STATE OF SOUTH CAROLINA
In the Court of Appeal

APPEAL FROM THE
SOUTH CAROLINA WORKERS' COMPENSATION COMMISSION

T. Scott Beck, Commissioner
Gene McCaskill, Commissioner
R. Michael Campbell, II, Commissioner

SCWCC File No. 1508995

Appellate Case No. 2018-001964

RECORD ON APPEAL

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SOUTH CAROLINA WORKERS' COMPENSATION COMMISSION

W.C.C. FILE NO: 1508995

SAMUEL PAULINO,

Claimant,

Respondent,

vs.

DIVERSIFIED COATINGS, INC.,

Employer,

and

AMGUARD INS. CO.,

Carrier,

Appellants,

DECISION AND ORDER ON APPEAL TO FULL COMMISSION

Appellant Panel Review held in Columbia, South Carolina, on July 16, 2018 per notices timely and properly served upon all parties of interest.

Appellant Panel Decision and Order filed October 3, 2018

APPEARANCES:

Claimant appeared and represented by Stephen N. Garcia, Esquire of Garcia Law, LLC, Greenville, South Carolina.

Defendants Diversified Coating Systems, Inc. and Amguard Ins. Co. appeared and represented by George Gallagher, Esquire of Speed, Seta, Martin, Trivett & Stubley, LLC, Columbia, SC.

STATEMENT OF CASE

This case was heard by the undersigned Commissioner on March 5, 2018 in Spartanburg, South Carolina. Notices were timely and properly served upon all parties of interest at which time all parties were present for the hearing: The Claimant, Samuel Paulino, the Claimant's attorney, Stephen N. Garcia; the Defendants, Diversified Coating System and AmGuard Ins. represented by their attorney, George Gallagher.

The Claimant presents to determine Claimant's entitlement to permanent total or partial disability, future medical care, compensability as to a denied psychological claim, continuing medical treatment, and whether Claimant is entitled to a lump sum award. Claimant argues that he is permanently and totally disabled under § 42-9-30(21) as he has allegedly sustained a 50% or greater disability to the spine. The Defendants argue that Claimant has not sustained a 50% or greater disability to the spine. Defendants admit that the psychological condition is related to the work incident, however, Defendants deny liability for the cost of medical treatment as the psychological treatment was not performed by a physician of the Defendants' choosing.

APA SUBMISSIONS

Pursuant to the Administrative Procedures Act, the Hearing Commissioner received the following records into evidence.

Defendants' APA Submissions:

APA No. 1. Dr. Timothy McHenry medical note dated 4/22/16 consisting of four (4) pages;

APA No. 2. FCE, Elite Physical Therapy dated 11/20/17 and consisting of nine (9) pages;

Claimant's APA Submissions:

APA No. 3. Southeastern Neuro & Spine, Dr. Timothy McHenry, medical notes dated 7/1/15 through 4/1/17 and consisting of thirty-six (36) pages;

APA No. 4. Surgery Ortho Clinic medical notes dated 9/3/15 through 11/19/15 and consisting of sixty-one (61) pages;

APA No. 5. Ortho-Neuro Patewood/Physiatry Crosscreek 111, Dr. Joyti K. Math medical notes dated 11/13/15 through 12/6/17 and consisting of ninety-one (91) pages;

APA No. 6. PMH Injection Clinic medical notes dated 8/2/16 and consisting of six (6) pages;

APA No. 7 New Horizon Behavioral Health medical notes dated 2/1/17 through 6/23/17 and consisting of twenty-two (22) pages;

and

APA No. 8. Independent Medical Evaluation of Dr. Glenn Scott dated 12/27/17 and consisting of two (2) pages.

STIPULATIONS

The Claimant's Counsel and Counsel for the Defendants stipulated at the hearing to the following issues:

1. The purpose of the Hearing was to determine issues set forth on the Forms 21 and 50.

2. The Claimant seeks benefits under the South Carolina Workers' Compensation Act for injuries allegedly sustained on or about February 6, 2015 while employed by the Defendant, Diversified Coating Systems, Inc. and therefore, the South Carolina Workers' Compensation Commission has jurisdiction over this case.

3. All parties received timely and proper notice of the scheduled hearing.

4. Venue for the hearing was properly set in Greenville County, but was later transferred to Spartanburg County by consent of parties.

5. The Commission file is made part of the record with the exception of self-serving declarations and unstipulated medical records.

6. The claimant has an average weekly wage of $468.32 with a corresponding compensation rate of $312.22.

7. The APA submissions of both parties are admitted without objection.

EVIDENCE OF CASE

Testimony

Testimony of Samuel Paulino – direct examination by Stephen N. Garcia

The Claimant prefaced his testimony with personal and background information. His date of birth is [redacted] He was born in the Dominican Republic. He moved to the United

States in May of 2014. Claimant testified that he does not speak English. He is married and resides with his wife, six-year-old child and seven-year-old child. Claimant testified that he moved to the United States primarily to find work. Claimant further testified that while he normally takes medications, he did not take his medications prior to hearing because the medications make him sleepy and groggy. The Claimant did not drive to work, but instead received a ride from his cousin. Claimant further testified that he would drive *before* this injury, however, he does not drive now. (Tr. p. 18, line 21 through p. 20, line 10.)

Attention was then turned to Claimant's educational background and work history. Claimant graduated from high school in the Dominican Republic. He attended a 4-year college in the Dominican Republic in Computer Information Systems. However, Claimant has not attended any college or university classes in the United States nor does he have any degrees or certifications from any institutions in the United States. Claimant has not attended English classes of any sort, although Claimant did testify that he had intended to enroll in classes prior to his work-related injury. Since moving to the United States, Claimant has held two jobs: one as an ice-cream truck driver for approximately four and a half months and the other for the Defendant Employer as a custodian/janitor for approximately five months. The position as an ice-cream truck driver required loading and unloading of the truck and consisted of lifting greater than 10 pounds and driving all day. Claimant's subsequent position at Defendant Employer required 40-plus-hour work weeks. When asked whether Claimant believed he could perform the same work for Defendant Employer in his current condition, Claimant testified he could not, citing excessive exertion of force. Defendant did not believe he could last two hours in the same position he held with Defendant Employer. (Tr. p. 20, line 11 through p. 23, line 20.)

Claimant was then questioned regarding his Functional Capacity Evaluation conducted on November 20, 2017. Claimant testified that the FCE was the only physical exertion he has taken part in since the work injury. Claimant testified that physical exertion required of him in completion of the FCE was easier than the work he would do for the Defendant Employer. Claimant stated that the work he would do for the Defendant Employer required lifting of greater than 10 pounds and required crouching (Tr. p. 23, line 21 through p. 24, line 16.)

Claimant was then questioned regarding his vocational history while in the Dominican Republic. Claimant testified that he worked as a bank teller following graduation and that he performed basic computer repairs on the side. Claimant never maintained any kind of meaningful employment as a computer repair technician within the Dominican Republic. Claimant was questioned as to why he cannot repair computers in the United States, and he responded that although he has sought work as a computer repair technician in the United States, he has been turned down repeatedly for failing to have any formal training or education in the United States and because of his language barrier. Claimant testified that he graduated from his computer-related education in Dominican Republic approximately ten years ago and that the last time he worked on a computer in any capacity was nearly five years ago. Claimant also testified that computers change over time. (Tr. p. 24, line 17 through p. 26, line 10.)

Claimant was questioned regarding whether he has looked for work following his work injury. Claimant indicated he *has* sought work, specifically in the computer field and in the construction/factory field. However, because of his inability to speak English, he could not find computer work and because of his restrictions and limitations, he could not perform construction/factory work. (Tr. p. 26, line 11 through p. 26, line 20.)

Attention was again directed towards the Claimant's Functional Capacity Evaluation performed in November of 2017. Claimant was questioned regarding some of the documented difficulties he experienced during and after the evaluation. Claimant testified that he approached the exam with maximum effort as a reference point for his resultant physical capacity following the work injury. Claimant testified that as a result of the effort exerted, he experienced a lot of pain and needed help for the next three days just to get out of bed. Claimant indicated that the FCE lasted only two hours and twenty minutes or so, but that he did not believe he could perform a repeat FCE at the same level the very next day. Claimant also stated that it would be impossible for him to perform the activities that comprised the FCE for eight hours per day and forty hours per week. (Tr. p. 26, line 21 through p. 27, line 19.)

Claimant was asked whether he would submit to the spinal cord stimulator trial that Dr. Math had recommended for him. Claimant indicated that he would. (Tr. p. 27, line 20 through p. 27, line 19.)

Attention was then turned towards Claimant's alleged psychological injury. Claimant was asked why he sought psychological treatment, and Claimant responded that he sought help for his depression and anxiety as it related to the work accident. Claimant testified that the psychological visits helped him "a little". However, Claimant also testified that he was referred to Mental Health of Greenville but was not able to continue that treatment because of lack of funds. (Tr. p. 28, line 20 through p. 29, line 18.)

Testimony of Samuel Paulino – Cross-Examination by George Gallagher

Cross-examination commenced with questions regarding whether Claimant had ever worked as a computer programmer in the Dominican Republic. Claimant stated that he did do some jobs as a sort of informal, independent contractor. Claimant testified that he did some

repair work and sometimes would install computer operating systems. However, Claimant testified that he did *not* program computers or write code. Claimant testified that he performed computer repair work for approximately three or four years following his stint as a bank teller in the Dominican Republic. He did not perform computer repair work for his employer bank. Claimant further testified that most of his computer education coursework involved mathematics. (Tr. p. 30, line 6 through p. 31, line 16.)

Claimant was then questioned as to whether his wife is employed. Claimant testified that his wife is employed and works at a supermarket. However, Claimant testified that she does not have group health insurance. (Tr. p. 31, line 17 through p. 31, line 16.)

No further testimony was presented at the Single-Commissioner Hearing.

FINDINGS OF FACT

IT IS FOUND AS A FACT:

1. *Order instructions were sent to the Parties on March 14, 2018.*
2. *This Claim was initially denied at the Single Commissioner Hearing held on September 13, 2016. This Claim was subsequently reversed and found compensable by the Full Commission at the Appeal Hearing held on April 18, 2017.*
3. *The Full Commission Order dated July 19, 2017 found that Claimant carried his burden of showing a work-related injury by accident occurring on or about February 6, 2015, awarded the cost of all causally related medical treatment, found the Claimant to be at MMI as to the spine on April 22, 2016, and awarded temporary total disability benefits for the period of July 15, 2015 to April 22, 2016. All other issues were held in abeyance. The Claimant having been previously deemed to have achieved MMI as to the spine on*

April 22, 2016, the primary issues before this Commissioner is permanency, Dodge medicals, the denied injury to the psyche, and a request for lump sum payment.

4. *Claimant was honest and clear in his testimony.*
5. *Claimant was a teller in a bank and repaired computers while living in the Dominican Republic.*
6. *Claimant has computer training; however, he also has a major language barrier as he is unable to speak much or any English.*
7. *Claimant was deemed to have sustained a 13% impairment to the whole person by Dr. McHenry, the inherited, authorized physician, on or about May 3, 2016. However, opinion regarding Claimant's permanent restrictions and future medical care were deferred to Dr. Joyti Math, the inherited, authorized pain management specialist.*
8. *Claimant's work restrictions are extensive. Although Claimant was found to have completed his functional capacity evaluation dated November 20, 2017 at a medium demand level, various issues in completing the evaluation were noted. Following review of the Functional Capacity Evaluation, Dr. Joyti Math opined that Claimant had sustained a 12% impairment to the spine and further assigned work restrictions of light work duty with no lifting of greater than 10 pounds.*
9. *I find that Claimant's impairment ratings are very low based on the poor surgical result.*
10. *I find that based on the medication list alone, Claimant has suffered a major disability.*
11. *I find that Claimant has met his burden of proving an injury to his psyche and that he is entitled to a psychological visit with a physician of Defendants' choosing.*
12. *I find that Claimant has sustained a greater than 50% disability to the spine.*

13. *Because of the Claimant's transient resident status, I find that Claimant is entitled to a lump sum award.*

CONCLUSIONS OF LAW

Accordingly, as provided under the South Carolina Code of Laws, § 42-17-40, and § 1-23-320, it is the determination of this Commissioner that:

1. *Pursuant to S.C. Code § 42-3-180, this Commissioner has jurisdiction over the parties to hear the issues in dispute.*
2. *Pursuant to S.C. Code § 42-17-20, venue in Spartanburg, South Carolina was proper and agreed to by the parties.*
3. *Pursuant to S.C. Code § 1-23-320(b), and Reg. 67-607, notice of the hearing was timely and properly served upon all parties of interest.*
4. *Pursuant to S.C. Code § 42-1-160 and based on a preponderance of the evidence, including the medical records, exhibits, and testimony presented at the hearing, the Claimant satisfied his burden of proof that he suffered an injury to his psyche by accident and arising out of and in the course and scope of his employment.*
5. *Pursuant to S.C. Code § 42-15-60, Claimant is entitled to psychological/psychiatric treatment under the control and direction of Defendants.*
6. *Pursuant to § 42-9-30(21), Claimant has sustained a greater than 50% disability to the spine, and therefore is permanently and totally disabled, and Defendants having failed to rebut that presumption, Claimant is thereby entitled to compensation under § 42-9-10(B);*
7. *Pursuant to § 42-15-60, Claimant is entitled to payment of all causally-related, authorized medicals as well as lifetime, causally-related medical benefits;*
8. *Pursuant to § 42-9-301, Claimant is entitled to lump sum payment of benefits.*

ORDER

IT IS HEREBY ORDERED *that the greater weight of the evidence supports a finding that Claimant is permanently and totally disabled and Defendant is entitled to credit for any temporary benefits paid to Claimant;*

IT IS HEREBY ORDERED *that Claimant is entitled to payment of all causally-related medicals as well as continued payment of lifetime, causally-related medical benefits;*

IT IS HEREBY ORDERED *that Claimant is entitled to lump sum payment of award.*

AND IT IS SO ORDERED.

After considering all the evidence contained in the record, we AFFIRM WITH AMENDMENTS the Single Commissioner's Findings of Fact, Conclusions of law, and Order and therefore make the following Findings of Fact, Conclusions of Law, and Order:

FINDINGS OF FACT

IT IS FOUND AS A FACT:

1. Order instructions for the Single Commissioner Hearing were sent to the Parties on March 14, 2018.
2. This Claim was initially denied at the Single Commissioner Hearing held on September 13, 2016. This Claim was subsequently reversed and found compensable by the Full Commission at the Appeal Hearing held on April 18, 2017.
3. The Full Commission Order dated July 19, 2017 found that Claimant carried his burden of showing a work-related injury by accident occurring on or about February 6, 2015, awarded the cost of all causally related medical treatment, found the Claimant to be at

the spine on April 22, 2016, and awarded temporary total disability benefits for the period of July 15, 2015 to April 22, 2016. All other issues were held in abeyance. The Claimant having been previously deemed to have achieved MMI as to the spine on April 22, 2016, the primary issues before the Full Commission was permanency, *Dodge* medicals, the denied injury to the psyche, and a request for lump sum payment.

4. The Single Commissioner found that the Claimant was honest and clear in his testimony.
5. Claimant was a teller in a bank and repaired computers while living in the Dominican Republic.
6. Claimant has computer training; however, he also has a major language barrier as he is unable to speak much or any English.
7. Claimant was deemed to have sustained a 13% impairment to the whole person by Dr. McHenry, the inherited, authorized physician, on or about May 3, 2016. However, opinion regarding Claimant's permanent restrictions and future medical care were deferred to Dr. Joyti Math, the inherited, authorized pain management specialist.
8. Claimant's work restrictions are extensive. Although Claimant was found to have completed his functional capacity evaluation dated November 20, 2017 at a medium demand level, various issues in completing the evaluation were noted. Following review of the Functional Capacity Evaluation, Dr. Joyti Math opined that Claimant had sustained a 12% impairment to the spine and further assigned work restrictions of light work duty with no lifting of greater than 10 pounds.
9. We find that Claimant's impairment ratings are very low based on the poor surgical result.
10. We find that based on the medication list alone, Claimant has suffered a major disability.

11. We find that Claimant has met his burden of proving an injury to his psyche, that he has achieved MMI, that no further psychological treatment is indicated, and that he is entitled to payment of causally related, completed psychological treatment.

12. We find that Claimant has sustained a greater than 50% disability to the spine.

13. Because of the Claimant's transient resident status, we find that Claimant is entitled to a lump sum award.

CONCLUSIONS OF LAW

Accordingly, as provided under the South Carolina Code of Laws, § 42-17-40, and § 1-23-320, it is the determination of the Full Commission that:

1. Pursuant to S.C. Code § 42-1-160 and based on a preponderance of the evidence, including the medical records, exhibits, and testimony presented at the hearing, the Claimant satisfied his burden of proof that he suffered an injury to his psyche by accident and arising out of and in the course and scope of his employment.
2. Pursuant to S.C. Code § 42-15-60, Claimant is entitled to payment of all causally related psychological/psychiatric.
3. Pursuant to § 42-9-30(21), Claimant has sustained a greater than 50% disability to the spine, and therefore is permanently and totally disabled, and Defendants having failed to rebut that presumption, Claimant is thereby entitled to compensation under § 42-9-10(B);
4. Pursuant to § 42-15-60, Claimant is entitled to payment of all causally-related, authorized medicals as well as lifetime, causally-related medical benefits;
5. Pursuant to § 42-9-301, Claimant is entitled to lump sum payment of benefits.

ORDER

IT IS HEREBY ORDERED that the greater weight of the evidence supports a finding that Claimant is permanently and totally disabled and Defendant is entitled to credit for any temporary benefits paid to Claimant;

IT IS HEREBY ORDERED that Claimant is entitled to payment of all causally-related medicals as well as continued payment of lifetime, causally-related medical benefits;

IT IS HEREBY ORDERED that Claimant is entitled to lump sum payment of award.

IN AFFIRMATION WITH AMENDMENTS OF THE SINGLE COMMISSIONER'S DECISION & ORDER, IT IS SO ORDERED.

SOUTH CAROLINA WORKERS' COMPENSATION COMMISSION

GENE McCASKILL, COMMISSIONER

R. MICHAEL CAMPBELL II, COMMISSIONER

T. SCOTT BECK, 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 Hollmon on October 3, 2018

STATE OF SOUTH CAROLINA	)	BEFORE THE SOUTH CAROLINA
	)	WORKERS' COMPENSATION COMMISSION
COUNTY OF GREENVILLE	)	
	)	
Samuel Paulino,	)	WCC FILE NO. 1422914 and 1508995
	)	
Claimant,	)	
	)	
vs.	)	
	)	**AMENDED**
Diversified Coating Systems, Inc.,	)	**APPELLANT'S BRIEF**
	)	
Employer,	)	
	)	
and	)	
	)	
AmGuard Insurance Company,	)	
	)	
Carrier,	)	
	)	
Defendants.	)	

STATEMENT OF THE CASE

Samuel Paulino ("Claimant") was admittedly involved in successive accidents arising out of and in the course of his employment with Diversified Coating Systems ("Diversified") on or about November 22, 2014 and/or February 7, 2015. Claimant alleged he sustained injuries to his lower back in these accidents. Defendants initially denied his claim for benefits under the South Carolina Workers Compensation Act ("Act') on grounds that he did not sustain "injury" in either accident per S.C. Code § 42-1-60, as evidenced by inconsistent histories in the medical records and equivocal witness testimonies. In the alternative, Defendants assert Claimant failed to timely report his alleged work injuries to Diversified, thereby barring his entitlement to benefits under the Notice statute- S.C. Code § 42-15-20.

By Order dated January 13, 2017, Commissioner Mike Campbell found, *inter alia*, the evidence establishes that Claimant was involved in incidents at work, but failed to meet his burden of proving that he sustained "injury" due to either accident. In addition, he found that Claimant failed to timely provide notice to Diversified that he had sustained injury in either incident. Claimant thereafter appealed to the Full Commission Appellate Panel, which REVERSED via Order dated July 19, 2017. The Full Commission specifically found that Claimant met his burden of proving injuries to his lower back in either or both of the accidents in question, ordered Defendants to pay all outstanding causally related medical bills, found Claimant had reached maximum medical improvement ("MMI") as of April 22, 2016 per the record from Dr. McHenry, ordered payment of TTD for a finite period between July 15, 2015 (stipulated date disability began) and April 22, 2016 (date of MMI), and essentially remanded the case for a determination of his entitlement to permanent disability compensation. Defendant's thereafter filed their Form 21 to have permanency adjudicated.

The permanency issues were originally set for Hearing before Commissioner Wilkerson on October 6, 2017. Claimant initially took the position he was not at MMI, was entitled to further medical evaluation and treatment, and additional TTD benefits. In the alternative, Claimant alleges he is permanently ad totally disabled under S.C. Code §42-9-10; therefore, the case is subject to mandatory mediation per WCC Regulation 67-1802. In reply, Defendants countered that the Full Commission's unappealed Order is the law of the case and is therefore binding on the issue of MMI in all further proceedings before the Commission. Since the date of MMI caps entitlement to further TTD benefits, the only issue properly before the Commissioner was a determination of Claimant's entitlement to permanent disability benefits. Further, Defendants argued that WCC R-67-1802 only requires mandatory mediation of a claim in cases where MMI is stipulated, which Claimant disputes. Therefore, a hearing to determine the threshold issue of MMI must ensue. Citing the interests of judicial economy, Commissioner Wilkerson ordered discretionary Mediation under WCC Regulation 67-1801 (B). The Mediation took place on December 1, 2017 and resulted in impasse. The case was then reset for Hearing before Commissioner Wilkerson on March 5, 2018.

At the Hearing that is the subject of the current Appeal, Claimant essentially stipulated he has reached MMI; therefore, a determination of permanency is ripe adjudication. Claimant contends he is permanently and totally disabled based on a greater than 50% loss of use of his back pursuant to S.C. Code § 42-9-30 (21). Claimant relies heavily on the fact that he has permanent 10-pound lifting restrictions per his pain management provider, even though an FCE reflects he can perform medium duty work. He also seeks a finding of compensability for a psychological overlay injury that he treated for during the pendency of the claim, including payment of any outstanding bills for psychological treatment. Claimant did not specifically request additional psychological evaluation/treatment, nor has any such treatment been recommended by any medical provider.

Defendants admit Claimant is entitled to PPD compensation for loss of use of the back based on the 13% whole person impairment rating assigned by the treating neurosurgeon (Dr. McHenry) and/or the 12% whole person impairment rating assigned by the treating pain management provider (Dr. Math). Defendants submit these impairment ratings for a single level microdiscectomy with residual radiculopathy do not support a finding of greater than 50% loss of use of the back, even when coupled with permanent restrictions. Moreover, all of Claimant's vocational and biographical factors, to whatever extent they are even relevant for a determination of loss of use under the "medical model" of the Act, mitigate against a finding of total disability based on greater than 50% loss of use of the back, including: Claimant's relatively young age (38 years old), college degree in Information Technology, and relatively sophisticated vocational history of light to sedentary duty employment as a computer technician and bank teller.

By Order dated April 13, 2018, Commissioner Wilkerson found, *inter alia*, that Claimant sustained a greater than 50% loss of use of his back and awarded permanent and total disability benefits under § 42-9-30 (21). He found there was no evidence in the Record to rebut this statutory presumption of total disability. Finally, he found Claimant sustained a compensable psychological overlay injury and ordered Defendants to provide further psychological evaluation/treatment with a provider of their choosing. Thereafter, Defendants timely appealed to the Full Commission on numerous grounds.

QUESTIONS PRESENTED

I. DID THE HEARING COMMISSIONER ERR IN FINDING CLAIMANT SUSTAINED A GREATER THAN 50% LOSS OF USE OF HIS BACK?

II. DID THE HEARING COMMISSIONER ERR IN FINDING THAT DEFENDANTS FAIELD TO REBUT THE PRESUMPTION OF TOTAL DISABILITY BASED ON 50% OR GREATER LOSS OF USE OF THE BACK?

III. DID THE HEARING COMMISSIONER ERR IN AWARDING PSYCHOLGICAL OVERLAY?

STANDARD OF REVIEW

It is undisputed that the Full Commission Appellate Panel is the ultimate finder of fact in worker's compensation matters. *DeBruhl v. Kershaw County Sherriff's Dept.*, 303 S.C. 20, 397 S.E.2d 782 (Ct. App. 1990). Upon a petition for review of a Hearing Commissioner's award/order, the Full Commission shall weigh the evidence presented at the Hearing and, if good grounds be shown, makes its own findings of fact and reach its own conclusions of law consistent or inconsistent with those of the Single Commissioner. *Pack. V. State Dept. of Transportation*, 381, SC 526, 673 S.E.2d 461 (Ct. App. 2009).

EVIDENCE OF THE CASE

Claimant underwent an L3-4 microdiscectomy performed by Dr. Timothy McHenry on July 30, 2015 [APA p. 21-23]. Claimant reported subjective improvement of his symptoms following surgery. Claimant had a post-surgical MRI, which was negative for recurrent disc herniation at any levels. [APA p. 34]. Following a relatively unremarkable post-surgical rehabilitation and recovery, Dr. McHenry ultimately released Claimant at MMI on April 22, 2016 and assigned a 13% impairment rating to the whole person [APA. p. 2]. Dr. McHenry based his rating on the AMA GUIDES TO THE EVALUATION OF PERMANENT IMPAIRMENT *5TH EDITION* ("*AMA Guides*"), specifically, a diagnosis based estimate per DRE Category III- Table 15-3 p. 384. This provision provides for a maximum 13% rating for residual radiculopathy due to a disc herniation with or without surgical repair. The *AMA Guides* also provide for a

factor of .75 for the conversion of a whole person impairment rating to a lumbar regional spine impairment rating. Although S.C. Code § 42-9-30 does not distinguish between regions of the spine for permanent disability compensation purposes due to loss of use of the "back," a 13% whole person impairment rating converts to a 17% reginal impairment to the lumbar spine [*AMA Guides* Section 15.13 p. 427].[1]

Thereafter, Dr. McHenry referred the Claimant to Dr. Math for pain medication management and possible injections on November 13, 2015. [APA p. 112-125]. Dr. Math noted on her initial physical examination that Claimant's gait and strength in the lower extremities are "NORMAL." [APA p. 125]. She noted restricted range of motion of the lumbar spine due to subjective complaints of pain, but his straight leg test was negative. [APA p. 125]. Dr. Math adjusted Claimant's Tramadol and other medications. After failing to achieve optimal pain control with medications, Dr. Math recommended an L4 transforaminal injection. [APA p. 154]. She again noted that Claimant's gait and lower extremity strength were "normal." [APA p. 155]. Claimant only reported a 10% improvement following the injection. On September 28, 2016 Dr. Math indicated she was discontinuing Tramadol due to Claimant's failure to submit to a urine drug screen (UDS). [APA p. 162]. She continued his Gabapentin and Flexeril.

In March 2017, Dr. Math referred Claimant back to Dr. McHenry for an updated assessment on further surgery. Dr. McHenry ordered another MRI to assess his post-surgical status. On April 12, 2017, Dr. McHenry stated the following: "I reviewed images from the most recent MRI lumbar scan, and compared with his previous post-op and the pre-op MRI. The disc herniation at L3-4 is no longer present. He has persistent degenerative changes but no focal impingement that correlates with his persistent radicular leg symptoms. I do not think he would benefit from further surgical intervention." Claimant returned to Dr. Math in June 2017. Dr. Math noted that his clinical progression remains unchanged with

[1] The South Carolina Workers Compensation Act endorses the AMA GUIDES as the expert basis for determination of scheduled disability impairment/loss of use- See WCC Regulation 67-1101 (B) (providing for impairment to body parts not specified under the schedule to be determined by the Guides; *See also* Therrell v. Jerry's, 370 S.C. 22, 633 S.E.2d 893 (SC 2006)("the proper course in these cases is to proceed pursuant to § 42-9-30(20) and use the AMA Guides or "any other accepted medical treatise or authority" to convert the injury to the rotator cuff into a percentage of impairment to the whole person.").

estimated pain level 5 out of 10. [APA p. 180]. She continued Gabapentin and Flexeril and ordered a functional capacity exam (FCE).

Claimant performed the FCE with Elite Physical Therapy on November 20, 2017. [APA p. 5]. Significant findings from the FCE include the following: 1) Consistent effort without high pain focus; 2) overall MEDIUM duty lifting capacity with OCCASIONAL maximum lift of 50 pounds and FREQUENT lift capacity of 15 pounds; 3) CONSTANT level (greater than 40 minutes/hour) for sitting, walking, and standing; 4) FREQUENT level (20-40 minutes/hour) for lumbar flexion and rotation; and OCCASIONAL level (less than 20 minutes per hour) for kneeling, squatting, and overhead lifting. [APA p. 12]. Claimant returned to Dr. Math on December 6, 2016. [APA p. 193]. She assigned him a 12% whole person impairment under the 6th Edition of the AMA Guides. She noted that he "will" require chronic pain medication management and interventions like epidural steroid injections. She stated Claimant "may" also be a candidate for a trial spinal cord stimulator. She restarted Tramadol. Regarding work restrictions, Dr. Math indicated on the WCC Form 14 B "light work duty no lifting > 10 pounds." [APA p. 201].

Claimant was referred by a primary care provider for psychological evaluation/treatment with New Horizon Behavioral Health in February 2017. [APA. 208-229]. He was diagnosed with a single moderate depressive disorder and general anxiety disorder He was prescribed an anti-depressant/anxiolytic but discontinued it after a short while. He underwent some group therapy and couples counseling with his wife. On June 23, 2017, it was noted that Claimant "feels therapy has been very helpful- sees things differently now. Not irritable anymore." [APA p. 210]. The provider further states she will reassess treatment goals on next visit but there is no additional follow up visit after June 23, 2017.

ARGUMENTS

I. THE UNDISPUTED EVIDENCE IN THE RECORD DOES NOT SUPPORT THE COMMISSIONER'S FINDING THAT CLAIMANT SUSTAINED GREATER THAN 50% LOSS OF USE OF HIS BACK.

In Clemmons v. Lowes, Inc., 420 S.C. 282; 803 S.E.2d 268 (SC 2017) the Supreme Court turned on its head the traditional deference given to the Commission's institutional expertise on application of a medical impairment rating to determine "loss of use" of a scheduled member. It was previously well-established that a permanent disability award pursuant to S.C. Code § 42-9-30 "need not be shown with mathematical exactness;" it must only be founded on evidence of sufficient substance to afford a reasonably determinable basis for it. *See* Bundrick v. Powell's Garage and Wrecker Service, 248 S.C. 496, 151 S.E.2d 437 (SC 1966); *See also* Linen v. Ruscon Construction, 286 S.C. 67, 332 S.E.2d 211 (1985) (although expert evidence found claimant suffered 20%-30% impairment to his back, testimony of vocational expert and lay testimony supported finding that claimant suffered greater impairment for compensation purposes).

However, Clemmons essentially holds that evidence of the medical impairment rating is virtually synonymous with "loss of use," and thus, is outcome determinative of entitlement to PPD compensation under § 42-9-30 (21). In that case, claimant had a multi-level cervical fusion and was assigned a 25% whole person impairment rating by the authorized treating physician. That rating converted to a 71% regional impairment per the *AMA Guides*. The Commission awarded claimant PPD benefits based on 48% loss of use of the back. The Court of Appeals affirmed, citing a line of cases holding that determination of impairment is "more of an art than science" that gives the Commission discretion to consider lay testimony and other evidence. *See also* Burnette v. City of Greenville, 410 S.C. 417, 737 S.E.2d 200 (Ct. App. 2012). The Supreme Court reversed, finding "there is *no* evidence in the record that Clemmons suffered anything less than a fifty percent impairment to his back. Every doctor and medical professional who assigned an *AMA Guides* impairment rating indicated Clemmons lost more than seventy percent of the use of his back." Clemmons at 803 S.E.2d 268 p. 271. Further, the Court remanded to the Commission "for a new hearing to determine his percentage of *impairment*..." (emphasis added).

In the instant case, Claimant has a 13% whole person impairment rating, which converts to a 17% lumbar impairment under the *AMA Guides*. Per the Court's reasoning in Clemmons, Claimant's impairment/loss of use to the back in this case is *per se* 17%, which under S.C. Code § 42-9-30 would yield an award of fifty-one (51) weeks. For this reason, the Hearing Commissioner's award of Permanent and Total Disability based on a greater than 50% loss of use of the back must be REVERSED. The Full Commission Appellate Panel should then enter an award of 17% loss of use of the back or $16,844.79 (51 weeks x Claimant's compensation rate of $330.29). This award is in keeping with a strict adherence to the Supreme Court's mandate in Clemmons.

Claimant will counter that Clemmons does not create a *per se* rule equating loss of use and medical impairment for purposes of awarding compensation under § 42-9-30 (21). Rather, the Court's holding merely establishes the medical impairment rating as the baseline for a loss of use award, and that additional evidence may indicate greater loss of use than the rating alone. First, this reasoning is dubious because the Court in Clemmons never referenced other evidence in that record of loss of use or disability beyond the ratings alone. The claimant in that case returned to work as a cashier performing tasks indicative of *less than* fifty-percent loss of use of his back. However, the Court focused entirely on the medical evidence, specifically held there is **no evidence** in the record that Clemmons suffered anything *less than* a 70% impairment to his back, and remanded the case to the Commission to "determine his percentage of impairment" in accord with the medical evidence. As such, the Court's remand instruction was not necessarily an invitation for the Commission to rely on evidence other than the impairment ratings for determining the "percentage of impairment." The Court specifically referenced the additional *higher* impairment ratings in the record.[2] The Court's remand instructions then ostensibly require the Commission to find an impairment/loss of use based on solely on those competing ratings in the record with 71% being the minimum rating supported by the evidence. There can be little doubt from the Court's strong language

[2] The Court in Clemmons prominently cited evidence that other providers of record-Tracy Hill, PT and Dr. Leonard Forrest, M.D.- assigned claimant impairment ratings of 91% and 99%, respectively.

that it intended for one of the competing ratings to be outcome determinative of the Claimant's "loss of use."

Assuming *arguendo* Claimant's position on the role of the impairment rating in light of Clemmons is correct, which again the Defendants do not concede, a finding of "greater than 50% loss of use of the back" is simply not supported by any additional evidence in the Record of this case. Even if the medical impairment rating is not outcome determinative of "loss of use" under § 42-9-30 (21), there can be no doubt it is the paramount factor for the Commission's consideration, as evidence by the Supreme Court's preoccupation with the impairment ratings in Clemmons. The question becomes what other evidence, if any, justifies an award higher than the rating denotes?

As discussed earlier, the impairment ratings presented here are 17% to the lumbar spine from Dr. McHenry and 16% from Dr. Math (12% whole person rating divided by the .75 conversion factor per the *AMA Guides*). Yet, the Hearing Commissioner here found loss of use to the back **three times greater** than the medical experts' determinations. The award is also **three times greater** than the preeminent factor Clemmons unequivocally suggests must be the foundation of a loss of use determination under the "medical model" for compensation. Although the Hearing Commissioner found that the impairment ratings are "very low based on a poor surgical result" (Finding of Fact # 9), this was error.

First, and with all due respect to the Commissioner, he is not a medical doctor with expertise to draw such conclusions. *See* Burnette v. City of Greenville *supra* (Court chastised a Commission finding regarding the significance of an MRI scan when there was no evidence indicating the opinion originated from a medical provider). Second, the impairment ratings from Dr. McHenry and Dr. Math are in perfect accord with the *AMA GUIDES* DRE Category III.[3] Claimant had a single-level microdiscectomy at L3-4, the least invasive spine procedure possible. The nature of this pathology itself is not indicative on its face of a severe injury. Under the "medical model" of compensation per § 42-9-30, the nature and character of

[3] The *AMA GUIDES* DRE Category III for determination of lumbar spine impairment provides, in pertinent part, for 10%-13% whole person rating for "significant signs of radiculopathy.... OR history of a herniated disc at the level and on the side that would be expected from objective clinical findings associated with radiculopathy."

the injury controls. *See* Stephenson v. Rice Services, 323 S.C. 113, 473 S.E.2d 699 (SC 1996) (with scheduled disability injuries the compensation depends on the character of the injury rather than loss of earnings). In contrast, the claimant in Clemmons had multi-level pathology requiring fusion, which invariably results in significant loss of motion and other functional impairment. The character of claimant's back injury in Clemmons was much more severe and presumptively disabling under the scheduled disability statute than Claimant's single level microdiscectomy, as reflected by the disparity in the impairment ratings prescribed by the *AMA GUIDES*- 71% versus 17%.

Claimant will inevitably point to other evidence of "loss of use" in the Record, particularly the 10-pound lifting restrictions imposed by Dr. Math on the Form 14B to justify the Commissioner's award. In reply, Defendants initially point out that restriction must be viewed critically and not in a vacuum. First, Dr. Math, not Defendants, referred Claimant to the specific PT facility in question, which certainly implies Dr. Math trusted that facility's reputation and evaluation methods. As noted earlier, the FCE determined Claimant was overall fit for MEDIUM duty work. If Dr. Math was simply inclined to impose an arbitrary 10-pound lifting restriction for prophylactic purposes, then why did she make the FCE referral in the first place?

Second, Dr. Math's Form 14B only addresses lifting restrictions. It does not address other capabilities impacted by a back injury that may be indicative of loss of use, such as walking, sitting, standing, bending, twisting, etc. Therefore, the FCE results are still a relevant objective indication of Claimant's functional loss of use of the back. In that regard, the FCE determines Claimant can perform CONSTANT sitting, walking, and standing, and FREQUENT lumbar flexion (i.e. bending) and rotation (i.e. twisting). These functional capabilities via use of his back simply do not support the conclusion Claimant has a greater than 50% loss of use of his back, even when considered in conjunction with the 17% medical impairment and the purported 10-pound lifting restriction.

Finally, if the medical provider's impairment rating must form the substantial basis of a loss of use finding as the Supreme Court has clearly mandates in Clemmons, then secondary evidence of additional loss of use cannot logically supersede the proportion the rating bears to the total loss of use award. Simply

put, the 10-pound lifting restriction from Dr. Math, and/or any other evidence of loss of use in the Record, absolutely cannot justify an award of **three times** the impairment rating. At most, Defendants would concede that additional loss of use evidence, such as the 10-pound lifting restriction, FCE restrictions, and any subjective complaints of dysfunction per Claimant's testimony, could arguably support an additional award up to the value of the medical impairment rating alone. In this case, the rating was 17% to the lumbar spine, so a maximum award of 34% loss of use of the back may be warranted based on additional evidence in this Record. Again, other loss of use evidence cannot collectively supersede the rating itself considering the Supreme Court's reasoning in Clemmons.

Any loss of use award contrary to this general framework must necessarily be based on surmise and conjecture, which obviously cannot stand. *See* Bundrick *supra* (the award may not rest on surmise, conjecture or speculation; it must be founded on evidence of sufficient substance to afford a reasonable basis for it) (emphasis added). The speculative nature of the Hearing Commissioner's finding here that Claimant sustained a "greater than 50% loss of use of the back" is self-evident. The Commissioner never even determined what Claimant's impairment/loss of use of his back is. He essentially found the loss of use of Claimant's back was some unknown factor at least **three times greater** than the impairment ratings. This is clearly erroneous because there is no evidence of "sufficient substance" to support it. Although the Court in Clemmons found there was no evidence of impairment/loss of use less than 50%, thus implicitly holding claimant was presumed to be totally disabled, it nevertheless remanded the case to the Commission with instructions to determine the actual impairment. Therefore, a finding of the impairment/loss of use is clearly required; a generic finding that the loss of use is simply greater than the threshold for a presumption of total disability renders the award nothing but surmise and conjecture.

For these reasons, the Hearing Commissioner's finding that Claimant sustained a "a greater than 50% loss of use of his back" must be REVERSED. The Appellate Panel, as the ultimate fact finder and arbiter in worker's compensation cases, should then enter an award of PPD benefits per S.C. Code § 42-9-30 (21) based solely on the 17% or 16% impairment ratings assigned by medical providers as mandated by Clemmons. In the alternative, the Appellate Panel may award PPD benefits for loss of use of the back per

§ 42-9-30 (21) greater than the impairment ratings based on additional competent evidence of loss of use in the Record, but not to exceed the value of the ratings themselves, in accordance with Clemmons and other applicable law.

II. IF THE APPELLATE PANEL FINDS CLAIMANT HAS SUSTAINED GREATER THAN 50% LOSS OF USE OF HIS BACK, THEN EVIDENCE IN THE RECORD SUCCESSFULLY REBUTS THE STATUTORY PRESUMPTION THAT HE IS PERMANENTLY AND TOTALLY DISABLED.

S.C. Code § 42-1-120 defines "disability" as the "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." This is the foundational standard under the "economic model" of compensation provided by the Act. Stephenson v. Rice Services *supra* (the definition of disability in South Carolina's workers' compensation statute clearly stems from the earning impairment model of workers' compensation whereas compensation for loss of a member or the loss of the use of a member under [schedule section] is not dependent on actual wage loss, and the fact that the claimant after his injury is regularly employed at greater earnings than before is immaterial). 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." Compensation for presumed total disability based on a 50% or greater loss of use of the back under S.C. Code § 42-9-30 (21) combines the "economic" and "medical" compensation models. As previously discussed, the initial inquiry of whether a claimant has sustained 50% or greater loss of use of the back involves a "medical model" analysis. If 50% or greater loss of use of the back is established, then defendants may rebut the statutory presumption of total disability under the "economic model." *See* Clemmons *supra*

In the instant case, evidence in the Record categorically rebuts the presumption Claimant is permanently and totally disabled under an economic or wage impairment theory, including, but not limited

to the following: 1) Claimant is extremely young at only 38 years old so there is no natural presumption that he could not adjust to new work as a result of his injury; 2) he has a four-year Bachelor's degree in Information Technology with heavy concentration in mathematics coursework (Hr. Tr. p. 31); 3) he has worked in the Dominican Republic installing computer operating systems and repairing computers/systems (Hr. Tr. p. 30); 4) he has also worked as a teller in a bank (Hr. Tr. p. 31); 5) he has worked in these capacities within the last five (5) years (Hr. Tr. p. 26), the significance of which is that he has a recent vocational history of sophisticated skilled light duty employment; and 7) As noted previously, Claimant's injury itself (single level disc herniation necessitating decompression via microdiscectomy) does not connote a presumption of severe disability. This latter point is particularly important because Claimant acknowledged improvement in his pain and function following surgery. Overall, Claimant's situation does not objectively support the profile of a totally disabled individual.

Although the Hearing Commissioner specifically found that Claimant's use of medications due to his injury causes "major disability" (Finding of Fact # 10), this finding is not supported by sufficient evidence in the Record. Claimant's current medication list consists of relatively low dosages of Tramadol (50 mg), Gabapentin (400 mg), and Flexeril (5 mg) (APA p. 177). There is no evidence in the Record that Claimant is not using these medications appropriately. Thus, no inference can be drawn that Claimant's proper use of these non-opiate based medications are disabling. This may be a different story if Claimant was taking multiple narcotics.

Claimant testified under direct examination that he did not take these medications before his appearance at the Hearing because they make him sleepy (Hr. Tr. p. 19-20). However, normal side effects from medications are a far cry from jumping to the conclusion that such effects are a "major disability." The fact that Dr. Math did not impose medical restrictions on driving, climbing, or operating machinery illustrates the point that Claimant's medication use must not be a substantial impediment to work, especially when Dr. Math- a pain management provider- envisioned Claimant returning to work! Defendants submit the Hearing Commissioner overreached in making his own medical judgment without expert support. *See*

Burnette v. City of Greenville *supra.* Therefore, Hearing Commissioner's Finding of Fact # 10 is patently erroneous, and any reliance on that finding for the proposition that Defendants have not successfully rebutted the presumption of total disability is misplaced.

For these reasons, the Appellate Panel must REVERSE and find that vocational evidence in the Record successfully rebuts the presumption that Claimant is permanently and totally disabled due to his back injury. The Full Commission can then, as the ultimate fact finder, enter a finding of Claimant's impairment/loss of use of the back, either less than 50% or 50% or greater, and award permanent partial disability (PPD) benefits accordingly under S.C. Code § 42-9-30 (21).

III. THE HEARING COMMISSIONER'S AWARD OF ONGOING AND/OR FUTURE PSYCHOLOGICAL EVALUTION AND TREATMENT WAS NOT RELIEF REQUESTED BY CLAIMANT AT THE HEARING AND IS NOT SUPPORTED BY EVIDENCE IN THE RECORD

The Record confirms Claimant sought psychological evaluation and treatment on his own initiative with New Horizon Behavioral Health for a finite between February 2017 and June 2017 [APA. p. 199-220]. He sought this treatment during the interim between Commissioner Campbell's original denial of the claim and the Full Commission's subsequent reversal. Claimant was not referred for this treatment or evaluation by Dr. McHenry or Dr. Math. At the Hearing that is the subject of the current Appeal, Claimant's counsel merely sought payment of any bills for Claimant's treatment with New Horizon; he did not request ongoing treatment or further psychological evaluation/treatment. Specifically, Claimant's counsel stated, "So, all were looking for here is the payment of the psych treatment itself; that the carrier remains responsible for that psych treatment." [Hr. Tr. p. 14 ll. 12-17]. Later, defense counsel stated the issue of psychological treatment thusly, "it's the payment of that capped period for psych treatment, which was about six months." [Hr. Tr. p 16 ll. 6-9]. In response, Claimant's attorney replied, "That's correct." *Id.* Moreover, Claimant's Pre-Hearing Brief phrases the issue as "whether Claimant is entitled to payment of psychological treatment." Yet, the Hearing Commissioner awarded further psychological treatment/evaluation in his Order. Defendants submit this was error because Claimant never requested that relief.

At the Hearing, Defendants opposed Claimant's demand for payment of psychological treatment bills incurred with New Horizon, so that issue remains outstanding. Defendants base their denial on the following grounds: 1) such evaluation/treatment was non-emergency treatment that Claimant sought on his own initiative when the claim was still denied by Commissioner Campbell's Order; and 2) Claimant was not referred by a subsequently designated authorized medical provider- Dr. McHenry or Dr. Math. Defendants submit they are not responsible for medical bills under this scenario per § 42-15-60. The statute only requires payment of emergency medical expenses when the employer fails to provide to provide treatment under the Act. In other words, the statute does not impose liability on Defendants for psychological treatment Claimant sought on his own because it clearly was not emergency treatment.

This scenario is fundamentally different than the medical treatment rendered by Dr. McHenry and Dr. Math for Claimant's primary back injury. The law does not require interruption of medical treatment already underway for an admittedly serious back injury until the threshold issue of compensability under the Act is finally determined. In that case, Defendants concede such treatment may be considered an "emergency" for purposes of the statute; therefore, the Commission can order payment of those medical benefits after the fact. On the other hand, Claimant should have secured an Order from the Commission requiring Defendants to provide psychological treatment if he wanted such treatment to be covered by them. As such, Defendants should not be responsible for psychological bills from New Horizon.

Otherwise, there is no evidentiary basis for the Hearing Commissioner's award of additional psychological treatment. The last record from New Horizon dated June 2, 2017 notes in pertinent part the following: "talked to wife- she feels client much better and couples counseling not needed.....feels therapy has been very helpful- sees things differently now. Not irritable anymore... wants to focus on moving forward. Would like to find work he can do." [APA p. 210]. The record goes on to state, "further tx goals unclear as client has improved and at this point just wants to find work he can do." *Id.* Claimant never returned to New Horizon. In sum, there is no recommendation for further psychological evaluation/treatment from an expert medical or psychological provider. As such, the Hearing Commissioner

erred by ordering same. Hartzell v. Palmetto Collision, 419 S.C. 87, 796 S.E.2d 145 (Ct. App. 2016), *rev'd on other grounds* 415 S.C. 617, 785 S.E.2d 194 (SC 2016). Hartzell interprets S.C. Code § 42-15-60 (A) to require expert medical evidence for an award of further medical evaluation or treatment beyond 10 weeks from the date of accident. Again, it is undisputed there is no such evidence here.

For these reasons, the Hearing Commissioner's order for further psychological evaluation and treatment must be REVERSED. Likewise, to whatever extent the Commissioner's Order can be construed to require Defendants to pay bills incurred for psychological treatments with New Horizon Behavioral Health must also be REVERSED.

CONCLUSION

In sum, the Hearing Commissioner made three reversible errors in his April 13, 2018 Order: 1) Finding Claimant sustained a "greater than 50% loss of use of the back," when such award is at least **THREE TIMES GREATER** than the medical impairment rating, is otherwise unsupported by other competent evidence in the Record, and most importantly, is contrary to the South Carolina Supreme Court's holding in Clemmons v. Lowes, Inc., 420 S.C. 282, 803 S.E.2d 268 (SC 2017); 2) Finding that evidence in the Record failed to rebut the statutory presumption of permanent and total disability under § 42-9-30 (21) due to his back injury, when Claimant is 38 years old, has a four-year college degree in Information Technology, and has a relatively sophisticated vocational history of skilled light duty work; and 3) Ordering further psychological evaluation and treatment when there is no expert recommendation for same in contravention of § 42-15-60 (A). For these reasons, the Appellate Panel must REVERSE the Hearing Commissioner's erroneous findings and enter an appropriate award of PPD benefits under S.C. Code § 42-9-30.

South Carolina Workers' Compensation Commission
1333 Main Street, Suite 500 • Post Office Box 1715
Columbia, South Carolina 29202-1715
(803) 737-5675
www.wcc.sc.gov

Physician's Statement

Claimant's Name: Samuel Paulino-Bautista
Physician's Name: Jyoti K. Math, MD
Practice/Clinic: Upstate Medical Rehabilitation
Preparer's Name: _____
Employer's Name: _____
Insurance Carrier: _____
SCWCC File No: _____
Phone: _____

The undersigned physician has been authorized to evaluate or treat this Claimant for his or her work injury or illness pursuant to *South Carolina Code Sections* 42-15-60, 42-15-80, 42-1-172, or 42-11-10.

Date of injury: 11/21/14 to 2/7/15 Date of first office visit: 11/13/15 Date of last office visit: 12/6/17

The medical opinions below are stated to a reasonable degree of medical certainty.

Diagnosis or nature of injury or illness: Lumbar HNP with RLE Radiculopathy

Body part(s) injured: Lumbar spine Body part(s) affected: -

Date of maximum medical improvement: 12/6/17

Has the Claimant sustained **permanent physical impairment** as a result of the work injury? ✓ Yes ___ No

If so, the permanent physical impairment is: 12 % medical impairment to the L Spine (injured body part).

If there is a permanent physical impairment to other body part(s) as a result of the work injury, please indicate below:
___ % medical impairment to the _____ (additional body part injured or affected).

The impairment rating(s) above are based upon the following:

✓ The AMA's *Guides to the Evaluation of Permanent Impairment* 6th Edition; or
___ Other medical treatise: _____
___ Other: _____ or

Does the Claimant have **permanent physical limitations** as a result of the injury? ✓ Yes ___ No

If so, the permanent physical limitations are: Light work duty NC lifting > 10lb needs work conditioning

Does the Claimant **possess retained hardware** as a result of the injury? ___ Yes ✓ No

If so, the retained hardware is: _____

Is there medical, surgical, hospital or other treatment that the Claimant needs as a result of the injury for an additional time that will tend to lessen the period of disability or maintain the current level of function: ✓ Yes ___ No

If so, the medical care and treatment that is needed is/are: Chronic pain management requiring follow up office visit q 4 6 wk, pain medications, injection RF spinal cord stimulator trial

*An indication or statement that future medical care "may be necessary" or "might be necessary" is not sufficient and will require further clarification.

I certify that I am a physician or other licensed healthcare provider, I have personally read and prepared this document, and the opinions reflected above are mine.

Jyoti Math 12/6/17

Treating or Evaluating Physician **Date**

STATE OF SOUTH CAROLINA
In the Court of Appeal

APPEAL FROM THE
SOUTH CAROLINA WORKERS' COMPENSATION COMMISSION

T. Scott Beck, Commissioner
Gene McCaskill, Commissioner
R. Michael Campbell, II, Commissioner

SCWCC File No. 1508995

Appellate Case No. 2018-001964

Samuel Paulino, Claimant, Respondent

v.

Diversified Coatings, Inc., Employer, and Amguard Ins. Co., Carrier, Appellants

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CERTIFICATION

Per Rule 210(g), SCACR, I certify 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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March 12, 2019
Columbia, SC