

DECISION AND ORDER

OF THE

SOUTH CAROLINA WORKERS' COMPENSATION COMMISSION

W.C.C. FILE NUMBER 1500788

John F. Underwood, CLAIMANT,

versus

Carolina Treats Inc., EMPLOYER

and

State Farm Fire & Casualty, CARRIER,

DEFENDANTS

RECEIVED

MAY 31 2019

SC Court of Appeals

HEARING:

Held on January 22, 2019 in Columbia, South Carolina

APPEARANCES:

Claimant represented by Andrea C. Roche of Mickle & Bass, LLC.

Defendants represented by Amity S. Edmonds of Gallivan, White & Boyd, P.A.

PURPOSE OF HEARING:

To determine the issues as set forth on the Defendants' Form 30, Request for Commission Review.

DECISION AND ORDER BY:

**Commissioners Barden and Campbell
Commissioner James dissented**

FILED:

STATEMENT OF THE CASE

Claimant suffered compensable bilateral knee injuries when he fell at work on February 3, 2018. Claimant filed a Form 50 seeking a finding of compensability for his right middle finger. He also sought a finding of permanent and total disability as a result of injuries to his bilateral knees and right middle finger, or, in the alternative, wage loss under 42-9-20 and causally related future medical care.

Defendants admitted Claimant suffered compensable injuries to his bilateral knees but denied injury to Claimant's right middle finger. Defendants denied Claimant was permanently and totally disabled and requested a determination of permanent partial disability to both knees. Defendants agreed Claimant was entitled to future medical treatment per the recommendations the authorized treating physician.

Commissioner Beck heard the case on May 15, 2018. On September 11, 2018, Commissioner Beck issued an order finding Claimant had met his burden of proving his right middle finger was compensable, Claimant had reached MMI, Claimant was permanently and totally disabled, and Claimant was entitled to lifetime causally related medical care.

Within the statutory period, counsel for Defendants/Appellants ("Defendants") filed an Application for Review, copies of which were furnished to all interested parties prior to oral argument presented before the Appellate Panel on January 22, 2019. All testimony has been taken. Such, together with all documentary evidence, has been delivered by oral argument to the individual members of the Full Commission and has since been under study and consideration.

By Appeal, Defendants respectfully submitted the following:

1. The Hearing Commissioner erred in failing to make sufficient findings of fact in this matter, the error being that the Commissioner erred as a matter of law to make findings of fact sufficient to explain the award and allow appellate review to determine whether the findings are supported by the evidence and whether the law has been properly applied to those findings;

2. The Hearing Commissioner erred in failing to make a finding of fact concerning when the claimant reached maximum medical improvement for his compensable injuries; the error being that without such a finding the Commissioner erred as a matter of law in reaching the issue of permanent disability and determining permanent disability;
3. The Hearing Commissioner erred in concluding as law that the claimant had reached maximum medical improvement; the error being that no medical evidence was submitted to support a finding that the claimant had reached maximum medical improvement for his right middle finger injury and without such a finding supported by the medical evidence, the Commissioner erred as a matter of law in reaching the issue of permanent disability and determining permanent disability;
4. The Hearing Commissioner erred in failing to make a finding of fact concerning when the claimant reached maximum medical improvement from his injuries; the error being that the Commissioner erred as a matter of law in failing to make findings of fact sufficient to explain the award and allow appellate review to determine whether the findings are supported by the evidence and whether the law has been properly applied to those findings;
5. The Hearing Commissioner erred as a matter of fact and law in stating the evidence established Dr. Westerkam assigned 15% whole person impairment due to the claimant's altered gait; the error being that the medical evidence submitted in the record does not indicate any impairment assigned to the claimant by Dr. Westerkam due to altered gait and such a finding being included in the medical evidence portion of the Order is improper and misrepresents the evidence of record;
6. The Hearing Commissioner erred as a matter of fact and law in giving greater weight to the vocational opinion of David Price and less weight to the vocational opinion of Jan Westmoreland on the basis that Ms. Westmoreland's opinions were based on physical demands different than those outlined in the FCE, where David Price also based his report on physical demands different than those outlined in the valid FCE;
7. The Hearing Commissioner erred in failing to make findings of fact concerning the claimant's loss of earning capacity; the error being that the Commissioner erred as a matter of law in failing to make findings of fact sufficient to explain the award of permanent and total disability and allow appellate review to determine whether the findings are supported by the evidence and whether the law has been properly applied to those findings;
8. The Hearing Commissioner erred in finding as fact and concluding as law that the claimant was permanently and totally disabled; the error being that such finding is arbitrary and capricious, is not adequately set forth in the record, is not supported by the greater weight of the evidence, and the reliable, probative, and substantial evidence of the case does not support such a finding or the finding is affected by other error of law;
9. The Hearing Commissioner erred as a matter of fact and law in concluding the claimant had met his burden of proving he is permanently and totally disabled; the error being that

the claimant failed to submit any evidence to meet his burden of proving any loss of earning capacity due to his work-related injuries;

10. The Hearing Commissioner erred as a matter of fact and law in concluding the claimant had met his burden of proving he sustained complete loss of earning capacity as a result of his work accident; the error being that such a finding is not adequately set forth in the record, is not supported by the greater weight of the evidence, is based on surmise, conjecture, or speculation, the reliable, probative, and substantial evidence of the case does not support such a finding, or the finding is affected by other error of law;
11. The Hearing Commissioner erred in failing to find as fact and conclude as law that the claimant was limited to permanent partial disability to his right and left knee pursuant to section 42-9-30; the error being that the evidence of the case does not support a finding of wage loss and the greater weight of the medical and testimonial evidence leads to the conclusion that the claimant failed to establish disability greater than the presumptive disability provided for under the scheduled member statute;
12. The Hearing Commissioner erred as a matter of fact and law in failing to find that even if the claimant established permanent wage loss, he was limited to an award under section 42-9-20 for partial wage loss; the error being that a finding of total loss of earning capacity is not supported by the greater weight of the evidence, is based on surmise, conjecture, or speculation, the reliable, probative, and substantial evidence of the case does not support such a finding, or the finding is affected by other error of law;
13. The Hearing Commissioner erred in Finding of Fact #4; the error being that Jan Westmoreland's Vocational Assessment took into account both the claimant's subjective and objective limitations, as well as the findings of the FCE and his vocational interview, when rendering her opinion that the claimant's transferable skills, education, physical limitations, and experience supported a finding that he remains employable and that more than 12 positions in or around his geographic region were suitable for his condition;
14. The Hearing Commissioner erred in Finding of Fact #5; the error being that David Price's conclusions were based on facts, in particular physical limitations of "sheltered sedentary duty," which are entirely unsupported by the medical and testimonial evidence and inconsistent with all of the medical providers who evaluated the claimant, including the claimant's own IME physician, Dr. Westerkam;
15. The Hearing Commissioner erred in Finding of Fact #5 that David Price's report was "credible and compelling"; the error being that this finding is inconsistent with Finding of Fact #3 which concluded the claimant's FCE was valid, particularly when considering that David Price's report unequivocally disregarded the FCE findings and based his conclusions on a finding that the claimant was subject to limitations more stringent than the FCE;
16. The Hearing Commissioner erred in Finding of Fact #6; the error being that the finding is not supported by the greater weight of the medical or testimonial evidence, particularly where the claimant was only assigned 2% impairment to each lower extremity by every

physician who evaluated him, every physician who evaluated him agreed he was able to return to work with restrictions, and the claimant's testimony failed to establish he was unable to return to gainful employment;

17. The Hearing Commissioner erred in Finding of Fact #7; the error being that the greater weight of the evidence establishes that a lump sum award prejudices the defendants by precluding effective adjudication of a change of condition claim once a lump sum is paid out;
18. The Hearing Commissioner erred as a matter of fact and law in awarding the claimant lifetime causally related medical care; the error being such is not supported by the greater weight of the evidence, the reliable, probative, and substantial evidence of the case does not support such a finding, or the finding is affected by other error of law, and specifically, the finding is overly broad;
19. The Hearing Commissioner erred as a matter of fact and law in failing to limit the claimant's future medicals under section 42-15-60 to cortisone injections, NSAIDs, and physical therapy as outlined by Dr. Tupis; the error being that an award of lifetime medicals is affected by other error of law;
20. The Hearing Commissioner erred in Conclusion of Law #3 and finding the claimant reached maximum medical improvement; the error being that there was no medical evidence submitted in the record establishing the claimant had reached maximum medical improvement for all of his causally-related injuries;
21. The Hearing Commissioner erred in Conclusion of Law #4 and finding the claimant had met his burden of proving he is permanently and totally disabled; the error being that the medical evidence did not support a finding of maximum medical improvement and therefore the Hearing Commissioner erred as a matter of law in reaching the issue of permanent disability and determining permanent disability;
22. The Hearing Commissioner erred in Conclusion of Law #4 and finding the claimant had met his burden of proving he is permanently and totally disabled; the error being that the greater weight of the evidence demonstrates the claimant failed to establish an inability to perform services other than those so limited in quality, dependability, or quantity that a reasonably stable market for them does not exist;
23. The Hearing Commissioner erred in Conclusion of Law #4; the error being that the greater weight of the evidence supports a finding of permanent disability pursuant to the scheduled member statute or, in the alternative, a finding of permanent partial disability under section 42-9-20, at most;
24. The Hearing Commissioner erred in Conclusion of Law #5; the error being that the Commissioner should not have reached the issue of lifetime causally-related medicals under section 42-15-60 since a finding of maximum medical improvement for all causally-related injuries was not supported by the medical evidence of record, or the award is affected by other error of law and fact;

25. The Hearing Commissioner erred in Conclusion of Law #6; the error being that the Commissioner should not have reached the issue of a lump sum award under section 42-9-301 since a finding of maximum medical improvement for all causally-related injuries was not supported by the medical evidence of record, or the award is affected by other error of law and fact; and

26. The Hearing Commissioner erred in Conclusion of Law #6; the error being that a lump sum award unfairly prejudices the defendants and is not supported by the greater weight of the evidence, or the award is affected by other error of law and fact.

In an appellate review, the Panel shall, pursuant to S.C. Code Ann. §42-17-50, review the award, weigh the evidence as presented at the initial hearing and, if good grounds be shown therefore, make its own Findings of Fact and reach its own Conclusions of Law consistent with or inconsistent with those of the Hearing Commissioner. After careful review in the instance case, the majority of the Panel Affirms the Single Commissioner's Decision and Order, with one amendment.

FACTS

Hearing testimony:

Claimant testified he was 56 years old, married, and lived in Conway, South Carolina. He completed 10th grade and later earned his GED. He was certified as a firefighter and hazardous materials technician in North Carolina. He also received a paramedic degree in 1989. He also has a culinary degree from Disney.

Claimant testified he served three tours in Iraq from 2004 to 2007 as a private contractor. He worked in restaurants and grocery stores before becoming a firefighter. He has worked as an EMT for most of his adult life. Claimant testified being a firefighter is not a light duty job.

Claimant testified he began working for Carolina Treats part time in September, 2015 and began working full-time in October. He worked as the kitchen manager and oversaw running the daily operations of the kitchen. Claimant testified that he worked from 60 to 80 hours a week. At least three days a week, he worked 18-hour days.

With respect to his accident, Claimant testified he was carrying a pot and coming back into the building. When he went to step into the building, the screen door grabbed him and caused him to twist and fall.

Claimant testified his left knee problems ultimately led to his right knee problem. Additionally, Claimant testified that about three weeks after the accident, his knee gave out on him, and he fell. When he grabbed the door to lift himself up, his hand went through an old hinge and cut the tendons in his right middle finger.

Claimant testified Dr. Tupis performed surgery on both knees. He testified his left knee constantly hurts. He can not put a lot of weight on it without pain. The left knee also pops and cracks. The right knee cracks as well. He stated the pain and cracking make it difficult for him to walk, sit on the lawnmower, and sleep.

With respect to his right knee, he stated it hurts quite a bit just from trying to walk on it. The pain interferes with his ability to walk. He cannot sit for long periods of time. He cannot squat, kneel, or crouch. He testified he can crawl, but not very far. He had a recent fall and had to crawl to get up.

With respect to his finger, Claimant testified he can bend his finger all the way but it is very painful to open it back up. Sometimes he holds it under hot water to help open it back up. Claimant testified he keeps a cane with him most of the time. The rubber bottom has come off, so he has to put tape on it every two to three weeks.

Claimant applied for a job as a dispatcher and had not heard back. He testified he has not tried any restaurants or the fire department because was unable to do that type work with his injury. He also testified he could not be a security guard. He also could not be a fire sprinkler inspector because it requires significant ladder climbing. Claimant testified he misses being able to work, and that he has not been able to find a job that would accommodate him.

On cross examination, Claimant stated he was putting his resume together for a fire sprinkler installation assistant. He stated the position would pay from \$10 to \$15 per hour. He did not know the rate of pay for the dispatch position. He confirmed he had not applied for any additional jobs in the last six months.

Claimant testified he had not applied for social security disability. He confirmed he was firefighter for a total of twenty-seven (27) years. The highest rank he achieved was lieutenant, with supervisory responsibilities. Claimant testified he did do some administrative work. He knew very little about using computers and only used one program on the computer at the fire department. Claimant testified that prior to going to Carolina Treats, he worked at the City of Conway Fire Department as a firefighter engineer.

Claimant testified he has had several workers' compensation claims. Prior claims included multiple injuries to his eyes and an injury to his ribs that resulted from a fall off a truck. Claimant testified he still has problems with his ribs. He also suffered second and third degree burns that necessitated he be put into an induced coma.

Claimant testified he takes Aleve for pain because he cannot take narcotics. Dr. Tupis gave him Meloxicam but it didn't agree with his stomach.

Claimant testified he is able to drive. He does volunteer work helping the homeless with his church. He still plays the guitar for his church regularly. He also has to cut the grass on the six-acre property that he lives on. He stated he did not remember the last time he had been fishing.

Claimant testified he told Ms. Westmoreland in September 2017 that he felt he could paint a room. He had not looked into any type of job retraining.

Claimant confirmed he had not seen Dr. Tupis in about a year before the hearing. He had his last injection about nine months prior, but it did not do him any good. He also confirmed he saw Dr. Westerkam one time, and Dr. Westerkam did not provide him with any actual treatment.

On re-direct, Claimant testified that being a firefighter was a physical job. He explained he could drive, but he must take frequent breaks. He testified that he can get into his truck "ok," but it is difficult to get down into his wife's Pontiac. Getting out of the car gives him the most trouble. Because of the pain from his injury, he could not get in and out of a car all day and make deliveries in a delivery truck.

Claimant also testified that he cannot cut grass for thirty or forty hours a week. He has had to pay someone to cut his grass. His wife also helps him cut grass. He also testified he could not paint for thirty or forty hours a week. He could not do it professionally. He also stated that while he can climb a ladder, he does not because of the pain in his left knee, and he does not trust he has the leg strength to stay on top of the ladder.

Medical Evidence

Claimant initially treated at Conway Medical Center on the day of the accident. He was diagnosed with internal derangement of the left knee and a left knee contusion. Conway Medical Center recommended additional work-up.

On February 9, 2015, Claimant saw Dr. Tupis. Dr. Tupis noted a possible lateral meniscus tear in the left knee and ordered an MRI. After reviewing the MRI, Dr. Tupis recommended arthroscopic surgery. Dr. Tupis performed an arthroscopic partial medial meniscectomy on March 24, 2015. Claimant continued to have pain, and Dr. Tupis recommended a Synvisc and cortisone injection. Dr. Tupis placed Claimant at MMI for the left knee on August 31, 2015, stating he will continue to need injections in the future.

The physical therapy records reveal Claimant had an antalgic gait. Claimant saw Dr. Chambers on October 7, 2015. Dr. Chambers stated to a reasonable degree of medical certainty that Claimant's right knee complaints were causally related to his work accident. Dr. Chambers agreed Claimant had reached MMI for the left knee and recommended an MRI and additional treatment for the right knee. Later, Dr. Tupis agreed that Claimant's right knee injury was causally related to his work accident and performed surgery on Claimant's right knee on May 24, 2016.

On August 31, 2015, Dr. Tupis placed Claimant at MMI for his left knee and assigned a 2% impairment rating. On March 6, 2017, he placed Claimant at MMI for his right knee, and assigned a 2% impairment rating. Dr. Tupis assigned light duty restrictions as outlined in the valid FCE performed on February 6-7, 2017. Claimant saw Dr. Westerkam on April 13, 2018. Dr. Westerkam agreed with the impairment ratings to the knees, assigned a 6% middle finger impairment rating, and a 15% whole person impairment rating for Claimant's altered gait. Dr. Westerkam agreed with the light duty restrictions and found Claimant should not squat, bend, stoop, or crawl. He can ambulate with a single-point cane and knee braces. Dr. Westerkam also limited Claimant's standing to no more than one hour at a time without a rest break. Dr. Westerkam placed no restrictions on his sitting or use of the right hand.

David Price performed a vocational assessment on April 5, 2017. David Price found Claimant was disabled vocationally and incapable of sustaining gainful employment due to his injury. Jan Westmoreland completed an employability analysis on September 21, 2017. Although she concluded Claimant was employable, she based her findings on a physical capacity range fell within the sedentary to medium physical demand work capacity. She opined that he could anticipate earnings ranging from \$7.25 up to \$13.00 per hour for the Myrtle Beach/Conway/North Myrtle Beach, SC and surrounding area.

DECISION AND ORDER OF THE SINGLE COMMISSIONER

The Order of the Single Commissioner included the following:

FINDINGS OF FACT **(Single Commissioner)**

After a careful review of the evidence, I make the following findings of fact:

1. By order of the Commission, Claimant sustained compensable injuries to both knees.
2. Claimant seeks a finding of compensability to the Claimant's right middle finger, and I find Claimant has met his burden.
3. Based upon the valid FCE and the conclusions of Dr. Todd Tupis, the authorized treating physician, I find Claimant is limited to light duty work.
4. I place little weight in the Vocational Assessment of Jan Westmorland as I find her assertion of physical limitations inconsistent with those of the authorized treating physician and the valid FCE.
5. I found the Vocational Assessment of David Price credible and compelling when read in its entirety.
6. While I note that the impairment ratings are extremely low in this matter and would normally not result in an award of permanent and total disability, the medical evidence, vocational evidence, and credible testimony of Claimant lead me to that result. Based on a preponderance of evidence in the record, Claimant is permanently and totally disabled.
7. Claimant is entitled to a lump-sum payment.
8. Claimant is entitled to lifetime causally related medical care.
9. Claimant is entitled to Utica-Mohawk allocation language. Once the amount is set, this order may be amended to include the precise allocation.

CONCLUSIONS OF LAW **(Single Commissioner)**

In view of these findings of fact, I conclude as matters of law:

1. The parties to this proceeding are subject to and bound by the South Carolina Workers' Compensation Act.
2. Claimant sustained an injury by accident arising out of and in the course and scope of employment to both knees and right middle finger. S.C. Code Ann. § 42-1-160.
3. Claimant has reached maximum medical improvement. S.C. Code Ann. § 42-15-60.
4. Claimant is permanently and totally disabled due to his work accident. S.C. Code Ann. § 42-9-10.
5. Claimant is entitled to lifetime causally related medical treatment. S.C. Code Ann. § 42-15-60.
6. Claimant is entitled to payment in a lump sum. S.C. Code Ann. § 42-9-301.
7. Claimant is entitled to Utica-Mohawk allocation language. Once the amount is set, this order may be amended to include the precise allocation.

ORDER AND AWARD
(Single Commissioner)

IT IS THEREFORE ORDERED that Claimant sustained an injury by accident arising out of and in the course and scope of his employment to his left knee, right knee, and right middle finger, and

IT IS FURTHER ORDERED that Claimant has reached maximum medical improvement, and

IT IS FURTHER ORDERED that Claimant is permanently and totally disabled, and

IT IS FURTHER ORDERED that Claimant is entitled to lifetime causally related medical treatment, and

IT IS FURTHER ORDERED that Claimant is entitled to a lump sum payment with Utica-Mohawk allocation language, and

AND IT IS SO ORDERED.

Based on a review of the record including evidence received and produced at the hearing, applicable laws, and oral arguments of the parties, the majority of the appellate panel hereby finds the following facts based on the preponderance of the evidence:

FINDINGS OF FACT

1. By order of the Commission, Claimant sustained compensable injuries to both knees.
2. Claimant seeks a finding of compensability to Claimant's right middle finger, and we find Claimant has met his burden.
3. Based upon the valid FCE and the conclusions of Dr. Todd Tupis, the authorized treating physician, we find Claimant is limited to light duty work.
4. We place little weight in the Vocational Assessment of Jan Westmorland as we find her assertion of physical limitations inconsistent with those of the authorized treating physician and the valid FCE.
5. We found the Vocational Assessment of David Price credible and compelling when read in its entirety.
6. While we note that the impairment ratings are extremely low in this matter and would normally not result in an award of permanent and total disability, the medical evidence, vocational evidence, and credible testimony of Claimant lead us to that result. Based on a preponderance of evidence in the record, Claimant is permanently and totally disabled.
7. Although the defendants raised the issue of MMI, we find that Dr. Westerkam assigned an impairment rating to the finger on May 4, 2018. Furthermore, based on the evidence in the record, we find the finger is not disabling. Therefore, we infer Claimant reached MMI for the right middle finger as of May 4, 2018.¹

¹The Appellate Panel amends the Single Commissioner's Findings of Fact to add this fact.

8. Claimant is entitled to a lump sum payment.
9. Claimant is entitled to lifetime causally-related medical care.
10. Claimant is entitled to *Utica-Mohawk* allocation language. Once the amount is set, this order may be amended to include the precise allocation.

CONCLUSIONS OF LAW

In view of these findings of fact, we conclude as matters of law:

1. The parties to this proceeding are subject to and bound by the South Carolina Workers' Compensation Act.
2. Claimant sustained an injury by accident arising out of and in the course and scope of employment to both knees and right middle finger. S.C. Code Ann. § 42-1-160.
3. Claimant has reached maximum medical improvement. S.C. Code Ann. § 42-15-60.
4. Claimant is permanently and totally disabled due to his work accident. S.C. Code Ann. § 42-9-10.
5. Claimant is entitled to lifetime causally-related medical treatment. S.C. Code Ann. § 42-15-60.
6. Claimant is entitled to payment in a lump sum. S.C. Code Ann. § 42-9-301.
7. Claimant is entitled to *Utica-Mohawk* allocation language. Once the amount is set, this order may be amended to include the precise allocation.

ORDER OF THE FULL COMMISSION

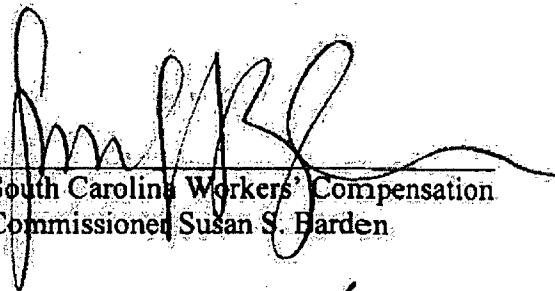
Pursuant to S.C. Code Ann. § 42-17-50, we, the Appellate Panel, have reviewed the Decision and Order of the Single Commissioner and weighed the evidence as presented at the initial hearing and considered all issues raised in the briefs of the Parties, as well as those issues raised at the Full Commission Review hearing.

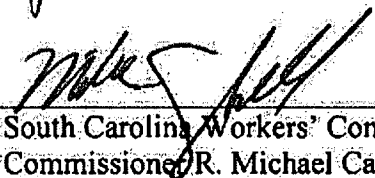
After careful review, The Appellate Panel of the South Carolina Workers' Compensation Commission, by majority vote, AFFIRMED with AMENDMENTS the Single Commissioner's order consistent with our Findings of Fact and Conclusions of Law as above.

IT IS THEREFORE ORDERED that, the findings of fact and conclusions of law of the Single Commissioner are incorporated herein as if set forth verbatim unless specifically reversed in the Order of the Full Commission.

AND IT IS SO ORDERED.

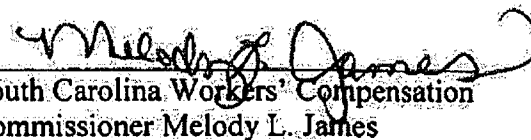
MAJORITY AFFIRM:


South Carolina Workers' Compensation
Commissioner Susan S. Barden


South Carolina Workers' Compensation
Commissioner R. Michael Campbell

DISSENT:

I respectfully dissent with the majority. The findings of fact and conclusions of law as to permanent disability should be vacated, as the medical evidence does not support a finding of maximum medical improvement for the right middle finger, a compensable and causally related injury. The finding of maximum medical improvement should be reversed as there is no medical opinion in the record which states whether or not the Claimant is at maximum medical improvement for his right middle finger. Therefore, a determination of permanency is premature and any findings as to permanent disability should be vacated.


South Carolina Workers' Compensation
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 30, 2019