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APPELLATE PANEL DECISION AND ORDER
OF THE

SC Court of Appeals

SOUTH CAROLINA WORKERS' COMPENSATION COMMISSION

W.C.C. FILE NO: 1413781

MAZIE PALMER, CLAIMANT

EMPLOYEE,
CLAIMANT/RESPONDENT

vs.

SOUTH CAROLINA DEPARTMENT
OF CORRECTIONS.

EMPLOYER,

and

STATE ACCIDENT FUND,

CARRIER,
DEFENDANTS/APPELLANTS.

Appellate Panel Review held in Columbia, South
Carolina on March 18, 2019, per notices
timely and properly served upon all parties of interest.

Appellate Panel Decision and Order Filed:

April 26

APPEARANCES:

Claimant/Respondent was represented by John K.
Koon, Esquire and J. Leeds Barroll, Esquire,
Columbia, South Carolina.

Defendants/Appellants were represented by Gabriel
Coggiola, Esquire, Columbia, South Carolina.

STATEMENT OF THE CASE

~~This parties were heard by Hearing Commissioner R. Michael Campbell, II at a hearing on~~
June 12, 2018, in Columbia, South Carolina. As a result of the hearing, Commissioner Campbell issued a Decision and Order on December 13, 2018, from which Defendants/Appellants appealed.

This matter was heard before the South Carolina Workers' Compensation Full Commission Appellate Panel on March 18, 2019. After consideration of the matter and review of the evidence, the Appellate Panel affirms with amendments the Decision and Order of the Single Commissioner which is incorporated below.

MEDICAL EVIDENCE/RATINGS- APA SUBMISSIONS

Pursuant to the South Carolina Administrative Procedures Act, South Carolina Code §1-23-320 *et seq.* and Regulation 67-612, the parties submitted the following items without objection as evidence in support of their cases.

CLAIMANT'S APA SUBMISSIONS

- APA #1 Report of Tariq Horani, MD at Palmetto Richland Memorial Hospital, consisting of 3 pages.
- APA #2 Vocational Evaluation Report of J. Adger Brown, Jr., consisting of 8 pages.
- APA #3 Questionnaire of J. Joseph Healy, MD, consisting of 2 pages.
- APA #4 Form 14B and Report of J. Joseph Healy, MD, consisting of 3 pages.
- APA #5 Reports and records of J. Joseph Healy, MD, consisting of 28 pages
- APA #6 Reports and records of Avie Rainwater, III., PhD and Stephanie Gibson, M.S. at LifeCare Psychology Group, LLC, consisting of 60 pages.

APA #7 IME Report for Defendants of David Stickler, MD, consisting of 4 pages.

~~APA #8 Reports and records of Nancy Lembo, D.O., consisting of 26 pages~~

APA #9 Reports and records of J. Joseph Healy, MD, from Carolinas Hospital System, consisting of 5 pages.

APA #10 Questionnaire of J. Joseph Healy, MD, consisting of 1 page.

DEFENDANTS' APA SUBMISSIONS

APA #11 Report and records of Timothy Malone, MD at Columbia Psychological Associates, consisting of 30 pages.

APA #12 Report from Palmetto Health Richland Memorial Hospital, consisting of 1 page.

APA #13 Reports and records from Kershaw Health Urgent Care, consisting of 22 pages.

APA #14 Reports and records of J. Joseph Healy, MD, consisting of 48 pages.

APA #15 Reports from Kershaw Medical Center - Radiology, consisting of 1 page.

APA #16 Reports from Carolinas Hospital System, consisting of 2 pages.

APA #17 Report from InMed Diagnostic Services, MD, consisting of 2 pages.

APA #18 Reports and records of First Physical Therapy, consisting of 34 pages.

APA #19 Reports of Matthew Gaskins, MD at Columbia Psychological Associates consisting of 19 pages.

APA #20 Test Results from Pain Specialists of Columbia, consisting of 2 pages.

DEFENDANTS' EXHIBITS:

EXHIBIT A Deposition of Claimant.

EXHIBIT B Deposition of Dr. Joseph Healy

EXHIBIT C Deposition of Dr. Nancy Lembo.

EXHIBIT D InQuest Investigative and Surveillance Reports.

EXHIBIT E Palmetto Home & Land Realty Website.

EXHIBIT F AMA 6th Ed. Chapter 13.

EXHIBIT G Surveillance DVD Footage.

STIPULATIONS

At the call of the case, counsel for the parties stipulated the South Carolina Workers' Compensation Commission has jurisdiction of this case and that venue is proper. The purpose of this hearing was to determine the issues raised in the Forms 50, 51, and 21. The date of accident was September 16, 2014. The claim is admitted as to the head and neck. Notice of the hearing was timely served upon all parties of interest. Both parties agreed and stipulated that the average weekly wage is \$921.18 and the corresponding maximum compensation rate is \$614.18. Without objection, and with the exception of any self-serving statements or unstipulated medical reports, the Commission's file was made a part of the record.

PROCEDURAL BACKGROUND

This matter is properly before Commissioner Campbell to resolve issues raised in Claimant's Form 50 and Defendants' Form 51 and Form 21 and he held that hearing on June 12, 2018. Notices were timely and properly served upon all parties of interest at which time the parties and their representatives appeared and evidence of the claim was submitted.

This is an admitted case in which the Claimant was knocked down by a psychotic inmate who kicked her legs from under her, causing her to fall and hit her head on the wall and tile floor,

rendering her unconscious on September 16, 2014. She contends that she suffered injuries to her ~~head, brain, neck and back. She contends that she is totally and permanently disabled and seeks~~ total and permanent disability benefits pursuant to SC Code Section 42-9-10. The Claimant also contends that she has severe and permanent physical brain damage entitling her to lifetime benefits as set forth in SC Code Section 42-9-10 (c). She also seeks lifetime medical benefits.

The Defendants admit that the Claimant sustained a compensable injury to her head and neck. Form 58, number 3. The Defendants deny that the Claimant is totally and permanently disabled or is entitled to lifetime benefits under SC Code Section 42-9-10 (c) as a result of physical brain damage. The Defendants deny that the Claimant is entitled to lifetime medical treatment. The Defendants contend that they are entitled to credit for overpayment of temporary total disability benefits paid to the Claimant after the date of maximum medical improvement, but this is no longer relevant to this case in light of the Appellate Panel's decision.

CLAIMANT BIOGRAPHICAL

AGE: 45 Years (Born June 24, 1972)

SEX: Female

HEIGHT: 5'7"

MARITAL STATUS: Divorced

CHILDREN: 1 daughter, age 10, lives in Claimant's home

WORK HISTORY: Claimant has worked as a registered nurse since 1998. She worked with the South Carolina Department of Corrections from November 13, 2013 through her date of injury.

EDUCATION: Bachelor's Degree in Science and Biology from the University
Of South Carolina and Associate Degree in Nursing from
Midland's Technical College.

EVIDENCE OF THE CASE

Testimony was taken from the Claimant who stated that she had been working as a Registered Nurse since 1998. She worked at Providence Hospital on the cardiac floor and electrophysiology (EP) lab for about 10 years. She next worked in the EP lab at Dr. Bouknight's office for a year. Claimant then worked in the EP Lab at Richland Memorial Hospital for about 4 years. She also worked in the Pacer Clinic and at an EP lab in Charlotte. She started working as an Emergency Room or Sick Call Nurse of the SC Department of Corrections.

On September 16, 2014, a psychotic inmate kicked her legs out from under her, and she fell and hit her head on the wall and tile floor, rendering her unconscious. She hit her head on the wall and tile floor three times within a brief period of time. Palmer Dep. 41-43; Tr. 34-35, 37-38.

The claimant testified at the hearing that she injured her head, neck, and back during a series of falls. In the first fall, she hit the back of her head on the wall. Tr. 38:19-23 She either lost consciousness or lost full awareness during three of these falls. The initial fall occurred when she was treating a psychotic patient with stomach pain, who suddenly started flailing and kicked the claimant's legs out from under her. The claimant testified that after the initial fall she did not remember anything until a guard came in. *Id* at 34-35, 37-38.

After the accident, the claimant had a headache and neck pain. She had a knot on the right side of her temple. *Id* at 38:14-18. She was taken by ambulance to Palmetto Health Richland Hospital on the day of the accident. The claimant testified that there is some time she can't

remember while she was in the hospital. *Id* at 39:3-7. The claimant testified that after her release from the hospital she still had headaches and neck and back pain. *Id* at 40:8-10.

The claimant testified that the day after she left the hospital, she passed out twice and had to go to Urgent Care. *Id* at 41:12-24. The claimant testified that since the accident and through the present, she has always had a daily headache. She wakes up crying every morning. *Id* at 43:4-18. Some days are more severe than others. *Id* at 47: 2-9. In order to accommodate the migraines, she must lie in bed and completely darken the room. These headaches can come in clusters that last for 2 to 3 days. *Id* at 45:17-25.

The claimant testified that she has not found a way to ward off the headaches and that sometimes they are so severe she must stop all activities and just lie down. *Id* at 45:12-16. The claimant testified that her headaches are sometimes so severe that they are blinding and excruciating, which she described as like a vice grip. She testified that when she has occipital neuralgia, her pain level is "like a 12." She testified that she sometimes sees spots in her eyes. She stated that even when the headaches are not at this level, they are migraine and tension headaches. *Id* at 44-45.

The claimant testified that in a normal week she would have 2 to 4 good days, but even on a good day she still has headaches which worsen with activity. *Id* at 46, 50. She attempts to drive and care for her ten year old child on her good days. The claimant testified that even on her good days her condition worsens with activity. *Id* at 46:10-20. She has headaches daily. *Id* at 43:8-12. The claimant lives next door to her mother and once or twice per week she has to have her mother take her daughter to school. *Id* at 18:6-9. On her worst days, she sometimes loses sight in

the right eye because of the intensity of the headache; this happens approximately once per week.

Id at 48:21- 49:3.

The claimant testified that she always feels light-headed. *Id* at 50:7-8. The claimant testified that on some occasions she is light sensitive. *Id* at 50:13-17. She testified she still occasionally has TIA- like symptoms every 5 or 6 months. *Id* at 49:7-15.

The claimant also testified that she has neck and back pain, and that sometimes her limbs feel like they are sleeping. She stated that on one occasion her right arm was numb for an hour. *Id* at 49:4-13. The first year after the accident, her neck pain was "excruciating." *Id* at 43:8-13. Her current neck pain is aggravated by activity. *Id* at 50:18-21.

On cross-examination, claimant testified that in addition to her educational history she presented on direct examination, claimant was certified as a licensed real estate agent in 2013 and she had her license recertified approximately 2 to 3 years ago, which was after her work accident. In addition, she testified that she does not actively sell real estate, but was advertised as a real estate professional as recently as November 9, 2017 on the website for her mother's company, Palmetto Homes & Land Realty. *Id.* at 61-62: 2-25 and 1-15. Claimant further testified that she has never done anything with it, she and her sister are registered agents with the Secretary of State for dragons and fireflies consignment shop, and they keep the LLC current so no one else can take the name. *Id.* at 63: 6-15. Claimant testified that at the conclusion of her treatment with Dr. Healy, all he was doing was giving her medication to help with her blood pressure, which in turn should help with her passing out. *Id.* at 72:3-9. Claimant acknowledged that although she testified at her deposition that she required the use of her sunglasses all day every day, at the hearing she testified

that she does not require sunglasses all day, and it depends on her headaches. *Id.* at 73-74:23-25 and 12-15. Finally, Claimant testified that although Dr. Healy's medical records dated September, 2016 through January, 2017 indicate that claimant was walking over a mile and performing yoga for exercise, claimant testified that she only tried it several times and was unable due to difficulty. *Id.* at 79-81.

The claimant has undergone various evaluations and attempted multiple modalities to deal with her headaches and neck and back pain. She saw the approved treating psychologist, Dr. Avi Rainwater for biofeedback. Dr. Rainwater is Board Certified in Clinical Psychology, Biofeedback, and Pain Management. Although she had a little relief from this, it was generally ineffective. The claimant then was treated by the approved Dr. Nancy Lembo. Dr. Lembo administered occipital nerve blocks and other injections which were ineffective. She actually had a negative reaction to one of the injections, and she testified that each injection made her sicker. *Id.* at 55:2-10. Dr. Lembo also prescribed a transdermal patch twice per day which was ineffective. The claimant was considered for the possibility of Botox injections but these were rejected by her authorized treating physicians.

On July 7, 2015, Dr. Lembo administered a cervical facet injection due to neck pain, but the claimant testified that this made her sicker. The claimant testified she is unable to take pain medication because a test showed that she has a problem metabolizing medication. *Id.* at 40:13-16. From her experience, medication just does not work. *Id.* at 40:22 - 41:8.

The claimant's testimony was corroborated by Cecelia Elton, a Registered Nurse and former co-worker of the claimant. Ms. Elton testified that she has supervisory experience as a

Registered Nurse. She testified that she first met the claimant approximately 20 years ago at Providence Hospital in the electrophysiology lab. Ms. Elton testified that the claimant was a cardiac nurse there at the time. Ms. Elton testified that the claimant taught her. *Id* at 87:24-25. Ms. Elton testified that she was a co-worker of the claimant at the South Carolina Department of Corrections, at Kirkland Correctional Institution during the last year that the claimant was working. Ms. Elton testified that in the last year before the accident in question, the claimant was very energetic and she enjoyed teaching people and she was very enthusiastic. Her personality was very happy and very outgoing. *Id* at 88:18-23. Ms. Elton testified that the claimant was very good in emergencies and was very good at thinking on her feet. Ms. Elton testified that it is very important to have a high energy level in order to deal with emergencies and this quality was also important when the claimant had been a cardiac nurse because it involved dealing with the heart. Ms. Elton added that the claimant was very detail-oriented in charting and in taking care of patients. She testified that her concentration was "very good". Ms. Elton testified that the claimant was very professional in dealing with patients. *Id* at 89:4- 23.

Ms. Elton stated that she had noticed a change in the claimant's personality since the accident, and that the claimant has become "very reclusive," just staying pretty much to herself and not outgoing at all. Ms. Elton testified that since the accident, the claimant's concentration is not nearly what it was. Ms. Elton testified that the claimant has been having headaches ever since the accident in question. *Id* at 90:12-24.

Ms. Elton testified that she knows that the claimant has headaches not only from the claimant's statements to her about how much pain she is in, but also because the claimant is not even able to carry on a conversation on the telephone for more than about a minute. *Id* at 91:1-3.

The Appellate Panel finds that the above testimony regarding the frequency and severity of the claimant's headaches and neck and back pain is consistent with the medical records.

The authorized treating neurologist, Dr. Joseph Healy, stated in a report of September 26, 2017 that the claimant is totally and permanently disabled due to a closed head injury with cervical spine trauma and persistent headaches. Dr. Healy found permanent disorder of higher cortical functioning, and permanently impaired concentration and attention. Dr. Healy also noted post-concussive syndrome. Claimant's APA, 14.

On April 2, 2018, Dr. Healy filled out a final questionnaire. This was based on the claimant's most recent visit of March 27, 2018. Dr. Healy noted that there has been no improvement in the claimant's condition since he last saw her. Dr. Healy stated that the claimant still has chronic intractable migraines which are permanent, to a reasonable degree of medical certainty. Dr. Healy stated that to a reasonable degree of medical certainty, the claimant has a brain injury which is so severe that the brain injury alone would keep her from returning to gainful employment and that this is permanent and severe. Dr. Healy concluded to a reasonable degree of medical certainty that the claimant should have access to whatever modalities and treatments which are effective for chronic migraines either now or in the future, and that she should have such access permanently to a reasonable degree of medical certainty, the claimant's brain will never recover and that her injuries are permanent. Claimant's APA, 140a.

Dr. Healy treated the claimant from October 21, 2014 to March 27, 2018. In Dr. Healy's deposition, he stated that the claimant's brain injury requires medical surveillance for life to a reasonable medical certainty. Healy Dep. 56. He stated that the claimant may pass out and that her

headaches would affect her ability to hold a job, to a reasonable medical certainty. Dr. Healy stated that the claimant's inability to work is solely related to the accident. Dr. Healy stated that the claimant's inability to work constitutes a symptom of her brain injury. Dr. Healy stated that the claimant may be away from her duties without predictability. Dr. Healy stated in his deposition that the claimant is subject to intermittent inability to concentrate. *Id* at 56, 60, 67-68. Thus, Dr. Healy's other statements elsewhere in the deposition such as "the proof is in the pudding" as to whether the claimant can work must be evaluated in the context of the above statements. The Appellate Panel concludes that Dr. Healy has made it clear that the claimant is totally disabled and cannot work.

Dr. Nancy Lembo, the authorized pain doctor, agreed that as of her last visit with the claimant, she still had significant neck symptoms. Lembo Dep, 36. Dr. Lembo treated the claimant from April 14, 2015 to January 7, 2016. Dr. Lembo stated that there are daily tension headaches with migraine clusters two or three days in a row with no effective treatment. Dr. Lembo stated that as of her last treatment, the claimant's headaches had not improved; since her headaches had not improved with treatment, Dr. Lembo concluded that the claimant's condition is permanent. Dr. Lembo noted that the claimant has had three total injections and still had headaches. *Id* at 36-38.

The claimant was also treated by Dr. Avi Rainwater for biofeedback to deal with headaches. On August 22, 2016, Dr. Rainwater, a psychologist, administered a battery of psychological testing including various MMPI tests, the Beck depression test, the Millon Behavioral Diagnostic Test, etc. Dr. Rainwater concluded that "the psychometric results are valid and represent a reliable conceptualization of the patient's current emotional functioning." Dr. Rainwater's Impression was as follows: her current level of psychological stress is not consistent with being able to be effective

on her job as a nurse. There is little question that her compromised coping is exacerbating her pain experience. Claimant's APA, 49. The patient underwent biofeedback therapy with Dr. Rainwater for only a few months, and although it was somewhat helpful, it was generally unsuccessful and the employer terminated it.

On March 9, 2017, in a vocational evaluation, Adger Brown Jr, opined: "I would suggest that an individual who is as dysfunctional as Ms. Palmer states she is, and with the contemporaneous documentation from Dr. Healy and Dr. Rainwater, would be incapable of sustaining a normal work week and would, by definition, be totally disabled from any and all forms of employment." Claimant's APA at 8-9.

As noted above, Dr. Healy stated in his deposition that the claimant would have intermittent inability to work and to concentrate. This intermittent inability is specifically discussed by Adger Brown in a vocational setting:

In summary, the totality of the medical records available for my review are indicative of a well-educated lady with an outstanding work record who, by virtue of severe and intractable migraine headaches has significant periods of time where she is incapable of functioning. One of the basic requirements of any employment is to show up at your job on a regular basis, work consistently throughout a full day and full week, and produce work of quality and value to the employer. Claimant's APA at 8.

On May 22, 2017, defendants sent the claimant for an IME by Dr. David Stickler. Dr. Stickler opined:

She has multiple headache types with the majority with bilateral head pressure without clear migrainous features. One headache type with unilateral stabbing pain could be considered migraine, but with the multifocal and varying degree of

headache types, I agree with her primary neurologist that Botox would not be a good treatment option. At this time, she plans to follow up with her primary neurologist who has recently placed her at MMI. Claimant's APA at 108.

It is significant that Dr. Stickler found in his treatment report that upon review of systems, the claimant had migraines, headaches, confusion, memory loss, poor balance, changes in gait, fainting/loss of consciousness, falls or other recent trauma, arm weakness, and leg weakness. Claimant's APA at 108. Dr. Stickler's Assessment was "Post Concussional Syndrome."

In a questionnaire dated May 26, 2017, authorized treating physician Dr. Joseph Healy, opined to a reasonable degree of medical certainty that the claimant has a closed head injury which can be deemed as physical brain damage, as well as a traumatic brain injury which can be deemed physical brain damage. In addition, Dr. Healy opined that claimant has a brain injury which is so severe that the brain injury alone would keep her from returning to gainful employment, and that such brain injury is permanent and severe. Dr. Healy opined that the claimant should have whatever modalities and treatments that are effective for chronic migraines either now and in the future, and she should have access to such treatments permanently. Dr. Healy also opined that the claimant's brain will never recover and her injuries are permanent. Claimant's APA at 108 at 12-13.

Dr. Healy overall has diagnosed a closed head injury, traumatic brain injury, and physical brain damage. Dr. Healy added in his deposition that there are two factors at work in causing her headaches. One is the Claimant's low blood pressure and the other is the neck injury which she sustained in the accident. The Claimant has agreed that she has always had low blood pressure and that she was always able to work in the past. Thus, it appears that the low blood pressure is

less of a causative factor. Dr. Healy noted that the actual cause of the headaches is less relevant because the claimant was effectively working at her job prior to the accident and she is unable to work now, and this is an admitted accident. *Id* at 60. Dr. Healy made it clear that the neck injury occurred when the Claimant fell and hurt her neck, and the cervical strain pinches the occipital nerve. Dr. Healy testified he felt that Claimant's worst headaches were greater occipital neuralgia. *Id* at 63:9-17.

Dr. Nancy Lembo testified that the claimant has been disabled the entire time she saw her. Lembo Dep. 39:23-40:1. Dr. Lembo stated that the claimant's suboccipital nerve problems could cause headaches. Indeed, Dr. Lembo's conclusion was that the claimant has post concussive headaches and cervical myofascial muscle pain. *Id* at 15. The cervical pain diagnosis demonstrates neck injury, and Dr. Lembo added that the concussion alone could be causing the headaches. *Id* at 26. Dr. Lembo's finding of neck impairments and headaches are bolstered by her statement that if Dr. Healy said that the headaches were due to the neck, this would further support causation. *Id* at 25-26. Dr. Lembo stated that the claimant still had significant neck symptoms the last time she saw her: cervical strain and cervical myofascial pain. *Id* at 15, 28, 36. Dr. Lembo testified that in addition to occipital nerves, there may be other nerves in the neck causing the headaches. *Id* at 26. Dr. Lembo agreed that the concussion alone can cause neck pain and headaches. *Id*.

Dr. Lembo explained that cervical strain pinches the occipital nerve and causes the headaches. Dr. Lembo agreed that the accident made the claimant's condition worse. *Id* at 25-26.

Dr. Lembo stated that the claimant's headaches consist of daily tension headaches with migraine clusters two or three days in a row with no effective treatment. *Id* at 38. Since her

headaches are not improved now, Dr. Lembo concluded that she now has permanency. *Id* at 36-37. Significantly, Dr. Lembo concluded that it is not unusual in a head injury case to be uncertain as to which specific nerve is causing the headache; Dr. Lembo stated that does not change her diagnosis of headaches. *Id* at 40-41.

In his deposition taken on August 14, 2017, Dr. Healy testified that from a neurological standpoint, the Claimant is at maximum medical improvement. Healy Dep. 36:19-37:16. Dr. Healy also testified that he would be happy to rate her, but would defer to a rehabilitation expert on whether or not she is employable. *Id* at 64:3-25.

In a letter to Claimant's counsel dated September 26, 2017, Dr. Healy opined that

this patient had closed head injury with cervical spine trauma and with persistent headaches and orthostatic hypotension. As a consequence, she has been totally disabled and not able to work. At this point I believe that she has reached MMI but with definite residual and permanent limitations.

and

At this point the patient has impaired concentration and attention primarily due to continued headache but also compounded by poor sleep and medications which she has to take in order to avoid syncopal episodes and to help her sleep. Because of continuing problems with syncope my impression is that she has a Class 3 impairment with 30% whole person impairment. Because of her sleep disorder she has a Class 3 impairment with a 25% overall impairment. The patient has disorder of the higher cortical functioning falling in class 2 with 20% impairment to the whole person. She has continued need for medication and medical surveillance because of this. This will likely be lifelong. The patient has a cervical spine injury with 10% whole person impairment. At this point no evidence of radiculopathy or myelopathy. Episodic loss of consciousness/awareness I believe the patient is class 2 with 20% whole person.

and

This patient's limitations because of her injuries include no working at heights. She will have impaired attention and concentration. She is unable to lift because of her poor balance. As a consequence, it is my impression that the patient is totally disabled. Claimant's APA, 14.

Dr. Healy concluded by stating "To a reasonable degree of medical certainty the above impairments are permanent and I will be happy to precipitate in her further care as necessary but I would anticipate she probably needs to be seen every 3 months for surveillance of the above problems and to refill medications." Claimant's APA at 15.

Dr. Healy completed a Form 14B on September 27, 2017 which summarized the ratings and limitations outlined in his letter dated September 17, 2017. Dr. Healy stated that Claimant had a 30% permanent physical impairment to the whole person based on the AMA Guides to the Evaluation of Permanent Impairment. The body parts injured were the "Head & C-spine & CNS." The date of maximum medical improvement is September 20, 2017. Dr. Healy stated that Claimant will need follow-up for medication and compliance. He also indicated that the Claimant does have permanent physical limitations. Claimant's APA at 16.

In a follow-up letter to Claimant's counsel dated March 21, 2018, Adger Brown Jr, reviewed the updated reports from Dr. Lembo and Dr. Healy and the permanent limitations and restrictions set by Dr. Healy. Mr. Brown stated that "it remains his opinion, within a reasonable degree of vocational certainty, that Ms. Palmer is permanently and totally disabled from any and all forms of work." Claimant's APA at 10-11.

On April 2, 2018, Dr. Healy filled out a final questionnaire. This was based on the claimant's most recent visit of March 27, 2018. Dr. Healy noted that there has been no

improvement in the claimant's condition since he last saw her. Dr. Healy stated that the claimant still has chronic intractable migraines which are permanent, to a reasonable degree of medical certainty. Dr. Healy stated that to a reasonable degree of medical certainty, the claimant has a brain injury which is so severe that the brain injury alone would keep her from returning to gainful employment and that this is permanent and severe. Dr. Healy concluded that to a reasonable degree of medical certainty that the claimant should have access to whatever modalities and treatments which are effective for chronic migraines either now or in the future, and that she should have such access permanently. Dr. Healy concluded that to a reasonable degree of medical certainty, the claimant's brain will never recover and that her injuries are permanent. Claimant's APA, 140a.

Defendants objected to the submission of a Questionnaire of Dr. Healy dated April 2, 2018. *Id.* That Questionnaire was based on a subsequent appointment that the Claimant had with Dr. Healy on March 27, 2018, which was after Dr. Healy's deposition was taken. Commissioner Campbell overruled the objection and offered to leave the record open to permit the defendants to take the deposition of Dr. Healy. Defendants declined the offer. Tr. 5-7.

FINDINGS OF FACT

BASED ON A PREPONDERANCE OF THE EVIDENCE, INCLUDING THE MEDICAL RECORDS AND SWORN TESTIMONY, WE HERBY FIND:

1. Based on a preponderance of the evidence, including the unrefuted opinions of authorized treating physician Dr. Healy and vocational evaluator Mr. Brown, we find that the Claimant has met her burden of proof that she is totally and permanently disabled pursuant to SC

Code Section 42-9-10 with her work-related injuries affecting more than one body part resulting in destruction of her earning capacity.

2. We find that the Claimant is at maximum medical improvement as of September 20, 2017. This was not disputed at the hearing or on appeal.

3. The Claimant is entitled to lifetime benefits pursuant to SC Code Section 42-9-10 (c) because she has sustained severe and permanent physical brain damage. Claimant will continue to receive weekly checks in the correct compensation rate of \$614.18 for the remainder of her life.

4 Defendants are responsible for all prior causally-related medical bills, as stipulated to by both parties at the hearing before the undersigned commissioner. Defendants are to make payment within 30 days of receipt of the bills.

5. Defendants are entitled to credit for overpayment of Temporary total Disability from the filing date of their Form 21, which is October 23, 2017.

6. We find the surveillance video not to be dispositive of anything.

7. Since the Claimant is totally and permanently disabled, she is entitled to receive causally-related lifetime medical benefits. Claimant will require ongoing medical treatment to maintain her level of function. Therefore, she shall continue to receive reasonable and necessary medical treatment as allowed under the Workers' Compensation Act and the medical treatment shall remain the responsibility of the defendants, including reimbursements to the Claimant for mileage and medications. We base this finding on the medical evidence as a whole, including the opinions of Dr. Healy.

8. These findings are based on the medical evidence, the vocational evidence, the record as a whole, the testimony of the Claimant and Cecilia Elton, and the observation of the Claimant by the single Commissioner.

9. Prior to the hearing, the employer demanded that the Claimant submit herself for an evaluation with Dr. Mark Williams, a neuropsychologist. The Claimant filed a motion to quash the evaluation. At the hearing, the Single Commissioner granted the motion to quash and overruled the motion of the employer to require the claimant to submit to an evaluation by a neuropsychologist who was not a medical doctor. The Appellate Panel endorses the motion to quash filed by the claimant and endorsed by the Single Commissioner.

Pursuant to South Carolina Code Section 42-15-80(A), the Commission has authority to send the claimant to a physician or surgeon. Defendants selected a number of medical doctors to treat Ms. Palmer over an extended period of time, but now after these physicians have opined that Ms. Palmer is suffering from severe physical damage to the brain, they sought yet another opinion. The Defendants have already sent the claimant to Dr. David Stickler for an IME. In *Risinger v. Knight Textiles*, 353 SC 69, 73, 577 SE 2d 222, 224 (Ct. App. 2002), the South Carolina Court of Appeals held that employers may not continue to "shop around" for additional opinions if the employer does not like the opinions of the previous physicians. Ms. Palmer's authorized treating physicians have all come to similar conclusions about Ms. Palmer's medical condition.

Although the Commission has the authority to send the claimant to a physician or surgeon, such authority does not extend to someone who is not a physician or surgeon. South Carolina Code Section 42-15-80(A) specifically uses the term "qualified physician or surgeon."

In *Green by & ex rel. Green v. Lewis Truck Lines*, 314 SC 303, 304, 442 SE 2d 906, 907 (1994), the Supreme Court held that clinical psychologists are not physicians for the purpose of South Carolina Rules of Civil Procedure Rule 35(a), and therefore a judge may not order a mental examination by a clinical psychologist. This logic is consistent with the statute cited above.

In *Potter v. Spartanburg School District 7*, 395 SC 17, 23-24, 716 SE 2d 123, 126-127 (Ct. App. 2011), the South Carolina Court of Appeals upheld an order from the Single Commissioner that stated that the clinical psychologists are not medical doctors.

Therefore, the Finding of the Single Commissioner quashing the employer's motion to send the claimant to a neuropsychologist is affirmed.

CONCLUSIONS OF LAW

Accordingly, as provided in Section 42-17-40, SC Code Ann. (1976), as amended, it is the determination of this Commission that:

1. The Single Commissioner properly granted the Claimant's Motion to Quash the Defendants' attempt to send the claimant to a neuropsychologist who was not a medical doctor. The Appellate Panel endorses the motion to quash filed by the claimant and endorsed by the Single Commissioner. Although the Commission has the authority to send the claimant to a

physician or surgeon, such authority does not extend to someone who is not a physician or surgeon. South Carolina Code Section 42-15-80(A) specifically uses the term "qualified physician or surgeon."

Further, defendants selected a number of medical doctors to treat Ms. Palmer over an extended period of time, but now after these physicians have opined that Ms. Palmer is suffering from severe physical damage to the brain, they sought yet another opinion. In *Risinger v. Knight Textiles*, 353 SC 69, 73, 577 SE 2d 222, 224 (Ct. App. 2002), the South Carolina Court of Appeals held that employers may not continue to "shop around" for additional opinions if the employer does not like the opinions of the previous physicians. Ms. Palmer's authorized treating physicians have all come to similar conclusions about Ms. Palmer's medical condition. Therefore, the Finding of the Single Commissioner granting claimant's motion to quash the evaluation with the neuropsychologist is affirmed.

2. Pursuant to S.C. Code Ann. Section 42-1-10 *et seq.* all parties to this proceeding are subject to and bound by the South Carolina Workers' Compensation Act.

3. Pursuant to S.C. Code Ann. Section 42-1-130; Claimant was a covered employee at the time in question; and pursuant to S.C. Code Ann. Section 42-1-140, Defendant/Employer was a covered employer under the act.

4. Pursuant to S.C. Code Ann. Section 42-1-160, Claimant sustained a compensable injury to her head, brain, and neck arising out of and in her course and scope of her employment on September 16, 2014.

5. Pursuant to S.C. Code Ann. Section 42-15-120, notice was properly given to the employer within the statutory ninety (90) days allowed.

6. Pursuant to Section 42-1-40, the appropriate average weekly wage is \$921.18 and the corresponding maximum compensation rate is \$614.18.

7. Pursuant to S.C. Code Ann. Section 42-9-10(B), Claimant permanently and totally disabled as a result of her injuries to multiple body parts.

7. Pursuant to S.C. Code Ann. Section 42-9-10 (C), Claimant is entitled to lifetime benefits as a result of permanent physical brain damage.

8. Pursuant to S.C. Code Ann. Section 42-15-60 (C), Claimant is entitled to future treatment, including reasonable and necessary nursing services, sick travel, medical, hospital, and other treatment or care during the life of the injured employee.

ORDER

IT IS THEREFORE ORDERED, that the Defendants shall pay compensation in the form of permanent total disability benefits to the Claimant, Mazie Palmer, at the compensable rate of \$614.18 per week for her lifetime, with credit to the Defendants for overpayment of temporary total benefits paid from October 23, 2017.

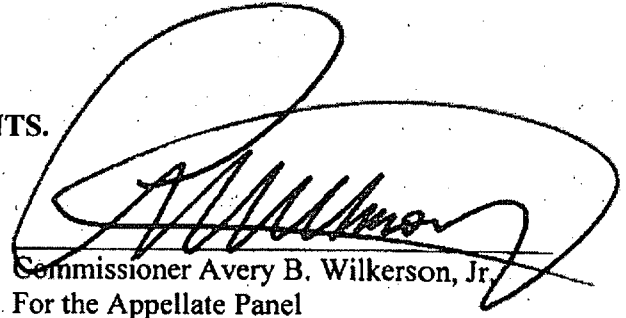
IT IS FURTHER ORDERED that Defendants are responsible for all prior causally-related medical bills, as stipulated to by both parties at the hearing before the undersigned commissioner. Defendants are ordered to make payment within 30 days of receipt of the bills.

IT IS FURTHER ORDERED that the Defendants will provide causally-related lifetime medical treatment to the Claimant. Claimant will require ongoing medical treatment to maintain

her level of function. Therefore, she shall continue to receive reasonable and necessary medical treatment as allowed under the Workers' Compensation Act and the medical treatment shall remain the responsibility of the defendants, including reimbursements to the Claimant for mileage and medications.

AND IT IS SO ORDERED.

AFFIRMATION WITH AMENDMENTS.

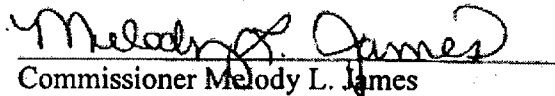


Commissioner Avery B. Wilkerson, Jr.
For the Appellate Panel

WE CONCUR:



Commissioner T. Scott Beck



Commissioner Melody L. James

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 April 26, 2019

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