disabled, as in fact, Dr. Ellis returned the Claimant to work after writing her a work excuse for several weeks, stating that there was no basis for the Claimant not to return to work.

7. That the Hearing Commissioner erred as a matter of law in relying upon Dr. Ellis in finding that the Claimant was permanently and totally disabled, as Dr. Ellis never causally related, to a reasonable degree of medical certainty, any of Claimant's medical conditions to her work-related accident, and to the contrary, stated that the Claimant's absence from work was not related to her work-related injury.

8. That the Hearing Commissioner erred in finding the Claimant permanently and totally disabled because the Claimant failed to establish to a reasonable degree of medical certainty that any alleged symptoms she was having in March 2016 for which she took herself out of work were related to malnutrition which was related to her work-related injury.

9. That the Hearing Commissioner erred as a matter of law when she found that Dr. Ellis' records supported the position that the Claimant was permanently and totally disabled,

as Dr. Ellis found no reason for Claimant to be out of work and wrote the Claimant back to work.

10. That the Hearing Commissioner erred as a matter of law in finding that the Claimant's weight loss/current weight alone would be sufficient to establish that the Claimant suffered malnourishment or fatigue resulting from the accident, when Claimant weighed less in 2013, 2014, and 2015, when she worked for three years as a CDL driver following her accident, and moreover, the Hearing Commissioner went beyond her qualifications and arrived at a medical conclusion that she was not qualified to make regarding the issue of the Claimant's weight when no other medical doctor testified that the Claimant suffered from malnourishment or fatigue that resulted in a permanent and total disability.

11. That the Hearing Commissioner erred as a matter of law in finding the Claimant permanently and totally disabled when Dr. Stacy Newsom opined that the Claimant could return to work on November 9, 2012, without restrictions, and Claimant did return to work without restrictions.

12. That the Hearing Commissioner erred as a matter of law in finding the Claimant permanently and totally disabled when the Claimant's dietary restrictions in 2016 were identical to the restrictions she had in 2012 and 2013 when she was released by her treating physicians to return to work and Claimant never had an alteration in those restrictions.

13. That the Hearing Commissioner erred as a matter of law in finding the Claimant permanently and totally disabled when Dr. Brian Svazas opined that the Claimant had suffered a 6% impairment to her shoulder and could attend physical therapy if desired,

though Claimant declined further physical therapy, but was otherwise able to return to work without restrictions.

14. That the Hearing Commissioner erred in finding that the Claimant was permanently and totally disabled because factually, there is no support for such a conclusion, and to the extent there are any facts, such facts fail to rise to the level of established beyond the preponderance of the evidence that the Claimant is permanently and totally disabled.

15. That the Hearing Commissioner erred in finding that there were sufficient facts to find the Claimant permanently and totally disabled, as such facts are not supported by the greater weight of the evidence;

16. That the Hearing Commissioner erred in finding that Dr. Brabham was credible in his opinions, as Dr. Brabham's report was factually erroneous in multiple regards and were not established by the evidence, including but not limited to the fact that Dr. Brabham stated that "to her credit, Ms. Cox tried to return to work, and actually drove a one week run. However, she was exhausted while doing so, and since that time, she has been unable to return to any gainful employment whatsoever, because of her on-the-job injuries on May 31, 2012." Dr. Brabham erroneously believe that Claimant had not worked in almost four years. Dr. Brabham's opinions were also erroneous in the following particulars: (1) that Claimant had lost 20 pounds since the accident; (2) in relying upon the Claimant's opinion for medical causation, nothing that in Claimant's opinion her weight loss was due to ongoing dental issues; (3) that Claimant had major problems falling asleep when, in fact, Claimant had been on insomnia medication for years, and before the accident; (4) he stated that due to her injury, she was unable to handle any type of work that would require her to maintain the same position for more than 30 minutes which was wholly erroneous in light of the fact the

Claimant drove tractor trailer trucks for 11 hours (or in 11 hour shifts) in 2013, 2014, 2015, and two months into 2016 without ever once calling in sick or declining to take a run.

17. That the Hearing Commissioner erred in relying upon Dr. Brabham's report to the extent he opined that she took Xanax because of the accident and that her injury was the cause of her current problems because Dr. Brabham only stated that "it was reasonable to conclude" the accident was the cause, which does not meet the most probably, to a reasonable degree of medical certainty standard which is required in this case and all medically complex cases.

18. That the Hearing Commissioner erred in finding the Claimant permanently and totally disabled, with such a conclusion unsupported by the facts, against the greater weight of the evidence, not supported by a preponderance of the evidence and such a conclusion constituted an abuse of discretion.

19. That the Hearing Commissioner erred in finding the Claimant permanently and totally disabled and failed to consider such facts which established otherwise the following facts, and the Hearing Commissioner erred in finding the Claimant credible, based upon the following facts which establish Claimant was not credible:

a. That the Claimant returned to work driving long distance, over-the-road trucking jobs from November 2012 until March 2016, when she voluntarily took herself out of work;

b. That at the time she took herself out of work, Claimant reported that she "hurt all over" and stopped showing up for work.

c. That prior to taking herself out of work in March 2016, Claimant never once turned down an assignment to drive, never took vacation or sick leave, and accepted

every driving offer given to her (her employment was not forced dispatch and Claimant was free to accept or turn down any job she wanted).

d. That in 2013, the Claimant earned $57,602.75 in her employment as an OTR driver with Palmetto State Transport.

e. That in 2014, the Claimant earned $75,464.77 in her employment as an OTR driver with Palmetto State Transport.

f. That in 2015, the Claimant earned $63,693.25 in her employment as an OTR driver with Palmetto State Transport.

g. That the Claimant's dietary restrictions never changed from 2012 until 2016;

f. That Claimant did not receive or seek any additional physical therapy to her shoulder and still had the 6% rating to her shoulder from Dr. Svazas;

h. That although the Claimant lost the approximate 9-11 natural teeth she had at the time of the accident, the Claimant's lost teeth were replaced with dental implants, which allowed her to eat 85% solid good and 15% semi-solid food;

i. that the Claimant took herself out of work in March 2016 and was not taken out of work by Dr. Ellis, though Dr. Ellis later approved several weeks out of work after the fact, though Dr. Ellis later stated that she could not medically continue to write the Claimant out of work beyond May 2016;

j. that the Claimant did not lose 25 pounds as alleged, and in fact, at various times, weighed near the same after the accident as she did before the accident, and by December 2016, weighed more than she did at any time before her accident;

k. that the Claimant had a longstanding history of depression that was recorded long before this accident, and in fact, she admitted that her depression was related to the death of her grandson and not this accident, and at no time in the nearly give years between her accident and the Hearing did the Claimant ever request, seek, or receive any therapy related to her depression;

l. that to the extent Claimant had some depression, she was placed on an anti-depression by Dr. Ellis and within a matter of two months felt much better;

m. That the Claimant was already on anxiety and insomnia medications before this accident and that there is no evidence or medical testimony that the accident was the cause of her continuing to receive these prescriptions over the four years she continued to work;

n. That in October 2015, the Claimant went being a team driver on a dedicated route to being a single driver running various routes, but despite this change, the Claimant still did not turn down an assignment or try to work any reduced hours prior to her voluntarily ceasing her employment in March 2016;

o. That although Dr. Cofer opined that the Claimant had numbness in her jaw because of the accident, this numbness had been present since the accident and formed the basis of Dr. Cobb giving her a 2% impairment to the facial nerve, and thus was not a new finding or recent development that impacted her ability to work and there was no medical testimony causally related any of Claimant's alleged malnourishment or fatigue or "body aches" to her facial nerve;

p. That the Claimant returned to work on June 1, 2016, but walked off the job two weeks later, without a doctor's excuse and was not written out of work for this absence and to this day, has never been written out of work by a medical doctor;

q. That Dr. Ellis never opined that the Claimant was permanently and totally disabled;

r. That in completing her disability paperwork, Dr. Ellis specifically stated that the Claimant's ongoing medical problems were not related to her work-related injury;

s. That the Claimant's testimony that her employer was "not comfortable accepting the liability implications stemming from her symptoms" is not credible due to the fact that her Employer continued to offer her employment through her absence, did not terminate her from her employment, and in October 2016, specifically offered Claimant a job driving as a team driver after Claimant represented that driving as a single driver was part of her concerns, but despite this, Claimant did not return to work;

t. That although Claimant stated she worked two weeks in June 2016 "with constant pain over her entire body," not doctor found that these alleged pains were causally related to her accident in May 2012, and the records of Dr. Ellis do not reflect any such pains ever being documented;

u. And other facts as shown by the record and will be briefed at the appropriate time.

20. That the Hearing Commissioner erred in finding that the Employer "authorized work hardening" when the Employer, as a benevolent employer, arranged for work hardening based upon Claimant's assurances that she could return to work if allowed to participate in or complete a "full body" program.

21. That the Hearing Commissioner erred in finding the Claimant was unable to return to work due to pain, weakness, fatigue, and anxiety, when there was no medical evidence causally related an inability to return to work to such alleged medical conditions.

22. That the Hearing Commissioner erred in Finding of Fact #4, as neither Dr. Ellis nor Dr. Brabham testified that the Claimant suffered an aggravation or exacerbation of a pre-existing condition that was, to a reasonable degree of medical certainty, causally related to her accident in May 2012.

23. That the Hearing Commissioner erred in Finding of Fact #7, as there was no medical evidence to establish that the Claimant was permanently and totally disabled because of her accident in May 2012, no medical evidence Claimant was permanently disabled, and no medical evidence stated to a reasonable degree of medical certainty, thus constituting an error of law.

24. That the Hearing Commissioner erred in Finding of Fact #7 in finding that Dr. Brabham and/or the Claimant was credible, for the reasons set forth herein.

25. That the Hearing Commissioner erred in Finding of Fact #8 in finding that the Claimant was entitled to a lump sum, as the Hearing Commissioner failed to take into account the standard for awarding lump sum benefits as required by Thompson v. Steel Erectors, 369 S.C. 606 (Ct. App. 2006); moreover, the Hearing Commissioner erred in finding the Claimant was entitled to a lump sum, as the award in such a manner deprives the Defendants of their ability to establish that the Claimant underwent a change of condition for the better, depriving them of a statutory right.

26. That the Hearing Commissioner erred in Finding of Fact #9 in finding that the Claimant had suffered an aggravation of depression, as there was no medical evidence from a

qualified medical doctor, stated to a reasonable degree of medical certainty, establishing that the Claimant suffered an aggravation of depression causally related to her work-related accident of May 2012, and in finding the Claimant was entitled to future medical care for depression when Claimant had never asked for, sought, or received depression related to her accident. Moreover, there is no evidence that the Claimant's pre-existing depression was quiescent but rather was an ongoing issue and therefore such condition could not be compensable under South Carolina law and Gordon v. E.I. Du Pont De Nemours Co., 228 S.C. 67, 76 (S.C. 1955), or at a minimum, expert testimony was required to establish causation.

27. That the Hearing Commissioner erred in Conclusion of Law #5, as said finding is not supported by the evidence and erroneous as a matter of law and fact for the grounds set forth herein.

28. That the Hearing Commissioner erred in Conclusion of Law #6, as said finding is not supported by the evidence and erroneous as a matter of law and fact for the grounds set forth herein.

29. That the Hearing Commissioner erred in failing to find that the Claimant suffered complete loss of earning capacity from her May 2012 injury, as is required to establish permanent and total disability; to the extent such a finding can be inferred, it is against the preponderance of the medical and lay evidence presented.

30. That the Hearing Commissioner erred in failing to find that the Claimant had an inability to perform services other than those so limited in quality, dependability, and quantity that a reasonable market for them did not exist, as is required to establish permanent

and total disability; to the extent such a finding can be inferred, it is against the preponderance of the medical and lay evidence presented.

31. That the Hearing Commissioner failed to properly place the burden of proof on the Claimant as is required under the Act, as the Claimant failed to show that she had made reasonable efforts to obtain employment and had failed because of an injury produced handicap.

32. Even assuming Claimant established that she was unable to be an OTR driver, the same of which is denied, the Claimant failed to establish by a preponderance of the evidence that she was unable to work in other suitable employment, as the medical and lay evidence establish she was capable of working.

EVIDENCE OF THE CASE

On May 31, 2012, the Claimant, while working in the course and scope of her employment as a tractor trailer driver for Palmetto State Transport, suffered injuries after a machine fell on her, knocking her to the ground. Because of the accident, the Claimant suffered injuries to her face and shoulder. Her injuries to her face included the removal of her remaining teeth (over time), surgery to her upper and lower mandibles, and the implantation of dental implants/dentures.

As to her left shoulder, Claimant was seen by Dr. Stacy Newsom. Claimant underwent an MRI of the shoulder which showed no physical injury and was deemed to be nonsurgical. Claimant started physical therapy with Proaxis Therapy on August 22, 2012, for her left shoulder pain.

On July 24, 2012, Claimant began treating with Dr. Larry W. Cobb at Piedmont Oral Surgery. Dr. Cobb determined that she needed an additional three months before attempting

restorative procedures. Dr. Cobb subsequently associated Dr. Ridgell with regard to the dental implants of the Claimant. It was later determined that she would need removal of her remaining natural teeth, bone grafting, and either one or both mandible plates had to be removed.

By November 9, 2012, the Claimant had completed physical therapy on her shoulder and was released to return to work by Dr. Newsom. (APA p. 285) The Claimant and her Employer both agreed that Claimant's position as a driver with Palmetto State did not require her to lift over 35 pounds because Palmetto State is a "no touch" freight hauler, i.e., the drivers do not have to load/unload the freight. With this understanding, Dr. Newsom released the Claimant to return to work at Palmetto State without restrictions. (APA p. 285). Dr. Newsom also found that Claimant had a 2% impairment to her left shoulder. (Id.)

On January 31, 2013, Claimant had her remaining 9 teeth removed. On April 29, 2013, the Claimant had 5 dental implants inserted. On July 7, 2013, Claimant had 6 dental implants. During this period, the Claimant continued to work as an over-the-road truck driver, except for when she was recovering for 4 to 6 weeks following each procedure. Both before and after the accident, the Claimant was driving as a team driver, and running a dedicated route from Greenville, South Carolina to Brownsville, Texas. While driving as a team driver, Claimant would still drive 10 hours straight before having her team driver relieve her, just as she would if she had been a solo driver. (H.T. 35-37).

On October 6, 2014, Claimant was seen by Dr. Brian Svazas for her shoulder. (APA p. 295). She complained that she had trouble reaching behind her and when driving her zero-clearance mower. (Id.) She stated that her range of motion and strength in the left arm were doing quite well. (Id.) She noted some soreness when driving long runs when she uses her left arm to steer and her right arm to flip switches. (Id.) She did not sleep on the left side but

otherwise had no difficulties with her left arm. (Id.) On exam, she could put her arm through full ranges of motion. She had no weakness in the arm. (Id.) She was pain free on supraspinatus and infraspinatus testing with no weakness with either maneuver. (Id.) She reported that the pain was alleviated with Tylenol. (Id.)

Dr. Svazas found that "the patient is functioning at 100%, as she has returned to her truck driver position and is thriving in this career." (APA p. 296). He recommended physical therapy for her, which the claimant declined. (Id.) Dr. Svazas conclude by stating that she was fit for full duty as a truck driver that she was at MMI, he increased her rating to 6%. He completed a Form 14B on her finding that she could return to work without restrictions. (APA p. 300).

The Claimant continued to work full time as a driver for Palmetto State. Palmetto State is not a "forced dispatch" company—the Claimant was not required to take every run or job that was offered to her. (H.T. 55-57). She was free to turn down any runs she desired and work as much, or as little, as she wanted. (H.T. 55-57). She admitted it was rare she would be forced to move any freight. (H.T. p. 49). Despite this, she testified that she not only continued to work, but also took every run offered to her from 2012 until 2016. (H.T. 55-57).

On April 27, 2015, Dr. Cobb found the Claimant to be at MMI with the following impairment ratings: 4% interincisal range of Motion- 30mm, 3% lateral excursion range of motion 5-6mm, 2% facial disorder for a scar, 1% to the facial nerve. Her diet was to consist of 85% normal foods and 15% soft or semi-solid foods. (APA p. 301-302).

On July 5, 2015 Dr. Fowler performed surgery for removal of some of the hardware in her jaw. In August 2015, Dr. Fowler released her to return to work without restrictions.

Dr. Ridgell completed a Form 14B on the Claimant on April 9, 2015, and noted that she could return to work without restrictions. (APA p. 299).

In October 2015, Claimant went from "team driving" to single driving because the route she had run as a team driver was lost by Palmetto State and was no longer available. (H.T. 16:17-25; 35:16-23). Notwithstanding the preceding statements, on approximately March 3, 2016, the Claimant reported that she had "pain all over" and was unable to work. Claimant confirmed that she had suffered no new injury that caused her to suffer "pain all over." Claimant later alleged that her pain came from fatigue which originated from malnourishment which came from her inability to eat the prescribed diet of 85% of a normal food and 15% semi-soft foods. She alleged her fatigue was all the result of her injury and loss of weight.

At the Hearing, the Claimant testified that she had lost a significant amount of weight and loss of energy due to the accident. (H.T. 23:1-21:24:10-21). She also claimed to suffer from fatigue and weight loss that was preventing her from being able to perform her job duties. (H.T. 33:11-24). Claimant acknowledged being treated for depression prior to this incident. (H.T. 27:23 – 28:5). On cross examination, the Claimant admitted her weight was not significantly lower than it had been prior to the accident and that she had gained weight during her physical therapy in 2016. (H.T. 33:25-34:25; 39:6 – 19; 40:17 – 24; 45:3 – 23; 46: 4 – 12).

Claimant acknowledged that she was released to full duty without restrictions in November 2012, and then periodically thereafter by various physicians associated with her care. (H.T. 35:4-9). Claimant acknowledged that upon her return to work, she returned to being a tandem driver and that she drove 10 hours per day per D.O.T. regulations, and that as a solo driver, her driving hours were the same. (H.T. 36:14 – 37:5) She also acknowledged that in the years after the accident, she earned nearly the same or slightly more money than prior to the accident. (H.T. 38:1 – 4; 16 – 25:39:1-4). Claimant also admitted that despite doing the same work she was doing prior to the accident, and being offered similar work through Palmetto

Transport, Claimant took herself out of work and refused to return. (H.T. 41:8 – 22; 48:12 – 17). Prior to taking herself out of work in 2016, Claimant never turned down a run and even did extra runs, despite the fact she could turn down any run she wanted. (H.T. 55:1 – 13; 56:1-3).

In 2013, the Claimant earned $57,602.75, which was near her average income for a full year. (APA p. 372-375). In 2014, the Claimant earned $75,464.77, above her normal average. (APA p. 372-375). In 2015, the Claimant earned $63,693.25 with Palmetto State, which was in the normal range of what she had made over the course of her employment. (APA p. 326-339).

STANDARD OF REVIEW

The Full Commission is the ultimate fact finder in Workers' Compensation cases and is not bound by the Single Commissioner's findings of fact. See Ross v. American Red Cross, 298 S.C. 490, 381 S.E.2d 728 (1989); see also Hoxit v. Michelin Tire Corp., 304 S.C. 461, 405 S.E.2d 407 (1991) (Full Commission is fact finder).

The Full Commission is empowered to make its own findings of fact and to reach its own conclusions of law consistent or inconsistent with those of the Single Commissioner. McGuffin v. Schlumberger-Sangamo, 307 S.C. 184, 414 S.E.2d 162 (1992); see also Brayboy v. Clark Heating Co., 306 S.C. 56, 409 S.E.2d 767 (1991) (Full Commission may review award of Single Commissioner and make its own findings of fact and conclusions of law). The final determination of witness credibility and the weight to be accorded evidence is reserved to the Full Commission. Ross, 298 S.C. at 492, 381 S.E.2d at 730; Rogers v. Kunja Knitting Mills, Inc., 312 S.C. 377, 440 S.E.2d 401 (Ct. App. 1994).

Where there are conflicts in the evidence over a factual issue, the findings of the Full Commission shall be conclusive. Rogers, 312 S.C. at 380, 440 S.E.2d at 403; see also Stokes v. First Natl Bank, 306 S.C. 46, 410 S.E.2d 248 (1991) (regardless of a conflict in the evidence,

either of different witnesses or of the same witness, a finding of fact by the Commission is conclusive).

LAW/ANALYSIS

The Defendants argue that the Claimant failed to prove that she was permanently and totally disabled and that permanency in this case should have been awarded to the Claimant pursuant to South Carolina Code Section 42-9-30. We agree.

South Carolina Code Section 42-9-10 provides for permanent and total disability "when the incapacity for work resulting from an injury is total." A claim can be pursued for permanent and total disability under this section when a claimant has suffered injury to more than one body under South Carolina Code section 42-9-30. When proceeding under Section 42-9-10, however, a claimant must establish his disability, as it is not presumed as it is under Section 42-9-30. See Brown v. Owen Steel Co., 316 S.C. 278, 280, 450 S.E.2d 57, 58 (Ct. App. 1994). "Disability" means incapacity because of injury to earn the wages which the employee was receiving at the time of injury in the same or any other employment. S.C. Code Ann. § 42-1-120.

The extent of disability is a question of fact to be proved as any other fact is proved. In Wynn v. Peoples Natural Gas Co. of S. C., 238 S.C. 1, 11–12, 118 S.E.2d 812, 817–18 (1961), our Supreme Court stated:

> Disability in compensation cases is to be measured by loss of earning capacity. Total disability does not require complete helplessness.... The generally accepted test of total disability is inability to perform services other than those that are "so limited in quality, dependability, or quantity that a reasonably stable market for them does not exist."

Wynn v. Peoples Natural Gas Co. of S. C., 238 S.C. at 11–12, 118 S.E.2d at 817–18 (1961). An award cannot rest on surmise, conjecture or speculation; it must be founded on evidence of

sufficient substance to afford a reasonable basis for it. Id. citing Revers v. V. P. Loftis Co., 214 S.C. 162, 51 S.E.2d 510.

If a claimant is attempting to establish causation of a medically complex condition, expert medical testimony is generally required. Brown v. La France Indus., 286 S.C. 319, 333 S.E.2d 348 (Ct. App. 1985); McLeod v. Piggly Wiggly Carolina Co., 280 S.C. 466, 313 S.E.2d 38 (Ct. App. 1984) (noting that depression was a medically complex issue). While the lack of medical causation may be overcome in some cases with competent evidence, The Appellate Panel is given discretion to weigh and consider all the evidence, both lay and expert, when deciding whether causation has been established. Ballenger v. S. Worsted Corp., 209 S.C. 463, 467, 40 S.E.2d 681, 685 (1946). McLeod provides the Appellate Panel with the ability to ascertain the proficiency of an expert and to decide whether a "higher degree of expertise" is needed regarding an award. Id. at 280 S.C. at 471, 313 S.E.2d at 41 (holding the award should be remanded for redetermination when an alleged defect and injury sustained by the claimant concerned a complicated area of the body requiring a higher degree of expertise than provided to the Appellate Panel).

As noted by the Supreme Court in Wynn v. Peoples Natural Gas Co. of S. C., 118 S.E.2d 812, 238 S.C. 1 (1961), "reliance on lay testimony and administrative expertise is not justified when the medical question is no longer an uncomplicated one and carries the fact-finders into realms which are properly within the province of medical experts.... The increasing tendency to accept awards unsupported by medical testimony should not be allowed to obscure the necessity of establishing medical causation by expert testimony in all but the simple and routine cases." Id. citing Larson's Workmen's Compensation Law, Section 79.54. Moreover, the Court in Wynn

further rejected the exact same proposition advanced here: that a claimant's own statement that she is unable to work is sufficient to support an award of permanent and total disability. Id.

The underlying Order bases permanent and total disability on the Claimant's weight in 2016, her testimony she was fatigued and unable to work, and reliance upon Dr. Ellis and Dr. Brabham. Our review of the record, however, does not supporting a finding of permanent and total disability, factually or causally.

Claimant's allegations in this case were that she had become malnourished, that her malnourishment caused her to suffer fatigue, and that her fatigue rendered her to be permanently and totally disabled, while Defendants argued that Claimant (a) failed to prevent sufficient evidence to establish these facts and (b) provided no medical evidence to support her claim.

A review of the record reveals that the Claimant provided no medical testimony or evidence to support her allegations of malnourishment, resulting in fatigue, rendering her permanently and totally disabled. None of the authorized treating physicians placed any restrictions on Claimant's ability to work, let alone opined that the Claimant was totally and permanently disabled. To the contrary, the authorized treating physicians all opined that the Claimant could return to work full duty following her accident: (1) On November 9, 2012, Dr. Stacy Newsom stated she could return to work without restriction and gave her a 2% rating to the shoulder (APA p. 285); (2) Dr. Cobb rated the Claimant in April 2015 and stated that she could return to work without restriction. (APA p. 302); (3) Dr. Svazas increased her impairment rating to the left shoulder to 6%, but found "that she is fit for full duty as a truck driver"; (4) Dr. Ridgell noted on his Form 14B that the Claimant could return to work without restrictions in April 2015. (APA p. 299).

In addition, Claimant did not complain to any of these physicians that she was suffering malnourishment or fatigue or ever registered a complaint that she was unable to work. While certainly the Claimant reported some issues with numbness of her facial nerve and some loss of function that impacted her diet, these issues were present from the outset when Claimant returned to work from 2012 until 2016. Moreover, these issues are reflected in the impairment ratings she received from her authorized treating physicians.

The Hearing Commissioner's Order relied upon the records of Dr. Ellis to support the decision that claimant was permanently and totally disabled. Dr. Ellis' records show, however, that she was written back to work by Dr. Ellis. Dr. Ellis never opined that the Claimant was permanently and totally disabled or opined on issues of causation other than to state her issues were not causally-related to her accident, or at best, were multi-factorial.

On March 3, 2016, the Claimant reported to Dr. Ellis that she was becoming mentally and physically fatigued. This was the first report of fatigue reported by the Claimant to any doctor. Dr. Ellis continued to see the Claimant in March 2016, April 2016, and May 2016. On April 22, 2016, Dr. Ellis noted that she believed the Claimant's weight loss and fatigue was "multifactorial." However, Dr. Ellis never identified the factors she felt were contributing to the Claimant's current status. Dr. Ellis did not opine to a reasonable degree of medical certainty that the Claimant's current condition (1) was causally related to her injury or (2) that Claimant was unable to return to work.

By May 9, 2016, Claimant reported that her energy level was improving. Dr. Ellis stated that she was "unable to continue to recommend [Claimant] out of [work] without clear deadline. [A]grees would be reasonable to return to work if maintains currents (sic) level of weight." Thus, as of May 9, 2016, Dr. Ellis opined that the Claimant had no restrictions that prevented her

from returning to work. On May 23, 2016, it was noted that the Claimant weighed 109.6 pounds and Dr. Ellis wrote her back to work. Claimant did not return to see Dr. Ellis after this visit returning her to work.

Dr. Ellis also completed disability paperwork for Claimant. (APA p. 322). Dr. Ellis wrote that the Claimant's primary condition was fatigue and weakness and a secondary condition of weight loss. (Id.) Dr. Ellis indicated that she expected significant improvement in the Claimant's medical condition in 1-2 months with a return to work date of May 30, 2016. (Id.) Dr. Ellis further indicated that the Claimant had no permanent restrictions preventing her from returning to work. (Id.) Finally, Dr. Ellis wrote that the Claimant's condition was not due to an accident. (Id.)

Based upon our review of the record, we find that Dr. Ellis' records do not support a finding of permanent and total disability, and to the contrary, support the fact that the Claimant was cleared to work without restrictions in May 2016. Dr. Ellis' records further support that rather than Claimant being permanently and totally disabled, the condition from which she was suffering, even if it was causally related, was short-term and did not result in total disability.

The Hearing Commissioner also relied upon Dr. Brabham's report to support a finding of permanent and total disability, which the Defendants contend was erroneous. We agree.

Dr. Brabham's report documenting his understanding of the Claimant's work history following the accident is clearly erroneous. In reciting her post-accident work history, Dr. Brabham states "[t]o her credit, Ms. Cox tried to return to work, and actually drove a one-week 'run.' However, she was 'exhausted' while doing so, and since that time, she has been unable to return to any gainful employment whatsoever, as a result of her on-the-job injuries on 5-31-12." (APA p. 274). Nowhere else in his report does Dr. Brabham recite any facts or information that

would lead us to believe that he was aware she worked full-time from January 2013 through March 3, 2016 and earning those amounts that were around or above her normal income. This lack of knowledge of the Claimant's work history undermines Dr. Brabham's report and its conclusions and do not provide a basis for determining that the Claimant is permanently and totally disabled. Alternatively, Dr. Brabham's report is outcome determinative.

Additionally, Dr. Brabham is not a medical doctor who was qualified to establish to a reasonable degree of medical certainty that Claimant's alleged fatigue that developed in 2016 was causally related to her work-related injury suffered in May 2012, or that any alleged fatigue would have rendered her permanently and totally disabled. Although Dr. Brabham cites portions of medical notes from the Claimant's authorized treating physicians and her treatment history, he does not cite any medical records from Claimant's authorized treating physicians that indicate the claimant has restrictions, let alone was unable to work. All the treating physicians in this case indicate that the Claimant could return to work without restrictions; accordingly, Dr. Brabham's conclusion that she is permanently and totally disabled is not supported by the opinions of the treating physicians.

Finally, we note that Dr. Brabham's conclusions about the Claimant's inability to perform activity because she is "unable to sustain much activity, due to pain" and that she must recline 2-3 hours of her day, to be in conflict with the record in this case. Claimant's medical records do not support any such complaints, let alone to be so great as to render her unable to work. Dr. Ellis' records reveal no such complaints of pain. There is no evidence the Claimant sought out any treatment for complaints of pain. The Claimant was not prescribed medicine for pain. Claimant testified what shoulder pain she may have was alleviated by Tylenol and/or SalonPas patches, and in 2014, Claimant rejected an offer to return to physical therapy on her

shoulder per Dr. Svazas. Moreover, Dr. Brabham's report is inconsistent with Claimant's testimony that from 2013 to 2016, she drove 10-hour runs across country in 2014, 2015, and 2016, from Greenville, South Carolina to Brownsville, Texas. She drove this route nonstop, but for gas and food, starting her first run on a Monday and ending on a Wednesday and making a second run on Thursday and ending on a Saturday. (Cox 8/23/16 depo., p. 17).

Based upon a review of the record, the briefs, and the oral arguments of this matter, the Appellate Panel **REVERSES AND REMANDS** the Decision and Order of the Hearing Commissioner dated May 23, 2017. The Findings of Fact and Conclusions of Law set forth herein, and below, shall become, and hereby are, the law of the case.

FINDINGS OF FACT:

1. The Claimant did sustain compensable injuries to her teeth, mandible, left shoulder, and facial nerve, as well as scarring to her chin.
2. The Claimant received medical care under with Dr. Cobb, Dr. Ridgell, Dr. Fowler, Dr. Cofer, Dr. Newsom, and Dr. Svazas for her injuries.
3. Upon being released by each of the authorized treating physicians, the Claimant was released to work full duty with no restrictions on her ability to perform her duties as an over-the-road truck driver.
4. Following her accident, the Claimant returned to work in November 2012 and shortly thereafter resumed her normal job as an OTR truck driver.
5. Claimant continued to work full-time as an OTR in 2013, 2014, 2015, save for those periods of time when she was undergoing further care.

6. In March 2016, Claimant took herself out of work, stating she was tired and unable to work due to fatigue secondary to malnourishment that was alleged to have resulted from her injuries.

7. Claimant saw her family physician, Dr. Ellis, in March 2016 for her complaints.

8. While Dr. Ellis treated the Claimant for weight loss and reported fatigue, by May 9, 2016, Dr. Ellis reported that the Claimant could return to work as a OTR truck driver. Dr. Ellis reiterated that opinion on May 23, 2016.

9. Dr. Ellis further completed a disability application for the Claimant, which stated that the Claimant's weight loss and reported fatigue were temporary in nature, lasted one to two months, and were not related to her accident.

10. At no point did Dr. Ellis opine as to the causation of Claimant's complaints; nor did Dr. Ellis opine that these complaints resulted in any permanent disability or even restrictions on Claimant's ability to work.

11. Dr. Cobb, Dr. Ridgell, Dr. Fowler, Dr. Cofer, Dr. Newsom, and Dr. Svazas, the authorized treating physicians, all released the Claimant to return to work full duty over the course of their treatment of the Claimant.

12. Claimant admits that she took every run offered to her between 2012 and 2016 and did not turn down any jobs until March 2016.

13. Claimant admitted, and her records, revealed that her weight throughout her recovery period fluctuated and that by May 2016, Dr. Ellis opined, and the Claimant agreed, that her weight was sufficient for her to return to work.

14. Claimant admitted that she was offered a tandem job by her employer, which she believed would allow her to return to work, but she declined to take her employer up on that offer to drive as a team driver and declined to return to work.

15. The Claimant provided no medical evidence to support her contention that she suffered from malnourishment or fatigue causally related to her 2012 injury.

16. The Claimant provided no medical evidence establishing that she was on restrictions or was permanently and totally disabled secondary to malnourishment.

CONCLUSIONS OF LAW

1. That under S.C. Code Ann. § 42-3-20 and § 42-3-180 (1985), the Commission has jurisdiction over the parties to hear the issues in dispute.
2. That under S.C. Code Ann. § 42-1-130, the Claimant is a covered employee.
3. That under S.C. Code Ann. § 42-1-140, Palmetto Transportation Company is a covered employer.
4. That under S.C. Code Ann. § 42-1-150, there was an employer/employee relationship between the parties at the time in question.
5. That the burden of establishing total and permanent disability, or any benefit, is on the Claimant. Lee v. Bondex, Inc., 406 S.C. 97, 749 S.E.2d 155 (Ct. App. 2013).
6. That under S.C. Code Ann. § 42-9-10, Claimant failed to meet her burden of proving permanent and total disability and is not entitled to permanent and total disability award under S.C. Code Ann. § 42-9-10.
7. That as Claimant failed to prove that she was permanently and totally disabled, the Claimant is not entitled to a lump sum award of permanent and total disability. S.C. Code Ann. § 42-9-10.

8. That the Claimant failed to establish by medical evidence, stated to a reasonable degree of medical certainty, that she suffered malnourishment resulting in fatigue or any alleged causal relationship to her May 30, 2012 accident. Brown v. La France Indus., 286 S.C. 319, 333 S.E.2d 348 (Ct. App. 1985); McLeod v. Piggly Wiggly Carolina Co., 280 S.C. 466, 313 S.E.2d 38 (Ct. App. 1984).

9. That the Claimant is not permanently and totally disabled as a result of her May 30, 2012, accident. McGuffin v. Schlumberger-Sangamo, 307 S.C. 184, 414 S.E.2d 162 (1992) (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); Brayboy v. Clark Heating Co., 306 S.C. 56, 409 S.E.2d 767 (1991) (Full Commission may review award of Single Commissioner and make its own findings of fact and conclusions of law).

10. That the Claimant is entitled to treatment for her work injuries pursuant to S.C. Code Ann. § 42-15-60 including lifetime repair, replacement and/or removal of any retained hardware.

11. That the Claimant shall be awarded compensation pursuant to S.C. Code Ann. § 42-9-30 and S.C. Reg. 67-1101 for any disability suffered as a result of her May 31, 2012 injury, as shall be determined by a Hearing Commissioner on remand.

12. This matter shall not be remanded to the Hearing Commissioner who heard this matter initially on February 2, 2017, but to another Commissioner.

13. The Claimant is not permanently and totally disabled.

ORDER

IT IS, THEREFORE, ORDERED that the Order of the Hearing Commissioner filed in the above-captioned matter on May 23, 2017, is hereby Reversed as to all Findings of Fact and Conclusions of Law related to the finding of permanent and total disability. Pursuant to this Order, a Hearing Commissioner should determine Claimant's permanency award for her compensable injuries sustained because of her May 31, 2012 injury, pursuant to this Order.

AND IT IS SO ORDERED.

South Carolina Workers' Compensation Commission

Michael Campbell, Commissioner

Avery Wilkerson, Commissioner

Susan S. Barden, Commissioner

CERTIFICATE OF SERVICE

This is to certify that the undersigned has on this date served a copy of this order in the above entitled action upon all parties to this case by sending an electronic copy hereof by electronic mail addressed to the attorneys for said parties; or if there is an unrepresented party(ies), by depositing a copy hereof, postage paid in the United States mail, first class, addressed to the unrepresented party(ies) and to the attorney(s) for the represented party(ies).

By Eugenia on May 21, 2018