

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM THE SOUTH CAROLINA WORKERS' COMPENSATION COMMISSION

Gene McCaskill, Commissioner
T. Scott Beck, Commissioner
Melody L. James, Commissioner

Appellate Case Number : 2012-212972
W.C.C. File No. 0905086

Alison Morrett,

Employee, Claimant/Appellant.

v.

Capital City Ambulance of GA, Ltd. and
Companion Property and Casualty Group,

Employer, Carrier/Respondents,

FINAL BRIEF OF APPELLANT

J. Bradley Baker, Esq.
403 East Main Street, Suite E
Lexington, South Carolina 29072
(803) 356-2800 - Office
(803) 358-9402 - Facsimile
Jbb@jbradleybakerlaw.com
Attorney for Appellant

December 23, 2013

RECEIVED

JAN 06 2014

SC Court of Appeals

TABLE OF CONTENTS

Table of Authorities.....4
Statement of Issues on Appeal.....5
Statement of the Case.....6
Facts.....7

Arguments

1. THE FULL COMMISSION ERRED AS A MATTER OF FACT AND LAW IN THEIR FINDING OF FACT 8 AND CONCLUSION OF LAW 9 WHEN THEY HELD THAT THE CLAIMANT DID NOT MEET HER BURDEN OF PROVING AN AGGRAVATION OF HER PREEXISTING PSYCHOLOGICAL CONDITION AND EATING DISORDER AS REQUIRED BY SOUTH CAROLINA CODE § 42-1-160 and § 42-9-35.(FINDING OF FACT 8, 14 AND CONCLUSION OF LAW 7 AND 8) 10

2. THE FULL COMMISSIONER ERRED AS A MATTER OF FACT AND LAW WHEN THEY CHOSE TO IGNORE ALL EVIDENCE SUPPORTING THE COMPENSABILITY OF THE PSYCHOLOGICAL AND EATING DISORDER AND HELD THAT THE DECISION OF DR. LIND SHOULD BE GIVEN GREATER WEIGHT THAN THE OPINIONS OF DR. PIASECKI AND COUNSELOR HOBBS. (FINDINGS OF FACT 9, 10, 11, 12, 13, 15, 16 AND CONCLUSION OF LAW 8) 14

3. THE FULL COMMISSIONER ERRED AS A MATTER OF FACT AND LAW WHEN THEY MISQUOTED THE RECORD AND STATED THAT DR. PIASECKI DID NOT CONSIDER THE CLAIMANT’S PREEXISTING CONDITION WHEN RENDERING HIS OPINIONS. (FINDING OF FACT 15). 23

4. THE FULL COMMISSION ERRED, AS A MATTER OF FACT AND LAW IN CONSIDERING A MEDICAL SUMMARY HANDED UP BY THE DEFENSE AT ORAL ARGUMENT OVER THE OBJECTION OF THE CLAIMANT AS IT WAS NOT A PIECE OF EVIDENCE AND WAS NOT SUBMITTED PURSUANT TO THE ADMINISTRATIVE PROCEDURES ACT. THE CLAIMANT HAD NO NOTICE THAT THE SUMMARY WOULD BE HANDED UP AT THE ORAL ARGUMENT AND THUS WAS NOT ALLOWED TO ADDRESS THE SUMMARY WHEN BRIEFING THE ISSUES 25

5. THE FULL COMMISSION ERRED AS A MATTER OF FACT AND LAW IN FAILING TO ADDRESS THE CREDIBILITY OF THE CLAIMANT AS THE SINGLE COMMISSIONER HELD THAT THE CLAIMANT TESTIFIED ACCURATELY AND IN LINE WITH THE MEDICAL AND COUNSELING RECORDS IN THE CASE WITHIN HIS FINDING OF FACT 9 YET THE FULL COMMISSION DID NOT REVERSE THIS FINDING AND DID NOT ADDRESS THE ISSUE. 29

6. THE FULL COMMISSION ERRED AS A MATTER OF FACT AND LAW IN CONCLUDING WITHIN THE ORDER PORTION OF THE FULL COMMISSION ORDER THAT THE CLAIM FOR AGGRAVATION OF A PRE-EXISTING PSYCHOLOGICAL CONDITION AND EATING DISORDER SHOULD BE DENIED IN ITS ENTIRETY TO INCLUDE DENIAL OF MEDICAL TREATMENT FOR THE AGGRAVATION AS THE DECISION IS BASED ON ERRORS OF LAW, CLEARLY ERRONEOUS IN VIEW OF THE RELIABLE, PROBATIVE AND SUBSTANTIAL EVIDENCE IN THE RECORD AND INVOLVES ABUSE OF DISCRETION 33

Conclusion 35

Certificate of Counsel 36

TABLE OF AUTHORITIES

CASES

Young v. Tide Craft, 270 S.C. 453, 468, 242 S.E. 2d 671, 678 (1978) 16

Tiller v. Nat'l Health Care Ctr. Of Sumter, 334 S.C. 333, 339 513 S.E. 2d 843, 845 (1999)
..... 16, 23

Lark v. Bi-Lo, Inc., 276 S.C. 130, 134-35 , 276 S.E. 2d 304, 306 (1981) 23, 25

Potter v. Spartanburg Sch. Dist., 396 S.C. 17, 716 S.E. 2d 123 (Ct. App. 2011).
.....18, 19, 22, 23

Risinger v. Knight Textiles, 353 S.C. 69, 577 S.E.2d 222 (Ct. App. 2002) 20

Nettles v. Spartanburg School District #7, 341 S.C. 580, 535 S.E. 2d 146 (S.C. Ct of Appeals 2000)
..... 31, 32, 33

Airco, Inc. V. Hollington, 269 S.C. 152, 236 S.E. 2d 804, 808 (1977). 32, 33

Parson v. Georgetown Steel, 318 S.C. 63, 456 S.E. 2d 366 (1995). 33

STATUTES AND REGULATIONS

S.C. Code Ann.§ 42-1-160 (1976) 10, 11, 12, 13, 20

S.C. Code Ann.§ 42-9-35 (1976) 12, 13

S.C. Code Ann. § 1-23-380 (1976) 23, 25

S.C. Code Ann.§ 42-15-60(1976) 20, 21, 34

S.C. Code Ann. § 1-23-320 (1976) 26, 27, 29

S.C. Code Ann. § 1-23-330 (1976). 26, 27, 29

S.C. Code Ann. 1-23-350(1976) 32

S.C. Code Ann Reg. 67-505 21, 27, 29

S.C. Code Ann Reg. 67-502 21

S.C. Code Ann Reg. 67-506 21

S.C. Code Ann Reg. 67-707 27, 29

S.C. Code Ann Reg. 67-705 27, 29

S.C. Code Ann Reg. 67-509 21

STATEMENT OF ISSUES ON APPEAL

1. WHETHER THE FULL COMMISSION ERRED AS A MATTER OF FACT AND LAW IN THEIR FINDING OF FACT 8 AND CONCLUSION OF LAW 9 WHEN THEY HELD THAT THE CLAIMANT DID NOT MEET HER BURDEN OF PROVING AN AGGRAVATION OF HER PREEXISTING PSYCHOLOGICAL CONDITION AND EATING DISORDER AS REQUIRED BY SOUTH CAROLINA CODE § 42-1-160 and § 42-9-35?(FINDING OF FACT 8, 14 AND CONCLUSION OF LAW 7 AND 8)
2. WHETHER THE FULL COMMISSION ERRED AS A MATTER OF FACT AND LAW WHEN THEY CHOSE TO IGNORE ALL EVIDENCE SUPPORTING THE COMPENSABILITY OF THE PSYCHOLOGICAL AND EATING DISORDER AND HELD THAT THE DECISION OF DR. LIND SHOULD BE GIVEN GREATER WEIGHT THAN THE OPINIONS OF DR. PIASECKI AND COUNSELOR HOBBS? (FINDINGS OF FACT 9, 10, 11, 12, 13, 15, 16 AND CONCLUSION OF LAW 8).
3. WHETHER THE FULL COMMISSION ERRED AS A MATTER OF FACT AND LAW WHEN THEY MISQUOTED THE RECORD AND STATED THAT DR. PIASECKI DID NOT CONSIDER THE CLAIMANT'S PREEXISTING CONDITION WHEN RENDERING HIS OPINIONS? (FINDING OF FACT 15).
4. WHETHER THE FULL COMMISSION ERRED AS A MATTER OF FACT AND LAW IN CONSIDERING A MEDICAL SUMMARY HANDED UP BY THE DEFENSE AT ORAL ARGUMENT OVER THE OBJECTION OF THE CLAIMANT AS IT WAS NOT A PIECE OF EVIDENCE AND WAS NOT SUBMITTED PURSUANT TO THE ADMINISTRATIVE PROCEDURES ACT?
5. WHETHER THE FULL COMMISSION ERRED AS A MATTER OF FACT AND LAW IN FAILING TO ADDRESS THE CREDIBILITY OF THE CLAIMANT AS THE SINGLE COMMISSIONER HELD THAT THE CLAIMANT TESTIFIED ACCURATELY AND IN LINE WITH THE MEDICAL AND COUNSELING RECORDS IN THE CASE WITHIN HIS FINDING OF FACT 9 YET THE FULL COMMISSION DID NOT REVERSE THIS FINDING AND DID NOT ADDRESS THE ISSUE?
6. WHETHER THE FULL COMMISSION ERRED AS A MATTER OF FACT AND LAW IN CONCLUDING WITHIN THE ORDER PORTION OF THE FULL COMMISSION ORDER THAT THE CLAIM FOR AGGRAVATION OF A PRE-EXISTING PSYCHOLOGICAL CONDITION AND EATING DISORDER SHOULD BE DENIED IN ITS ENTIRETY TO INCLUDE DENIAL OF MEDICAL TREATMENT?

STATEMENT OF THE CASE

The Claimant sought benefits under the South Carolina Workers' Compensation Act based upon an admitted accident which occurred on May 11, 2009. At the hearing before the Single Commissioner the parties agreed that the Claimant had suffered a compensable injury to her right lower extremity. It was the position of the Claimant that the admitted compensable physical injury coupled with six (6) surgeries, the recovery from those surgeries and pain associated with each surgery had aggravated her pre-existing psychological condition as well as her pre-existing eating disorder. Claimant was seeking treatment for the psychological and eating disorder. Defendants denied that the Claimant's conditions had been aggravated. A hearing was held before Commissioner Derrick Williams on February 6, 2012. After the hearing the Commissioner issued an order finding Claimant's psychological condition and eating disorder were aggravated by her work accident and subsequent treatment and awarded temporary total payments and causally related medical care. The Single Commissioner also held that the Claimant testified accurately and in line with the medical and counseling records in this case. Finding of Fact 9 of the Single Commissioner. (R. p. 26).

The Defendants appealed the decision of the Single Commissioner. The Full Commission heard oral arguments on the issue of the compensability of the Claimant's aggravation of her psychological and eating disorder. The Full Commission reversed the Single Commissioner's findings and holdings in which he found that the Claimant's aggravation of her psychological and eating disorder were compensable. On September 20, 2012 Alison Morrett filed and served her notice of appeal upon Counsel for the Employer/Carrier.

FACTS

The Claimant was involved in an admitted injury to her right knee on May 11, 2009. At the time of the hearing before the Single Commissioner the Claimant had undergone six (6) surgeries to repair her injured knee, the most recent surgery being conducted on January 23, 2012. Claimant's APAs 3, 4, 5 and 8 contained the records surrounding the six (6) surgeries which had been performed on the Claimant's right lower extremity. The records surrounding the treatment of the Claimant's knee can be found in the Record at pages 355 to 485. (See Operative Notes at R. pp. 356, 380, 409, 458 and Appendix pp. 4 and 8). Because of the complexity of Ms. Morrett's case many of her surgeries have required that she be admitted to the hospital following her surgeries.

By way of history, the Claimant has suffered from an eating disorder since she was approximately 14 years of age. In the year 2000 at the age of 18, the Claimant was diagnosed with major depression, anorexia, bulimia, and borderline personality disorder. The Claimant has been receiving on and off treatment for her diagnoses of major depression, anorexia, bulimia and borderline personality disorder since early 2000. During her ongoing treatment the Claimant has been admitted into psychiatric care, voluntary and involuntary, between ten and fifteen times.

Following the fifth authorized knee surgery it began to appear in the medical records that the Claimant was struggling psychologically. The Claim for the aggravation of the pre-existing psychological issues and eating disorder was filed on November 15, 2011. At that time and currently the Claimant's authorized treating physician was Dana Piasecki, M.D. Dr. Piasecki noted in his office visit of October 20, 2011 (R. pp. 471-472) that "a long discussion is had today with Alison, her family and the case manager regarding some issues with self-induced vomiting on a regular basis given concerns over her weight as well as relative depression which appears to be limiting her energy level with respect to doing therapy on her own". Dr Piasecki then goes on to state "I have discussed

with Alison at some length today that these issues are not terribly surprising given her long surgical history and the prolonged rehab and recovery which is necessary from her current staged operative approach. I do believe that her psychological state is work related given the multiple surgeries which have been involved here and I would recommend that she see a nutritionist as well as get back on an antidepressant which she has previously been prescribed. She should have follow up for this with a psychiatrist in my opinion". (R. p. 472).

Dr. Piasecki confirmed his opinion in a questionnaire dated November 30, 2011 which was introduced as Claimant's APA 148 (R. p. 481). Within the questionnaire, Dr. Piasecki confirms that the opinions expressed in his medical note of October 20, 2011 are his opinions to a reasonable degree of medical certainty. Further, in his deposition of January 26, 2012, Dr. Piasecki (referred to incorrectly as Tiasecki by the court reporter) reaffirms his opinions.

During his deposition Dr. Piasecki was confronted with the report of Psychologist Lind and the extensive prior treatment and trauma that the Claimant has endured. Dr. Piasecki stated that "I would say that the stress of undergoing as many surgeries as she has, has increased the likelihood of her having worsening depression and eating disorders more than 50 percent..." (R. p. 150, lines 18 - 21). At pages 16 and 17 (R. pp. 157-158) of his deposition Dr. Piasecki opines that the decline in Ms. Morrett's psychological state is causatively related/connected to the physical injury of May 11, 2009 and the subsequent treatment and surgeries that followed. He also opined that the aggravation of Ms. Morrett's eating disorder is causatively related or connected to her physical injury of May 11, 2009 and the treatment and surgeries that followed. At pages 16 and 17 (R. pp. 157-158) of his deposition, Dr. Piasecki also opines that Ms. Morrett's need for treatment for her psychological decline and exacerbation of her eating disorder is related or connected to her physical injury and subsequent surgeries.

At his deposition, Dr. Piasecki was asked about what type of treatment Ms. Morrett might require. (R. p. 159, lines 5-10). Dr. Piasecki states: “Whether or not she needed inpatient treatment at the time of the injury, I think is immaterial because what I think she has is a relative worsening of whatever she had then. So there may be a certain threshold above which a psychiatrist or a psychological or a counselor would recommend inpatient treatment. And beyond that, patients could have any of a number of degrees of severity of psychiatric problems. If she was at the threshold of needed admission at that point, the fact that she’s worse now and still needs that, does not necessarily negate that she’s had a worsening as a result of this whole process.” Dr. Piasecki is then asked “So are you saying even if she needed treatment at the time, the treatment she needs now is more than the treatment she needed at the time? Dr. Piasecki answered “Yes”. (R. p. 159, line 18-p. 160, line 9).

Marjorie Hobbs, MA, LPC is a licensed professional counselor who has the unique perspective of having treated the Claimant both before and after the accident. Ms. Hobbs has been treating the Claimant since 2004 and is well aware of the Claimant’s history. Ms. Hobbs testified that in her opinion the physical injury coupled with the six surgeries, the inability to work, the pain, the isolation, the financial stress and the fear of never regaining full use of her leg has exacerbated Ms. Morrett’s psychological condition. Ms. Hobbs also opined that the physical injury coupled with the six surgeries, the inability to work, the pain as well as fear of the unknown has exacerbated Ms. Morrett’s eating disorder (R. p. 120, line 1 - p. 122, line 11).

Nicholas A. Lind, PsyD of Post Trauma Resources conducted one evaluation of the Claimant at the request of the Defendants on January 11, 2012. Dr. Lind diagnosed the Claimant with Bulimia Nervosa and opined that this diagnoses is directly related to her military service. (R. p. 1341). Dr. Lind further opines that the Claimant’s inability to complete an intensive outpatient program at the

Ridgeview Institute due to a medical emergency of a collapsed lung contributes to her ongoing eating behaviors (R. p. 1341). Dr. Lind opines that it is the failure of finishing her treatment and not the work related injury that occurred approximately three months later, that contributes to her ongoing eating behaviors (R. p. 1341).

The testimony of the Claimant was that she completed the program at Ridgeview. (R. p. 179, line 12 - p. 180, line 22) (R. p. 202, lines 19 - 25). Although she had some health problems on February 10, 2009 she returned to Ridgeview. (R. pp. 970- 971). Her return to Ridgeview is noted within Defendants' APA 1300 (R. p. 1290) which is the admission note for her collapsed Lung and it indicates that she is being admitted on February 17, 2009 to Wellstar from a local psychiatric hospital where she is being treated for bullimia. The note states "The patient was due to be discharged" when referring to the local psychiatric hospital. (R. p. 1290). Defendants' APAs 2, 4, 5, 6, 9, 10 and 12 contain records related to the Claimant's extensive pre-injury treatment for her psychological issues as well as her eating disorder. The records include many of the hospitalizations the Claimant endured prior to her injury. (R. pp. 518 - 1304)

ARGUMENTS

1. THE FULL COMMISSION ERRED AS A MATTER OF FACT AND LAW IN THEIR FINDING OF FACT 8 AND CONCLUSION OF LAW 9 WHEN THEY HELD THAT THE CLAIMANT DID NOT MEET HER BURDEN OF PROVING AN AGGRAVATION OF HER PREEXISTING PSYCHOLOGICAL CONDITION AND EATING DISORDER AS REQUIRED BY SOUTH CAROLINA CODE § 42-1-160 and § 42-9-35.(FINDING OF FACT 8, 14 AND CONCLUSION OF LAW 7 AND 8)

Under South Carolina Code Ann. § 42-1-160(D) (1976) stress, mental injuries, and mental illness alleged to have been aggravated by a work-related physical injury may not be found compensable unless the aggravation is:

- (1) admitted by the employer/carrier;

- (2) noted in a medical record of an authorized physician that, in the physician's opinion, the condition is at least in part casually-related or connected to the injury or accident, whether or not the physician refers the employee for treatment of the condition;
- (3) found to be casually-related or connected to the accident or injury after evaluation by an authorized psychologist or psychiatrist; or
- (4) noted in a medical record or report of the employee's physician as casually-related or connected to the injury or accident.

The opinions of Dr. Piasecki clearly satisfy § 42-1-160(D) (2) and (4). As noted above Dr. Piasecki is the Claimant's current authorized treating physician. Dr. Piasecki noted in his office visit of October 20, 2011 (R. pp. 471 - 472) that he believed that her psychological state is work related given the multiple surgeries which have been involved here and he recommend that she see a nutritionist and follow up with a psychiatrist (R. p. 472) .

Dr. Piasecki has confirmed his opinion is to a reasonable degree of medical certainty in a questionnaire dated November 30, 2011 which was introduced as Claimant's APA 148 (R. p. 481). Further, in his deposition of January 26, 2012, Dr. Piasecki (referred to incorrectly as Tiasecki by the court reporter) reaffirms his opinions that the injury coupled with the extensive treatment has aggravated the Claimant's pre-existing psychological and eating disorder. (R. p. 150, lines 14 - 21). At pages 16 and 17 of his deposition (R. pp. 157 - 158) Dr. Piasecki opines that the decline in Ms. Morrett's psychological state is causatively related/connected to the physical injury of May 11, 2009. At pages 16 and 17 of his deposition, Dr. Piasecki also opines that Ms. Morrett's need for treatment for her psychological decline and exacerbation of eating disorder is related or connected to her physical injury and subsequent surgeries. (R. pp. 157 - 158).

Dr. Piasecki is a board certified orthopedic surgeon (R. p. 146, lines 20 - 21). He attended undergraduate training at Harvard University and obtained his medical degree from Vanderbilt University (R. p. 146, lines 11 - 19). He specializes in difficult cases such as Ms. Morrett's and has

first hand experience in dealing with patients who have had multiple surgeries and he emphasized the stress that one undergoes after multiple surgeries and states that the development of psychological issues is not unusual (R. p. 146, lines 05 - 08) and (R. p. 150, lines 03 - 13). Dr. Piasecki testified that “I don’t know that I would say that the knee condition that she has, which resulted from her work related injury, has caused her psychological condition. I think the process of going through as many surgeries as she has, and the recovery from those surgeries, has aggravated it. And that comes from experience treating patients who have had multiple knee surgeries, which are very complex and require inpatient stays, extended periods of time without weight bearing, and limited control of their lives. In my experience, depression, and particularly in female patients, eating disorders is very common. (R. p. 152, lines 13 - 25). Dr. Piasecki further testified that “But common sense would argue that the stress of undergoing these surgeries is immense. (R. p. 153, line 25 - p. 154, line 1).

The medical notes, questionnaire and deposition testimony have clearly satisfied the Claimant’s burden that is set out in S. C. Code Ann. § 42-1-160 (D) (2) as the aggravation is “noted in a medical record of an authorized physician that, in the physician’s opinion, the condition is at least in part casually-related or connected to the injury or accident...” and the records, questionnaire and opinions of Dr. Piasecki clearly satisfy § 42-1-160 (D) (4) which is “noted in a medical record or report of the employee’s physician as casually-related or connected to the injury or accident.” The testimony of Counselor Hobbs bolsters the opinion of Dr. Piasecki.

The Claimant has also satisfied South Carolina Code Ann. § 42-9-35 (1976) in that the Claimant has produced significant medical evidence that the injury of 2009 and the extensive

treatment that has followed has aggravated the Claimant's pre-existing eating disorder and psychological issues. The testimony of Piasecki and the testimony of Counselor Hobbs satisfy the burden established by South Carolina Code § 42-9-35.

South Carolina Code § 42-9-35 states in part:

(A) The employee shall establish by a preponderance of the evidence, including medical evidence, that:

(1) the subsequent injury aggravated the preexisting condition or permanent physical impairment; or

(2) the preexisting condition or the permanent physical impairment aggravates the subsequent injury...

(C) As used in this section, "medical evidence" means expert opinion or testimony stated to a reasonable degree of medical certainty, documents, records, or other material that is offered by a licensed health care provider....

The Claimant has clearly met her burden of proving an aggravation of her psychological condition and her eating disorder. The testimony of Dr. Piasecki as well as the testimony of Counselor Hobbs satisfies the burden created by South Carolina Code § 42-9-35.

The legislator has set the burden of proof that is required of a Claimant to prove a mental injury. The burden is stated within South Carolina Code § 42-1-160(D). The Claimant has met the burden. The legislator has also established that medical evidence is required to prove an aggravation of a preexisting injury or condition pursuant to South Carolina Code § 42-9-35. The Claimant has also met the burden of proof required by South Carolina Code § 42-9-35. For the Full Commission to find that the Claimant failed to meet her burden of proof is a misapplication of the law and amounts to an error of law and an unwarranted exercise of discretion. Furthermore, Finding of Fact 8 and conclusion 9 are clearly erroneous based on the reliable, probative and substantial evidence within the entire record. There is no evidence to support the Full Commission's Finding and

Conclusion in which they state that the Claimant failed to meet her burden of proof. For this reason the decision of the Full Commission should be reversed. The decision of the Single Commissioner should be reinstated and the Claimant's aggravation of her psychological issues and eating disorder should be deemed compensable and the Defendants should be ordered to provide treatment for the aggravation of the Claimant's psychological issues and eating disorder.

2. THE FULL COMMISSIONER ERRED AS A MATTER OF FACT AND LAW WHEN THEY CHOSE TO IGNORE ALL EVIDENCE SUPPORTING THE COMPENSABILITY OF THE PSYCHOLOGICAL AND EATING DISORDER AND HELD THAT THE DECISION OF DR. LIND SHOULD BE GIVEN GREATER WEIGHT THAN THE OPINIONS OF DR. PIASECKI AND COUNSELOR HOBBS. (FINDINGS OF FACT 9, 10, 11, 12, 13, 15, 16 AND CONCLUSION OF LAW 8).

The decision of the Full Commission is not supported by the substantial evidence in the record. In fact the only evidence that supports the decision of the Full Commission is the report of Dr. Lind. The reliance on the opinion of Dr. Lind is misplaced for many reasons. There are many obvious flaws with the report of Dr. Lind and his conclusions are based on assumptions that are incorrect and simply wrong.

The report of Dr. Lind confirms he was hired by the Defense and only met with the Claimant one time for 60 minutes. (R. p. 1335). Dr. Lind's report also contains inaccuracies about the Claimant, the medical records involved and the medical treatment received by the Claimant. At Defendant's APA 16 (R. p. 1336) Dr. Lind indicates that the Claimant lives in Manning. (R. p. 1336). The Claimant has never lived in Manning. Dr. Lind also indicates the records he supposedly reviewed. (R. p. 1336). Dr. Lind indicates that he reviewed records from SouthEastern Spine Institute, Manning Medicine, Easter Cooper Regional Medical Center, Physical Rehabilitation Group, Clarendon Memorial Hospital, Lowcountry Urology Clinics, Fifi Jubran, MA, Rehabilitation

Consultant. The Claimant has not treated with any of the providers listed within Dr. Lind's report at R. p. 1336. There are no other medical records listed. At the time he prepared the report he did not have the records from Ridgeview Institute although the basis of his opinion is that the Claimant did not complete the treatment at Ridgeview. The assumption that Ms. Morrett did not complete the program at Ridgeview is false. The testimony of the Claimant was that she completed the program at Ridgeview. (R. p. 179, line 12 - p. 180, line 22) (R. p. 202, lines 19 - 25). The Full Commission affirmed the Single Commissioner's Finding in which he stated the Claimant's testimony was accurate and in line with her medical records and psychological records. (R. p. 25). Although the Claimant had some health problems on February 10, 2009 she returned to Ridgeview. (R. pp. 970 - 971). Her return to Ridgeview is noted in the Record at page 972 and within Defendants' APA 1300 (R. p. 1290) which is the admission note for her collapsed Lung and it indicates that she is being admitted on February 17, 2009 to Wellstar from a local psychiatric hospital where she is being treated for bullimia. The note states "The patient was due to be discharged" when referring to the local psychiatric hospital. (R. p. 1290). There was no Finding of the Full Commission or the Single Commission that the Claimant did not complete the program at Ridgeview. Furthermore, the Full Commission did not reverse the Single Commissioner's finding that the Claimant testified accurately and in-line with the medical records.

The foundation of Dr. Lind's opinion is that the Claimant did not complete the treatment at Ridgeview. A fact that is not true and not supported by the record. Furthermore, because of the flaws in Dr. Lind's report it is impossible to say what if any records he reviewed to form his opinion. The South Carolina Supreme Court has stated "It is, of course, elementary that the factual or

underlying basis for the expert's opinion be set out, otherwise the opinion lacks probative value” Young v. Tide Craft, 270 S.C. 453, 468, 242 S.E. 2d 671, 678 (1978). Clearly an expert report based on data that is not correct lacks probative value.

Although it has been argued by Defense Counsel that Dr. Lind reviewed Ms. Morrett's prior records before rendering his opinion there is no evidence of that within the record. It was clearly assumed by the Full Commission that Dr. Lind reviewed the prior records of the Claimant before rendering his opinion. The Full Commission's decision to give Dr. Lind's report more weight was based on this incorrect assumption. During oral argument Commissioner Beck asked Claimant's Counsel at page 16, line, 16 “Did he (Dr. Piasecki) have all the prior information?” when referring to the opinion of Dr. Piasecki. (R. p. 228, lines 16 - 17). It is also noted in Finding of Fact 15 of the Full Commission Order that Dr. Piasecki admitted he was not aware of the Claimant's extensive preexisting psychological treatment. (R. p. 36 - 37). So it is clear that the Full Commission's decision to give greater weight to the opinion of Dr. Lind was based on the incorrect assumption that he had reviewed the prior records of the Claimant. By assuming that Dr. Lind has reviewed the prior records of the Claimant the Commission has engaged in surmise, conjecture and speculation. The South Carolina Supreme Court has held that “an award may not rest upon surmise, conjecture or speculation. Tiller v. Nat'l Health Care Ctr. Of Sumter, 334 S.C. 333, 339 513 S.E. 2d 843, 845 (1999).

Dr. Lind also based his opinion on the false statement that the medical notes of Counselor Hobbs only mention the Claimant's work related injury 5 times. Dr. Lind states in his report that Counselor Hobbs medical notes only mention the work related injury five times. (R. p. 1338). Dr. Lind's statement is wrong. The injury is mentioned at least 10 times between May 2009 and July

2011. On **May 18, 2009** Counselor Hobbs notes “Pt experiencing significant anxiety over knee injury...processed fears/feelings over MRI on 5/21/11. Has appt. with an orthopedic MD in 3 weeks. Feels discouraged.” (R. p. 252). On **September 14, 2009** Counselor Hobbs notes “Pt. Reports finding new MD named Dr. Holmes. She reports being happy with MD and states she will continue to go.. (R. p. 252). The **April 12, 2010** note of Counselor Hobbs states: “Pt processed situation with knee injury. She reports frustration at having 4 surgeries in the last year. She reports constant pain in the knee and denies taking any pain medication. Pt. states her knee being “screwed up” messes up everything up. She states she cannot wear her leg brace. “Everything bad is happening to me!” When asked to clarify, she indicates she is referring to her knee injury.” (R. p. 252). On **May 3, 2010** Counselor Hobbs notes “Pt. Has MD appt. tomorrow. Processed feelings over treatment. She reports getting a new case manager for workman’s comp case and an attorney.” (R. p. 252). On **September 20, 2010** it is noted that the Claimant is distressed over not being able to exercise. , (R. p. 253). On **November 1, 2010** Counselor Hobbs record states ...”Reports Eating Disorder Bx’s are flaring up. Pt. Knows her triggers are combining to create a “perfect storm”....not being able to use her knee, being in pain...” (R. p. 253). On **January 17, 2011** it is noted “Discussed frustration over her leg. Her stress over leg and school and her inability to get control over ED Bx are her stated stressors at this time” (R. p. 254). On **May 9, 2011** it is noted that “Finances are an issue” (R. p. 256). At the time of this note the Claimant had been unable to work for over two years and lost health benefits when she got injured. On **May 16, 2011** Counselor Hobbs notes: “Pt. reports having a bad week because there was not structure.” (R. p. 256). On **June 20, 2011** it is noted that “Pt. discussed frustration over leg injury and inability to do the things she normally could due pre-injury.

Pt. expresses hopelessness about the future related to not being able to work.” (R. p. 256). On **June 27, 2011** it is noted that “Pt. expressed increased anxiety over upcoming MD appt., the ending of school, her hopelessness about her knee and her inability to work” (R. p. 257). On **July 25, 2011**, Counselor Hobbs notes indicate “Pt. appears discouraged and depressed...She stated she found it depressing to think another year of her life will be about her knee, with no promises of it being totally fixed at the end. Pt. Is highly anxious over ending school and being incapacitated due to surgery, etc.” (R. p. 257).

Dr. Lind’s mischaracterization of the records of Counselor Hobbs sheds doubt on what if any records he reviewed. Dr. Lind either failed to adequately review the records of the Claimant or chose to ignore the obvious mentions of the knee injury and the stressors that come with such an injury and multiple surgeries. Dr. Lind focuses on just the injury and ignores the six surgeries when he states “In my opinion it is this treatment failure, and not the work-related injury that occurred approximately three months later, that contributes to her ongoing eating behaviors.” (R. p. 1339). This opinion again refers only to the injury. Dr. Lind has ignored the six surgeries over nearly a three year period of time. For that reason alone his opinion is flawed.

In basing their decision on the opinion of Dr. Lind The Full Commission has ignored all other evidence in this case. The Full Commission ignored the testimony of the Claimant. They have ignored the records, questionnaire and testimony of Dr. Piasecki as well as the testimony of Counselor Hobbs.

In support of their decision to ignore the opinion of Dr. Piaseck, the Full Commission has cited the case of Potter v. Spartanburg Sch. Dist., 396 S.C. 17, 716 S.E. 2d 123 (Ct. App. 2011). The

reliance on Potter is misguided as Potter can easily be distinguished from the facts at hand. In fact, if the rationale of the Court in Potter is applied to the case of Alison Morrett the opinion of Dr. Piasecki should have been given greater weight. In Potter the Full Commission discounted the opinion of Dr. Randolph Waid, a licensed clinical psychologist who only performed one evaluation of Potter. Potter, at 21. Dr. Waid was not the treating physician. Potter, at 20. The Workers' Compensation Appellate panel affirmed the Order of the Single Commissioner and made some additional findings. Potter, at 21. The Appellate Panel affirmed the Single Commission holding that: "Dr. Waid is a clinical psychologist, not a neurosurgeon or a medical doctor, and his opinion concerning alleged brain damage is beyond his area of expertise" Potter, at 21. Additionally the Appellate Panel affirmed the holding of the Single Commission who held that "greater weight is given to the opinion of the treating physician". Potter, at 21. The South Carolina Court of Appeals affirmed the decision of the Appellate Panel.

In the case of Ms. Morrett, the Full Commission has discounted the opinion of Dr. Piasecki, the authorized treating physician, who had seen the Claimant eight (8) times at the time of the hearing before the Single Commissioner. He had also performed multiple surgeries on Ms. Morrett. In Potter, Dr. Waid was a hired expert of the Claimant who saw the Claimant one time. Potter, at 20. In the case of Alison Morrett Dr. Lind is a hired expert who evaluated the Claimant one time. On the other hand, Dr. Piasecki is the authorized treating physician picked by the Defendants because of his expertise in dealing with complicated cases such as Ms. Morrett's. Based on the opinions of Dr. Piasecki the Defendants have authorized multiple surgeries on the Claimant. The surgeries have included hospitalizations due to the complicated nature of the Claimant's situation. The parties have relied on his opinions to keep Ms. Morrett out of work, Ms. Morrett has continued to received

weekly benefits based on the opinions of Dr. Piasecki. The Defendants have approved all treatment that has been recommended by Dr. Piasecki with the exception of his recommendation that Ms. Morrett receive treatment for the aggravation of her psychological and eating disorder. In short, the Defendants picked Dr. Piasecki, have approved the treatment recommended to include two surgeries but now want to question his opinion regarding the aggravation of Ms. Morrett's psychological and eating disorder. Dr. Piasecki's credentials are impeccable and he has a unique perspective of having treated client's with very difficult orthopedic situations. He knows what the stress of multiple surgeries can do to ones psyche. Although South Carolina Code Ann. §42-15-60 (1976) allows the Defendants to determine the medical providers, it does not allow the Defendants to dictate treatment. Risinger v. Knight Textiles, 353 S.C. 69, 577 S.E.2d 222 (Ct. App. 2002). In this case the Defendants are attempting to dictate the Claimant's treatment.

It is important to note that throughout the South Carolina Workers' Compensation Act the opinion of the authorized treating physician and medical providers are given great deference. As stated above, under South Carolina Code Ann. § 42-1-160(D) (1976) stress, mental injuries, and mental illness alleged to have been aggravated by a work-related physical injury may not be found compensable unless the aggravation is:

- (1) admitted by the employer/carrier;
- (2) **noted in a medical record of an authorized physician that, in the physician's opinion, the condition is at least in part casually-related or connected to the injury or accident, whether or not the physician refers the employee for treatment of the condition;** (emphasis added)
- (3) found to be casually-related or connected to the accident or injury after evaluation by an authorized psychologist or psychiatrist; or
- (4) noted in a medical record or report of the employee's physician as casually-related or connected to the injury or accident.

In South Carolina the employer/carrier is given the authority to pick and authorize the selection of the authorized treating physician pursuant S.C. Code Ann. § 42-15-60 and S.C. Code Ann. Reg. 67-509. In the case of Alison Morrett the Defendants selected Dr. Piasecki as the authorized treating physician. Clearly this is a very powerful tool for the employer and carrier in the South Carolina Workers' Compensation system. In fact, if an injured employee refuses to accept medical treatment provided by the employer this can be grounds for termination of further compensation until the refusal ceases. South Carolina Code § 42-15-60. Other examples of the Workers' Compensation Act giving great deference to the opinions of the authorized treating physician can be found within S.C. Code Ann. Reg. 67-505 which grants the employer/carrier the right to terminate temporary total benefits when the authorized health care provider reports that an injured worker is able to return to work. Within S.C. Code Ann. Reg 67-502 the phrase "Return to work without restriction" is defined as "A statement of the authorized health care provider..." The opinion of the authorized health care provider is also controlling when an employer wants to terminate temporary total compensation after 150 days pursuant to S.C. Reg. 67-506. The Commission has created a Form 14B which is to be completed by the authorized health care provider. This form is entitled "Physician's Statement". Clearly the opinion of the authorized treating physician or provider should be given great deference.

Ms. Morrett has treated with Dr. Piascki, the authorized treating physician, and he has determined that she is in need of psychological treatment and treatment for an aggravation of her eating disorder as a result of her admitted accident and the subsequent six (6) surgeries the claimant has endured. What the Full Commission has done in disregarding and discounting the opinion of

Dr. Piasecki is given the employer a second bite at the apple. The Defendants chose Dr. Piasecki and they should be bound by his opinion as he was and is the authorized treating physician.

Instead the Full Commission has given deference to Dr. Lind, an IME psychologist. In looking at the opinion of Dr. Lind and applying the same rationale as used by the Court in Potter v. Spartanburg Sch. Dist., 396 S.C. 17, 716 S.E. 2d 123 (Ct. App. 2011) the decision of the Full Commission should be reversed. Dr. Waid in Potter and Dr. Lind in the case at hand are in very similar situations. Dr. Waid saw the Claimant in Potter on one occasion. Potter, at 20. Dr. Lind saw Ms. Morrett on one occasion for about one hour. Dr. Waid did not treat the Claimant in Potter. Potter, at 21. Dr. Lind did not treat the Claimant in the case at hand. In Potter, great deference was given to the authorized treating physician. Potter, at 21. In the case of Alison Morrett great deference should be given to the authorized treating physician. The Court in Potter also felt that it was important that Dr. Waid was the only medical provider giving an opinion that Potter had suffered a physical brain injury. Potter, at 23. In the case of Alison Morrett, Dr. Lind is the only opinion in this record that states the injury and subsequent surgeries have not aggravated the Claimant's psychological and eating disorder.

In the case of Alison Morrett the opinion of Dr. Piasecki is bolstered by the opinions of Counselor Hobbs. In ignoring the authorized treating physician's opinion in this case the Full Commission has committed a violation of the statutory provisions of the Workers' Compensation Act, an error of law, their decision is clearly erroneous in view of the reliable, probative and substantial evidence in the record and their holding is an abuse of discretion.

In conclusion, there is not substantial evidence within the record to support the Full Commission's decision to give greater weight to the opinion of Dr. Lind. The decision of the Full

Commission to give greater weight to the opinion of Dr. Lind is based upon surmise, conjecture and speculation that Dr. Lind reviewed prior records of the Claimant before forming his opinion and a decision cannot be based on surmise conjecture or speculation pursuant to Tiller v. Nat'l Health Care Ctr. Of Sumter, 334 S.C. 333, 339 513 S.E. 2d 843, 845 (1999). Dr. Lind's report is also based on assumed facts that are not correct, to include his assumption that the Claimant did not complete treatment at Ridgeview. Dr. Lind also incorrectly bases his opinion on his belief that the injury is only discussed with Counselor Hobbs five (5) times. Furthermore, when the rationale of the Court of Appeals in Potter v. Spartanburg Sch. Dist., 396 S.C. 17, 716 S.E. 2d 123 (Ct. App. 2011) is applied to the facts of this case, the opinion of Dr. Piasecki should have been given greater deference.

The decision to hold that the aggravation of the Claimant's psychological and eating disorder are not compensable is not supported by the substantial evidence in the record. The South Carolina Administrative Procedures Act establishes the substantial evidence standard for judicial review of the decisions by the Commission. S.C. Code Ann. § 1-23-380 (1976); Lark v. Bi-Lo, Inc., 276 S.C. 130, 134-35, 276 S.E. 2d 304, 306 (1981). Because the decision of the Full Commission is not supported by substantial evidence in the record the decision should be reversed. The Claimant's aggravation of her psychological and eating disorder should be found compensable.

3. THE FULL COMMISSION ERRED AS A MATTER OF FACT AND LAW WHEN THEY MISQUOTED THE RECORD AND STATED THAT DR. PIASECKI DID NOT CONSIDER THE CLAIMANT'S PREEXISTING CONDITION WHEN RENDERING HIS OPINIONS. (FINDING OF FACT 15).

The Full Commission stated in Finding of Fact 15 that Dr. Piasecki was not aware of the Claimant's extensive preexisting psychological treatment and did not take her preexisting condition

into account when rendering his opinion. This finding is not supported by substantial evidence and is an error of fact. (R. pp. 36 - 37). At page 8, line 11 of Dr. Piasecki's deposition he was asked to review the report of Dr. Lind. (R. p. 149, lines 11 - 14). After being confronted with the report of Psychologist Lind and the extensive prior treatment and trauma that the Claimant has endured, Dr. Piasecki stated that "I would say that the stress of undergoing as many surgeries as she has, has increased the likelihood of her having worsening depression and eating disorders more than 50 percent..." (R. p. 150, lines 14 - 21). At page 10, line 16 of Dr. Piasecki's deposition he was asked: "Were you aware that, at the time of this accident and after this accident, the Claimant had anxiety issues regarding the relationship with her mother?" (R. p. 151, lines 16-18). At page 151, line 20, Dr. Piasecki is asked : "Were you aware that, at the time of this accident and after this accident, the Claimant has had anxiety issues with regard to relationships with men?" (R. p. 151, line 20). At page 151, line 25 through page 152, line 3 Dr. Piasecki was asked: "Were you aware that, before this accident and after this accident, the Claimant has had anxiety issues as a result of the molestation at age five?" (R. p. 151, line 20 - p. 152, line 3). After being confronted with the report of Dr. Lind and the facts regarding the Claimant's prior psychological issues Dr. Piasecki is asked at page 152, line 4: "Do you still agree that the Claimant's psychiatric condition has been aggravated by the knee injury?" Dr. Piasecki answered "Yes" at page 152, line 6 of the record. (R. p. 151, lines 4 - 6).

The answer of Dr. Piasecki at page 159 and 160 of the Record clearly proves he considered the Claimant's pre-existing issues. (R. pp. 159 - 160). At page 159, line 18 Dr. Piasecki states: "Whether or not she needed inpatient treatment at the time of the injury, I think is immaterial because what I think she has is a relative worsening of whatever she had then. So there may be a certain threshold above which a psychiatrist or a psychological or a counselor would recommend

inpatient treatment. And beyond that, patients could have any of a number of degrees of severity of psychiatric problems. If she was at the threshold of needed admission at that point, the fact that she's worse now and still needs that, does not necessarily negate that she's had a worsening as a result of this whole process." (R. p. 159, line 18 - p. 160, line 5). Dr. Piasecki is then asked "So are you saying even if she needed treatment at the time, the treatment she needs now is more than the treatment she needed at the time? Dr. Piasecki answered "Yes". (R. p. 160, lines 6 - 10).

The Finding of the Full Commission that Dr. Piasecki did not consider the preexisting condition of the Claimant is false and not supported by the substantial evidence in the record. The Finding of the Full Commission amounts to an error of law and is grounds for reversal of the decision. The South Carolina Administrative Procedures Act establishes the substantial evidence standard for judicial review of the decisions by the Commission. S.C. Code Ann. § 1-23-380 (1976); Lark v. Bi-Lo, Inc., 276 S.C. 130, 134-35, 276 S.E. 2d 304, 306 (1981). There is no evidence in the record to support the Full Commission's Finding that Dr. Piasecki did not take the Claimant's pre-existing condition into account when rendering his opinion. Because the decision of the Full Commission is not supported by substantial evidence in the record the decision should be reversed.

4. THE FULL COMMISSION ERRED AS A MATTER OF FACT AND LAW IN CONSIDERING A MEDICAL SUMMARY HANDED UP BY THE DEFENSE AT ORAL ARGUMENT OVER THE OBJECTION OF THE CLAIMANT AS IT WAS NOT A PIECE OF EVIDENCE AND WAS NOT SUBMITTED PURSUANT TO THE ADMINISTRATIVE PROCEDURES ACT. THE CLAIMANT HAD NO NOTICE THAT THE SUMMARY WOULD BE HANDED UP AT THE ORAL ARGUMENT AND THUS WAS NOT ALLOWED TO ADDRESS THE SUMMARY WHEN BRIEFING THE ISSUES.

At the oral argument before the Full Commission, Defense Counsel handed up an 18 page summary of the Claimant's psychological treatment over the objection of Claimant's Counsel. (R.

pp. 1386 - 1403). Counsel for the Claimant objected to the introduction and consideration of the summary based on the fact that it is not a piece of evidence, the Claimant did not know it was to be handed up at oral argument and thus did not have an opportunity to brief, review or respond to the summary. (R. p. 215, line 23 - p. 216, line 4). The first notice that Claimant's Counsel had that the summary existed and was to be handed up at oral argument was a few minutes before the hearing. Over the objection of Claimant's Counsel the Full Commission decided to consider the summary and allowed it to be handed up to the Commissioners on the Panel.

The summary is 18 pages and contains cherry picked portions of the Claimant's medical history/records and to consider the summary in this case was a violation of the statutory provisions of the Workers' Compensation Act, the Administrative Procedures Act, was in excess of the authority granted to the Full Commission, was unlawful procedure, affected by an error of law, clearly erroneous and to consider the summary amounts to an abuse of discretion.

Pursuant to S.C. Code Ann. § 1-23-320(E) (1976); Opportunity must be afforded all parties to respond and present evidence and argument on all issues involved. In the case at hand the Full Commission committed an error of law when the allowed the summary to be handed up and considered. The summary was not served on Claimant's Counsel prior to the hearing, was not in the record, was not a piece of evidence and the Claimant did not have the opportunity to brief references within the summary.

In contested cases S.C. Code Ann. § 1-23-330 (1) (1976) provides; Irrelevant, immaterial or unduly repetitious evidence shall be excluded... In this case the summary is an incomplete representation of some of the Claimant's psychological records. It is clearly repetitious evidence.

It is also prejudicial as it is not a complete summary of the Claimant's medical or psychological records. Thus it should have been excluded.

If the Defendants wanted to introduce the summary there are procedures to follow for the introduction of new evidence. S.C. Code Ann. Reg. 67-707(B) provides; "when a party seeks to introduce new evidence into the record on a case on review, the party shall file a motion and affidavit with the commission's Judicial Department." In the case at hand no such motion or affidavit was filed.

Further, S.C. Code Ann. Reg. 67-705 requires that a brief be filed and served in a timely manner. To prevent a party from being surprised by an argument, S.C. Reg. 67-705 (H)(1) states; "all briefs must be filed at least five days before the scheduled date for review. The Commission will exclude from consideration a brief filed later than five days before the scheduled review." In the case at hand the Defendants should have been prevented from handing up a document at oral argument that had not been filed and served on the other party and had not been reviewed by the other party. This is a clear violation of S.C. Code Ann. § 1-23-320(E), § 1-23-330 (1), S.C. Reg. 67-707(B) and S.C. Reg. 67-705. It was unfair to the Claimant and prejudicial to allow such a piece of evidence in at the last minute. The statutes and regulations surrounding the workers' compensation act are put in place to prevent a party from being surprised on the day of a hearing.

At the Full Commission Hearing Defense Counsel argued that the Summary was already in evidence. That is not correct. The summary offered at the Full Commission Hearing was different than the summary used at the hearing before the Single Commissioner. The summary handed up at the Full Commission was entitled "Claimant's Psychological Treatment" and is 18 pages. (R. 1386). The summary handed up at the hearing before the Single Commission was 36 pages and is entitled

“Medical Summary”. (R. 1350). The summary handed up at the Single Commission hearing was much more even handed and included references to the Claimant’s physical therapy, the Claimant’s surgeries and treatment with Dr. Piasecki. The summary handed up at the Single Commission also referenced notes of Dr. Piasecki which were favorable to the position of the Claimant. The Single Commission summary includes a summary of the note in which Dr. Piasecki states that he believes her psych state is work related due to multiple surgeries and in which he recommends that the Claimant see a nutritionist. (See pg. 32 of the Summary entitled “Medical Summary”) (R. p. 1381). It is also noted on pg. 34 that Dr. Piasecki answered affirmatively to the questionnaire that was submitted to him by Claimant’s Counsel concerning causation/aggravation of the psychological condition. (R. p. 1383).

The “Claimant’s Psychological Treatment” document which was erroneously considered by the Full Commission is much more one sided. (R. 1386). There is no mention of Dr. Piasecki’s records or his opinions. Although Counselor Hobbs notes are referenced there is no mention of her deposition testimony in which she stated that the extensive treatment following this admitted on the job injury has aggravated the Claimant’s psychological condition. There is no mentioned of the extensive physical therapy the Claimant has endured. The surgery notes and records are not summarized in this document. There is nothing in this summary that supports the Claimant’s position in this case.

The argument that portions of the summary were handed up at the Single Commission hearing should not excuse the Full Commission’s obvious error in this situation. Hearings before the Single Commission and the Full Commission are very different. There are strategic reasons that one might allow a summary in before a Single Commissioner but object to a summary at the Full

Commission. Those reasons include the fact that a Single Commissioner gets to hear testimony and observe the Claimant. There is a chance to respond to such a summary at the Single Commission level through argument and testimony. At the Full Commission hearing the time to argue is very limited. Prior to a hearing Counsel should be able to rely on the fact that a Full Commission hearing will be limited to the record. It should be safe to assume that the arguments will be limited to issues briefed. It should also be safe to assume that the record is closed and that the decision of the Full Commission will be based on the documents and evidence that was presented at the Single Commission hearing. Interestingly, the summary that Defense Counsel handed up at the Full Commission Hearing was not referenced or mention within the Defendants' brief to the Full Commission. Therefore, Counsel for the Claimant had no opportunity to respond to the summary. Certainly, such a document would never have been considered by the S.C. Court of Appeals or the South Carolina Supreme Court.

The Full Commission's decision to allow the summary to be handed up and considered was an abuse of discretion and an error of law. This is a clear violation of S.C. Code Ann. § 1-23-320(E) (1976), § 1-23-330 (1), S.C. Code Reg. 67-707(B) and S.C. Code Reg. 67-705. The decision to allow the summary in was in excess of the authority granted the Full Commission, was unlawful procedure, affected by an error of law and a misapplication of the law and to consider the summary amounts to an abuse of discretion.

5. THE FULL COMMISSION ERRED AS A MATTER OF FACT AND LAW IN FAILING TO ADDRESS THE CREDIBILITY OF THE CLAIMANT AS THE SINGLE COMMISSIONER HELD THAT THE CLAIMANT TESTIFIED ACCURATELY AND IN LINE WITH THE MEDICAL AND COUNSELING RECORDS IN THE CASE WITHIN HIS FINDING OF FACT 9 YET THE FULL COMMISSION DID NOT REVERSE THIS FINDING AND DID NOT ADDRESS THE ISSUE.

The Single Commissioner made a Finding of Fact at Finding of Fact 9 that “Claimant testified accurately and in line with the medical and counseling records in this case”. (R. p. 25). The Defendants appealed this Finding when they filed their Form 30. (R. p. 45, Issue #3). Within their Form 30, the Defense raised the issue at #3 “Whether the Commissioner erred in Finding of Fact No. 9 that the Claimant “testified accurately and in line with the medical and counseling records in this case”. The Defendants also raised the issue in their Brief to the Full Commission. On page 6 of their brief they list the Issue of whether or not the Claimant testified accurately and in-line with the medical records and counseling records as #3. (R. p. 53). Under the heading of “Arguments” Number 1a. the Defendants argued that the testimony of the Claimant was not accurate and in-line with the medical and counseling records. (R. p. 54). Page 7 and 8 of Defendants’ brief is devoted to arguing that the Claimant did not testify accurately and in-line with the medical and counseling records. (R. pp. 54-55). The Claimant responded to this argument in their brief and argued that the Claimant’s testimony was accurate and in-line with the medical and counseling records.

This is a very important issue because the Claimant testified that she completed the Ridgewiew program. The foundation of Dr. Lind’s opinion is based on his assumption that she did not complete the program. (R. pp. 82-83). The Claimant also testified that the injury and the extensive recovery from each surgery had aggravated her psychological and eating disorder. Without giving a factual basis the Full Commission choice to completely ignore the Claimant’s testimony and did not rule on the issue of whether she testified accurately and in line with her medical records.

Despite the Single Commission’s Finding that the testimony of the Claimant was accurate and the issue being appealed in the Form 30, the Full Commission failed to specifically address this issue in their decision. As the Full Commission made no finding of fact concerning whether or not

the Claimant's testimony was accurate and in-line with the medical records this matter must be remanded to the Full Commission for a proper finding. The Case of Nettles v. Spartanburg School District #7, 341 S.C. 580, 535 S.E. 2d 146 (S.C. Ct of Appeals 2000) is controlling. In Nettles the Claimant claimed to have suffered a compensable injury to her right iliac crest. Nettles, at 585. The Single Commissioner failed to make any findings of fact concerning problems associated with the illiac crest.Nettles, at 585. Nettles filed a Form 30 requesting the Commission review the decision of the Single Commissioner. Specifically, Nettles raised the issue of whether the "Commissioner erred in failing to find that Nettles had a compensable injury to her right iliac crest.Nettles, at 585. The Full Commission adopted the Single Commissioner's findings of fact and conclusions in their entirety and affirmed the Single Commissioner. Nettles v. Spartanburg School District #7, 341 S.C. 580, 535 S.E. 2d 146 (S.C. Ct of Appeals 2000). Nettles perfected a timely appeal of the Commission's decision to the Circuit Court. Nettles, at 585. Although the Circuit Court noted that Nettles set forth seven exceptions to the Commission's decision including its "failure to award permanent partial disability to the right iliac crest" the Circuit Court found that there was substantial evidence in the record to support the Commission's failure to award any disability to the right iliac crest. Nettles, at 586. Nettles appealed, claiming that the Circuit Court erred in finding substantial evidence to support the Full Commission's failure to award her partial disability for her left lower extremity as the Commission made no specific finding of fact concerning this issue. Nettles, at 588. The S.C. Court of Appeals held that they must remand the issue to the Commission because the Commission made no specific finding of fact concerning the issue (disability to right iliac crest) but implicitly ruled on it.Nettles,at 588. It was remanded for a proper finding.

In the case of Nettles v. Spartanburg School District #7, 341 S.C. 580, 535 S.E. 2d 146 (S.C. Ct of Appeals 2000) the South Carolina Court of Appeals stated; “As the commission made no specific finding of fact concerning this issue, but implicitly ruled on it, we must remand the issue to the commission for a proper finding. Further, within the footnote to this paragraph at FN4 it is noted:

“The commission’s failure to explicitly rule on an issue raised to it in a Form 30 does not create an error preservation problem although a similar omission in a civil proceeding would be fatal. While a trial court’s ruling may be challenged by an aggrieved party with a motion to reconsider under Rule 59 or 60, worker’s compensation law does not contain a motion to reconsider before the commission. An aggrieved party may not challenge the commission’s decision with a motion to the commission, but only with an appeal...

The Court went on to say that the “Commission’s implicit ruling concerning the hip is too indefinite for this Court to review. The Commission must make specific findings of fact upon which a claimant’s right to compensation are based. S.C. Code Ann. 1-23-350. The Nettles Court cited the South Carolina Supreme Court decision of Airco, Inc. V. Hollington, 269 S.C. 152, 160 236 S.E. 2d 804, 808 (1977) in which the Supreme Court held that the Commission has a statutory duty to make a finding of fact for all “essential factual issues.”

The Full Commission in the case of Alison Morrett has failed to rule on the issue of whether or not the Claimant testified accurately and in line with her medical and psychological records. Instead she chose to completely ignore the testimony of the Claimant to include the testimony that the injury and six (6) surgeries, the rehab, the pain the stress of the unknown and the inability to work for over (3) three years has aggravated her psychological and eating disorder. The Full Commission also decided to ignore the testimony that the Claimant completed the treatment at Ridgeview despite Dr. Lind’s opinion being based on his assumption that she did not. The Full Commission has implicitly ruled that the Claimant is not credible but failed to make specific findings

of fact concerning this issue. As the Court of Appeals did in of Nettles v. Spartanburg School District #7, 341 S.C. 580, 535 S.E. 2d 146 (S.C. Ct of Appeals 2000) the case of Alison Morret should be remanded for specific findings to indicate why the Full Commission felt the testimony of the Claimant could be ignored. Whether or not the testimony of the Claimant was accurate is an essential factual issue and must be ruled upon pursuant to Airco, Inc. V. Hollington, 269 S.C. 152, 160 236 S.E. 2d 804, 808 (1977).

The Full Commissions' decision is inconsistent, incomplete and amounts to an error of law, is clearly erroneous in view of the reliable, probative and substantial evidence in the record and to disregard the testimony of the Claimant amounts to an abuse of discretion. Because they failed to rule on the accuracy of the Claimant's testimony their decision is not supported by substantial evidence in the record and must be remanded for specific findings. See Parson v. Georgetown Steel, 318 S.C. 63, 456 S.E. 2d 366 (1995) in which the South Carolina Supreme Court held that an order of the Commission that does not include sufficiently detailed findings of fact must be remanded to the Commission.

6. THE FULL COMMISSION ERRED AS A MATTER OF FACT AND LAW IN CONCLUDING WITHIN THE ORDER PORTION OF THE FULL COMMISSION ORDER THAT THE CLAIM FOR AGGRAVATION OF A PRE-EXISTING PSYCHOLOGICAL CONDITION AND EATING DISORDER SHOULD BE DENIED IN ITS ENTIRETY TO INCLUDE DENIAL OF MEDICAL TREATMENT FOR THE AGGRAVATION AS THE DECISION IS BASED ON ERRORS OF LAW, CLEARLY ERRONEOUS IN VIEW OF THE RELIABLE, PROBATIVE AND SUBSTANTIAL EVIDENCE IN THE RECORD AND INVOLVES ABUSE OF DISCRETION.

Within the Order portion of the Full Commission Order they ruled that the Claimant's claim for aggravation of her eating disorder and psychological condition should be denied in its entirety. This would include denial of medical treatment for the psychological condition and eating disorder.

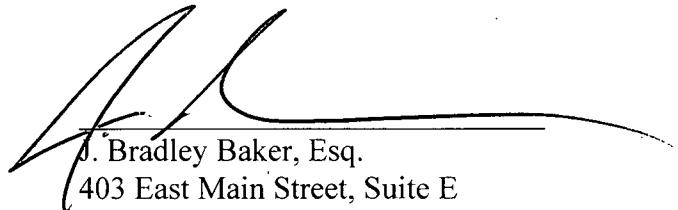
The Full Commission also held at Finding of Fact 4 that the Claimant was only entitled to medical treatment for her knee. For the reasons stated above the decision of the Full Commission with regards to medical treatment should be reversed. The Decision of the Single Commission should be reinstated to include the award of treatment to the Claimant for the aggravation of the preexisting psychological condition and eating disorder. Pursuant to S.C. Code Ann. 42-15-60 (1976) the claimant is entitled to medical treatment for the compensable psychological injuries as long as such treatment would tend to lessen the Claimant's period of disability as evidence by expert medical evidence stated to a reasonable degree of medical certainty. Dr. Piasecki noted in his office visit of October 20, 2011 "I do believe that her psychological state is work related given the multiple surgeries which have been involved here and I would recommend that she see a nutritionist as well as get back on an antidepressant which she has previously been prescribed. She should have follow up for this with a psychiatrist in my opinion". (R. p. 472).

Dr. Piasecki confirmed his opinion in a questionnaire dated November 30, 2011 which was introduced as Claimant's APA 148 (R. p. 481). Within the questionnaire, Dr. Piasecki confirms that the opinions expressed in his medical note of October 20, 2011 are his opinions to a reasonable degree of medical certainty. Further, in his deposition of January 26, 2012, Dr. Piasecki (referred to incorrectly as Tiasecki by the court reporter) reaffirms his opinions.

The substantial evidence in this record does not support the decision of the Full Commission to deny aggravation of the Claimant's psychological condition and eating disorder and thus the matter should be remanded and the Claimant awarded medical treatment as the reliable, probative and substantial evidence in the record proves that such medical treatment for the aggravation of the psychological condition and eating disorder would tend to lessen the Claimant's period of disability.

CONCLUSION

For the reasons stated above the decision of the Full Commission should be reversed and the Decision of the Single Commissioner should be reinstated. The aggravation of the Claimant's psychological condition and eating disorder should be found compensable and the Defendants should be ordered to provide medical treatment to the Claimant for the aggravation of the psychological and eating disorder. In the alternative, this matter should be remanded to the Full Commission for further findings and to correct statutory and procedural errors.

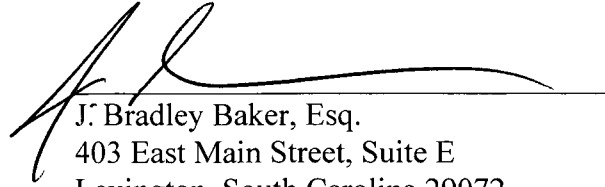


J. Bradley Baker, Esq.
403 East Main Street, Suite E
Lexington, South Carolina 29072
(803) 356-2800 - Office
(803) 358-9402 - Facsimile
Jbb@jbradleybakerlaw.com
Attorney for Appellant

Certificate of Counsel

The undersigned hereby certifies that the Final Brief of the Appellant complies with Rule

211(b).



J. Bradley Baker, Esq.
403 East Main Street, Suite E
Lexington, South Carolina 29072
(803) 356-2800 - Office
(803) 358-9402 - Facsimile
Jbb@jbradleybakerlaw.com
Attorney for Appellant

December 23, 2013

RECEIVED
JAN 06 2014
SC Court of Appeals

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

RECEIVED

JAN 09 2014

SC Court of Appeals

APPEAL FROM THE SOUTH CAROLINA WORKERS' COMPENSATION COMMISSION

Gene McCaskill, Commissioner
T. Scott Beck, Commissioner
Melody L. James, Commissioner

JAN 09 2014

SC Court of Appeals

Appellate/Tracking Case Number : 2012-212972

Alison Morrett,

Employee, Claimant/Appellant.

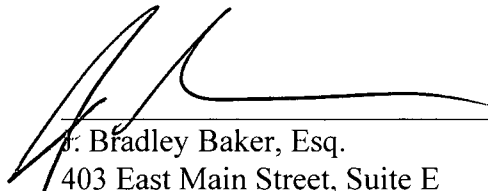
v.

Capital City Ambulance of GA, Ltd. and
Companion Property and Casualty Group,

Employer, Carrier/Respondents,

PROOF OF SERVICE

I certify that I have served the Final Brief of Appellant and Final Reply Brief of Appellant on the South Carolina Workers' Compensation Commission by depositing a copy of the same in the United States Mail, postage prepaid, on January 8, 2014, addressed to the South Carolina Workers' Compensation Commission, Attn: Judicial Department, Post Office Box 1715, Columbia, South Carolina 29202-1715.



J. Bradley Baker, Esq.
403 East Main Street, Suite E
Lexington, South Carolina 29072
(803) 356-2800 - Office
(803) 358-9402 - Facsimile
jbb@jbradleybakerlaw.com

January 8, 2014