THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM THE SOUTH CAROLINA
WORKERS' COMPENSATION COMMISSION
APPELLATE PANEL

Appellate Case No. 2012-213625
W.C.C. File No. 0907957

Sylvester Dublin, Jr., Employee, ... Appellant,

v.

Luther B. Hicks Logging, Employer, and
Palmetto Timber Fund, Carrier, ... Respondents.

RETURN TO MOTION TO HOLD
APPEAL IN ABEYANCE

Respondents Luther B. Hicks Logging and Palmetto Timber Fund (collectively "Respondents") submit this return in opposition to the motion by Appellant Sylvester Dublin, Jr. ("Dublin") to hold this appeal in abeyance pending the decision of the South Carolina Supreme Court on rehearing in *Bone v. U.S. Food Serv.*, 399 S.C. 566, 733 S.E.2d 200 (Aug. 01, 2012), *reh'g granted* (Sept. 14, 2012). For the reasons stated in greater detail below, Respondents submit that Dublin's appeal arises from a non-final, interlocutory order that is not subject to immediate appellate review pursuant to the holding of the South Carolina Supreme Court in *Bone* and a line of related cases. Accordingly, Respondents are entitled to an order dismissing this appeal in its entirety pending a final judgment in the matter by the South Carolina Workers' Compensation

Commission. Indeed, dismissal of this appeal will facilitate an expedited final order because it will permit the single commissioner to complete the tasks assigned to her on remand and will ensure the Full Commission considers and disposes of all appealable issues in this case. Respondents therefore respectfully submit that Dublin's motion for a stay should be denied and that this Court should dismiss this interlocutory appeal of a non-final order.

FACTUAL AND PROCEDURAL BACKGROUND

This appeal stems from an admitted work-related back injury Dublin sustained in a one-vehicle accident on June 15, 2009. His claim was heard before the single commissioner on February 1, 2012, at which time Dublin sought compensation for alleged injury to additional body parts, including his head, neck, shoulders, and arms. At the same time, Dublin asserted entitlement to additional treatment and disability benefits and that he was not yet at maximum medical improvement. Respondents denied Dublin was entitled to additional compensation for alleged injury to additional body parts and took the position that he was at maximum medical improvement.

In her Decision and Order filed April 20, 2012, attached as Exhibit 1, the single commissioner exhaustively catalogued the facts pertinent to her conclusions and order. Notably, the commissioner determined Dublin sustained a compensable injury to his back with some psychological overlay. She further found his additional alleged injuries non-compensable and that a determination of permanency was premature as that issue was not raised in the hearing. Finally, she ordered that Respondents send Dublin to an independent psychologist for an MMPI test with sufficiently detailed test results to be submitted to her so she can adjudicate the remainder of the issues before her. Dublin

filed a timely appeal to the Full Commission, which unanimously affirmed the single commissioner via written order filed November 16, 2012. *See* Appellate Panel Decision and Order, attached as Exhibit 2. As a result of the orders of the single commissioner and the Appellate Panel of the Full Commission, Respondents continue to be responsible for payment of temporary disability payments and on-going medical treatment.

ARGUMENT

Dublin's underlying workers' compensation claim remains pending before the Commission; therefore, this appeal is interlocutory and should not be considered until a final judgment disposing of all issues has been rendered. The only issues addressed by the single commissioner and the appellate panel of the Full Commission are Dublin's compensable back injury with psychological overlay and his failure to demonstrate compensable injury to other body parts, including his head, shoulders, bilateral upper extremities, right hand, and ankles. *See* Appellate Panel Decision and Order, Ex. 2, p. 11.

The Commission has yet to address, among other things, whether Dublin's compensable injuries are permanent in nature and whether he is therefore entitled to permanent disability benefits. Specifically, the Full Commission ordered that "permanency is premature because the Claimant did not seek it on his Form 50 and it was not an issue at this hearing." *Id.* In addition, Respondents continue to pay temporary benefits and were ordered to "send the Claimant to an independent psychologist for a [sic] MMPI test (with sufficiently detailed test results) to be submitted to Commissioner Barden ***so she can adjudicate the remainder of issues before her***." *Id.* (Emphasis added). As the portions of the Appellate Panel Decision and Order addressing

permanency and additional testing are interlocutory and do not constitute a final adjudication of all issues in this case, the appeal is interlocutory and should be dismissed.

South Carolina and the Workers' Compensation Commission "adhere to the final judgment rule. Accordingly, subject to certain exceptions, an appeal lies only from a final judgment." *Brunson v. American Koyo Bearings*, 367 S.C. 161, 165, 623 S.E.2d 870, 872 (Ct. App. 2005), *reh'g denied* (Jan. 19, 2006), citing *Hagood v. Sommerville*, 362 S.C. 191, 194-195, 607 S.E.2d 707, 708 (2005); S.C. Code Ann. § 1-23-380, -390; Rule 201(a), SCACR. "An order which does not finally end a case or prevent a final judgment from which a party may seek appellate review usually is considered an interlocutory order from which no immediate appeal is allowed." *Hagood v. Sommerville*, 362 S.C. 191, 195, 607 S.E.2d 707, 709 (2005) (citing *Tatnall v. Gardner*, 350 S.C. 135, 138, 564 S.E.2d 377, 379 (Ct. App. 2002)).

The issue on appeal in the instant case is not a final order and does not prevent a final judgment. A "final judgment" is an order that must dispose of the whole subject matter of the action or terminate the action, leaving nothing to be done but to enforce what already has been determined. *Bone v. U.S. Foodservice*, 399 S.C. 566, 733 S.E.2d 200 (Aug. 01, 2012), *reh'g granted* (Sept. 14, 2012) (*citing Charlotte-Mecklenburg Hosp. Auth. v. S.C. Dep't. of Health and Envtl. Control*, 387 S.C. 265, 267, 692 S.E.2d 894, 895 (2010)); *Long v. Sealed Air Corp.*, 391 S.C. 483, 706 S.E.2d 34 (Ct. App. 2011). Here, the Full Commission order specifically contemplates that Dublin will undergo additional testing so that the single commissioner can rule upon additional issues and that the Commission will eventually be tasked with making a determination as to the permanency of Dublin's work-related injuries. Dismissing this appeal and remanding the

matter to the Full Commission actually will conserve judicial resources and the resources of the parties because: (1) it will shorten the period during which Respondents are responsible for the payment of temporary benefits, a period which would be inordinately longer if this interlocutory appeal is allowed to continue; (2) it will allow the single commissioner to finish her work, specifically, consideration of the MMPI testing that remains to be administered; and (3) it will allow the Full Commission to reach a final decision with regard to all issues in this case.

Since no final judgment has been rendered, this appeal should be dismissed as interlocutory and remanded to the Full Commission for further proceedings consistent with its Decision and Order. Pursuant to the holdings of *Long, Charlotte-Mecklenburg*, and *Bone*, dismissal and remand will preserve judicial resources and prevent piecemeal appeal of the various issues presented (and not yet decided) in this case. Accordingly, this Court should deny Dublin's motion to stay and dismiss this appeal.

CONCLUSION

For the reasons stated herein, Dublin's appeal is interlocutory and not subject to immediate appellate review by this Court. Accordingly, Dublin's request to hold this appeal in abeyance and to stay briefing deadlines should be denied, and this matter should be dismissed.

(Signature page to follow.)

February 6, 2013 By:

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ATTORNEYS FOR RESPONDENTS

EXHIBIT 1

SOUTH CAROLINA WORKERS' COMPENSATION COMMISSION

W.C.C. FILE NO: 0907957

SYLVESTER DUBLIN, Employee, Claimant, vs. LUTHER B. HICKS LOGGING, Employer, AND PALMETTO TIMBER FUND, Carrier, Defendants.	**DECISION AND ORDER**

HEARING: Held in Florence, South Carolina, on February 1, 2012.

APPEARANCES: Claimant represented by Ronald J. Jebaily, Esquire, of The Jebaily Law Firm, P.A., of Florence, South Carolina.

Defendants represented by Walter H. Barefoot, Esquire, of Turner Padget Graham & Laney P.A., of Florence, South Carolina.

PURPOSE OF HEARING: To determine issues set forth on Forms 50 and 51 as well as any other issues, which may timely come before the Commission.

DECISION AND ORDER: The Honorable Susan S. Barden, South Carolina Workers' Compensation Commissioner.

FILED April 20, 2012

STIPULATIONS

Counsel for both parties stipulated at the hearing to the following issues:

1. The purpose of the hearing is to determine the issues set forth on the hearing notice, issues pled on Forms 50 and 51 and any other issues, which may timely come before the Commission.

2. Notice of the hearing was timely and properly served upon all parties of interest.

3. The Claimant's average weekly wage and compensation rate are $502.50 and $335.02, respectively.

4. Venue, set in Florence County, is proper.

5. The Claimant seeks benefits under the South Carolina Workers' Compensation Act based upon an injury by accident occurring on June 15, 2009, while in the employ of the employer, and therefore, the South Carolina Workers' Compensation Commission has jurisdiction of the case.

CLAIMANT – BIOGRAPHICAL

The Claimant is a forty-four (44) year old single married male with one daughter, age 22, and one grandson, age 6. He stands 6 feet 2 inches tall, weighs 295 pounds, and is left handed. He graduated from high school where he took vocational courses in cabinet making and food service. He graduated from truck driving school in 1995. He passed the test to obtain his commercial driver's license the first time he took it. He also has a hazardous material tank vehicle and passenger endorsement for his commercial driver's license.

He has no difficulty with reading and writing and testified he can handle money. The Claimant served in the Army for a short time but did not complete basic training due to being diagnosed with flat feet. The Claimant's work history includes positions as a livestock floor killer, a utility worker for a municipality, a housekeeper at a hospital, and approximately seventeen (17) jobs as a truck driver between 1995 and 2009.

APA Evidentiary Submissions

The following records were admitted into evidence pursuant to the Administrative Procedures Act:

NAME OF PROVIDER/OTHER	DATE(S)	# of Pages
1. Records of Marlboro Park Hospital	06/15/2009	12
2. Records of McLeod Regional Medical Center - Dillon	06/19/2009	8
3. Records of Dillon Internal Medicine	08/15/2007 – 03/10/2010	35
4. Records of Dr. John Stanton of Physicians Healthcare of Dillon	07/13/2009 - 09/04/2009	40
5. Records of McLeod – Physical Therapy	10/08/2009 – 11/04/2009	7
6. Records of Dr. Bills Edwards and Dr. Anthony Alexander of Pee Dee Orthopaedic Associates	09/24/2009 – 10/17/2011	20
7. Records of Edward Scearce of Life Care Psychological Group	02/23/2010 – 03/01/2010	3
8. Records of Post Trauma Resources	04/03/2010 – 10/15/2011	37
9. (Objection to what was marked as #9 sustained and it was not admitted into evidence)		
10. Records of Wal-Mart Pharmacy	06/05/2008 – 07/31/2009	2
11. Records of InMed	08/25/2009	1
12. Records of Dillon Internal Medicine	08/15/2007 – 03/17/2010	7
13. Records of McLeod Health – Dillon	10/19/2009 – 11/09/2009	7
14. Claimant's Resume	Undated	4
15. Records of the South Carolina Department of Employment and Workforce	Undated to 06/21/2010	24
16. Correspondence and email about IME	12/21/2011 – 01/17/2012	3
17. Records of Dr. William H. Kirkley	01/23/2012	3
18. Records of Dr. Anthony Alexander of Pee Dee Orthopaedic Associates	01/15/2012	2
19. Records of William H. Kirkley of Carolina Orthopaedic and Sports Medicine	01/23/2012	3

In addition, the Claimant submitted into evidence as Exhibit #1 portions of the Claimant's file with the North Carolina Commission, and as Exhibit #2 four pages of photographs of the truck at the time of his accident. Defendants' Exhibit #1 is the Claimant's deposition from March 2, 2010.

The Claimant objected to surveillance video and surveillance report coming into evidence. This Commissioner sustained the Claimant's objection to the surveillance report (it was labeled as APA #9) on the basis that it is not the best evidence, but the actual video itself is the best evidence. Since this Commissioner will be reviewing the surveillance herself she does not need the report and any editorial comments it may include. This Commissioner overruled the objection to the video.

The Claimant also objected to introduction into evidence of records from the Employment Security Commission or its successor agency. This Commissioner held that objection in abeyance, as noted in the Findings of Fact, and then allowed it into the record.

The Defendants objected to Exhibit #2, APA pages 172 – 175, those being photographs of the Claimant's truck immediately after the accident. The Defendants made this objection on the basis of the relevance since this is an admitted injury. This Commissioner overruled that objection and allowed them in the evidence on the basis she believes they are relevant.

STATEMENT OF THE CASE

The Claimant contends that he sustained an injury by accident arising out of and in the course of his employment on June 15, 2009. It is his position that he injured his back, with some radiculopathy into his left leg. He also alleges he has sustained psychological overlay. In addition to those admitted injuries, the Claimant seeks a finding of compensability for an alleged injury to his head, neck, shoulders, and bilateral upper extremities.

The Claimant does not believe he has reached maximum medical improvement and is entitled to additional treatment from Dr. Alexander. He also believes that he has not been released by Drs. Bergmann and Deal for his post-traumatic stress disorder and other psychological difficulties and is entitled to additional treatment for that. He believes he suffered a "near death" experience as a result of this accident.

The Defendants admit that the Claimant sustained an accidental injury on June 15, 2009 resulting in an injury to his back with some radicular symptoms into his left leg and some psychological overlay. They believe the Claimant has reached maximum medical improvement based in part on the Form 14B, Physician's Statement, completed by Drs. Bergmann and Deal showing the Claimant is at maximum medical improvement. They also believe that there is no objective pathology which would explain the Claimant's ongoing complaints and would point the Commissioner's attention to the surveillance video.

With the exception of any unstipulated medical evidence or self-serving declarations, the Commission's file was made a part of the record. Additionally, evidentiary submissions were made as noted above.

EVIDENCE OF THE CASE

All of the evidence submitted was taken into consideration in deciding this matter. A summary of the evidence I find most relevant to the issues at hand is found below.

Non-Medical Evidence

The Claimant testified. He provided biographical information noted above. Before the date of accident in this claim he had high blood pressure and was taking medication for it.

The Claimant was involved in an automobile accident in 1996 in which he had an injury to his neck. He also had a low back injury at prior job in the early 2000's.

During the beginning of the Claimant's testimony this Commissioner had to move to the end of the table so she could hear him. He initially spoke very softly.

The Claimant testified regarding his job duties with Luther Hicks Logging.

In regards to the injury of June 15, 2009, the Claimant testified that he was driving his truck on the way to the mill to deliver a load of logs when he began to smell fumes coming through the air conditioner vent from an oil leak on the engine. He said he started feeling sick to

his stomach from the fumes and rolled the window down to get some fresh air. He remembers there was a sharp curve to the right and he had already started slowing down before he got there. He remembers the steering wheel shaking in his hand when he lost control of the truck and went off the road. He testified that his feet were "pinned to the accelerator, to the floor." He testified he could not lift his leg to stop the truck and the truck turned over on its side. He is not sure if he lost consciousness, but believes he may have. He remembers looking up and hearing glass cracking. He also remembers seeing trees coming through the truck just before crushing the cab around him. At this point, the Claimant became emotional and began saying "Thank you, Jesus. Thank you. Thank you, Jesus." He was rubbing his eyes and began tearing. After the accident the Claimant testified the truck was still running and he thought it might blow up. He reached down and switched it off. He was reaching and trying to get his seatbelt off and testified he was actually reaching the wrong side to get his seatbelt off. The Claimant testified he thought he was going to die at that moment and "didn't realize what was really going on after I finally made it out of the truck." (Transcript of Hearing ("T.H."), p. 23, ll. 14-18.)

The Claimant testified that nobody helped him out of the truck and he had to push the door open. He said it kept falling down on him and he finally got it up to where he could get out. At that point he had to jump to the ground. When he got up he had a real bad headache and felt like he did not know what was going on. He said he was looking at his truck in the ditch and thinking to himself "why is my truck in the ditch?" (T.H., p. 24.) At that point, the Claimant testified he began taking pictures of his truck with his cell phone. He then identified those pictures as being the pictures he admitted into evidence. (T.H., p. 24.)

The Claimant testified that he called his boss and let him know that the truck had turned over and he was waiting for them to come. When his boss came he told him he had a bad

headache and that his back and neck were beginning to hurt. His boss, Danny Hicks, then called an ambulance for him.

The ambulance came to get him and took him to Marlboro Park Hospital. From there he was seen at McLeod – Dillon. From there he was referred to Dillon Internal Medicine, Dr. Odin, his family doctor. He also saw Dr. Stanton, a chiropractor, for a while. Dr. Odin sent him to McLeod Physical Therapy, and then he was referred to Pee Dee Orthopaedic Associates. He testified he has been treating with Dr. Alexander ever since then. He also saw Dr. Edwards for a while.

The Claimant testified he began having trouble with Post-Traumatic Stress Disorder ("PTSD"). He saw Dr. Scearce on his own. The Defendants then sent him to Drs. Bergmann and Deal. The Claimant acknowledged that he drove himself to Columbia for the appointments with Drs. Bergmann and Deal. In addition, the Defendants provided him with some rides. The Claimant testified that the Defendants owe him some mileage for driving back and forth.

The Claimant also testified that he has continued to treat with Dr. Alexander whenever it is approved. He also testified he has continued to treat with Drs. Bergmann and Deal. He said that Dr. Alexander did a series of injections in his back and that those injections helped him.

The Claimant also testified that he was referred to Dr. Kerkley in Columbia. He saw him and told him everything that was going on. He was satisfied with Dr. Kerkley's evaluation.

In regards to his medication from Dr. Deal, he said that he is currently taking Xanax, Trazodone, and Effector. He said those medications help him. He is still seeing the Bergmann.

In regards to his current problems, The Claimant said he has pain that goes from the back of his head down to in between his shoulder blades and across his shoulders, down both arms to

his ring fingers and pinky fingers causing them to go numb. He said his right arm is worse than his left arm.

He also has pain in his lower back and that his left leg goes numb. The pain goes from his lower back through his left buttock down the back of his left leg. He also has pain in his ankles, both of them. He said his ankles actually give out on him and he is afraid he might fall sometime. He used a cane at the hearing. The Claimant also said that his right hand bothers him and he has not seen a doctor for that.

In regards to the surveillance, the Claimant testified that he has seen the video and it is indeed him in the video. He acknowledged that he is able to drive to Columbia and back for his medical visits. Sometimes he is not able to go the entire way without stopping, though. On the day he was videoed, though, he was able to make it from Columbia to Latta, South Carolina without stopping. When he got to Latta he had a call from his girlfriend and met her. She was having car trouble. He testified that he raised up the hood of the car and was able to look up under the hood. He said he "bent over some." (T.H., p. 35.) He also acknowledged that he was videoed putting gasoline in his car and he is able to do that. He acknowledged that he was putting air in a tire and was able to do that at least one time.

On cross-examination the Claimant acknowledged that he lives by himself. He also acknowledged that he got his commercial driver's license in 1995 and then went to work for several different employers. The Claimant's attorney objected to questioning about the Claimant's job history since he had handed up a written version of his job history. The Claimant was then asked if he had worked for at least seventeen different employers truck driving between 1995 and 2007. The Claimant testified "I've never counted; I don't know." (T.H., p. 41.) The

Claimant then testified that he did remember working for at least ten of the employers in question.

There was a question about whether the Claimant quit or was fired from G&P Trucking. He testified he did not recall. He was then presented with the records from the Department of Employment and Workforce regarding his pursuit of unemployment benefits in which he alleged that he did not quit, but was fired, and they alleged that he had indeed quit.

The Claimant was cross-examined about his prior North Carolina Workers' Compensation claim. The Claimant testified that he had fully recovered from that injury. He then acknowledged that he had more than one Workers' Compensation claims in North Carolina and that both of them involved his lower back. Even though he said he had fully recovered, he had a 5% impairment and received about $10,000 from one of them and about $5,000 from the other.

In regards to his 1996 automobile accident where he hurt his neck, on cross-examination the Claimant admitted that he had hurt his lower back in that injury as well. He had received some sort of injection as a result of that accident, although he said it was not an epidural steroid injection.

Claimant testified that Dr. Odin was not his family doctor, but acknowledged that Dr. Odin is with Dillon Internal Medicine and that is his family doctor practice. He also acknowledged being seen by them at one point before this accident when his commercial driver's license was put on a three month monitoring pass because of high blood pressure problems. Further, as a result of the prior automobile accident, he acknowledged he had seen a chiropractor for both his back and his neck. Further, he had also had a MRI done on his lower back before the accident in this claim.

In regards to treatment after this accident, the Claimant said that he climbed out of the truck by himself. He did not call 911, but rather called Mr. Hicks. Mr. Hicks called 911 and an ambulance come. At the scene the Claimant refused to let them put a cervical collar on his neck. He testified that he was asked if he wanted to lie on board or something and he told them that he did not want to. He said he did not let him put a collar on his neck because he did not think he needed one. Further, when the ambulance arrived at the scene the Claimant was walking around.

The Claimant was taken to Marlboro Park Hospital and testified he told him everything that happened and everything that was wrong. (T.H., p. 48.) At Marlboro Park Hospital they did CT scans on both his neck and lower back. Despite the report from Marlboro Park Hospital stating that the Claimant denied loss of consciousness, the Claimant testified that he did not remember if he had lost consciousness. The Claimant then said "how would I know if I lost consciousness or not, I don't even know." (T.H., p. 50, ll. 18-22.)

In regards to the pictures of the truck the Claimant took at the scene of the accident, the Claimant testified he did that before the ambulance came. He did not remember whether he did it before or after he called Mr. Hicks.

The Claimant said that when he saw Dr. Edwards he told him everything that was going on. He acknowledged that Dr. Edwards also examined his right hand. He also acknowledged that he had physical therapy which he says did not help.

In regards to his current physical condition, the Claimant testified that despite the pain in his lower back he can bend at his waist, but that he will be in pain. When asked if he could bend to the point where his head was actually below his waistline he said he had never measured to see. The Claimant then said that he had been suffering all this time and had not been approved to see a doctor to get medical attention. He then acknowledged that he had seen Dr. Edwards, Dr.

Bergmann, the chiropractor, Dr. Odin, and Dr. Alexander. He also acknowledged that he still does some light cooking and is able to dress himself, although he has to take his time.

In regards to the video of May 27, 2011, the Claimant denied that he had bent over at his waist to put air in a tire on a white car he was driving that day. He said he had bent at his knees. He then said he did not understand the question and clarified by saying he may have had to bend some. He then demonstrated to this Commissioner how he would bend to put air in a tire. He said he stretched his left leg out behind him and tried to bend at the right knee. The Claimant was clear that he did not bend past his waist to put air in the tire, though. This Commissioner attempted the clarify what the Claimant was saying since it appeared that the Claimant was saying that he did not bend forward 90 degrees at the waist as the Defense attorney had demonstrated in his question at the hearing. The Claimant then said at the time he was bending forward like that was when he was looking under the hood to check his girlfriend's car. He said that he was able to do that, though, because he had injections and the pain was not that severe at that time. The Claimant's attorney then pointed out that when Claimant demonstrated the motion he made to air in the tire, in addition to stretching out his left leg he did lean forward some. He just did not lean forward 90 degrees. This Commissioner asked the Claimant about when he had the injections since the two days of surveillance were two different days. The Claimant said he thought they were both the same day, but then realized that one was May 27 and one was June 29. He said that was during the time when he got the injection.

The Claimant was then cross-examined about the video showing him going to the trash dump and reached inside his car and bent at the waist almost 90 degrees, if not more. He did not recall that portion of the video. The Defendants pointed to the Commissioner to about 10:55

a.m. on that particular video. In regards to the trash, the Claimant said that he uses mostly paper products so his trash is not heavy.

In regards to the video of June 29, the Claimant indicated that he had to raise the hood on his girlfriend's car to look under it. He acknowledged that he bent over at the waist several times looking under the hood of that car. He also said that on neither of the video days did he have a cane with him. He also said that he has not worked since the day of the accident.

In regards to other activities, the Claimant performs in a singing group called U.T.C. - Unlimited Through Christ. He has been in that singing group for a couple of months now. The Claimant said that for the last three years he has been trying to get together another group. When he performs he wears a shirt, tie and vest. Practice is every Thursday at 6:00 p.m., when they are able. The practice usually lasts a couple of hours or "something like that." (T.H., p. 65.) The group has performed twice, once in a town right outside of Raleigh, North Carolina and once at the Community Center in Marion.

Video Surveillance of the Claimant

On May 27, 2011 and June 29, 2011 – shows the Claimant's activities on those days. On May 27, 2011 the Claimant was driving a white car in Dillon, South Carolina. At 10:49 a.m. he had arrived at a gas station where he bent at his waist and pumped air into the tire of the vehicle. The Claimant was not using any sort of cane. Later that morning the Claimant went to a waste management facility. He removed a large bag of trash from the vehicle. He then bent over at the waist at a 90 degree angle within the vehicle and removed several pieces of trash from the vehicle. He was not using a cane at that time either. Later that morning the Claimant went to a grocery store where he is seen getting out of his vehicle. Later that morning the Claimant can be seen talking on his cell phone. The Claimant then went to Hardees and then went home.

On June 29, 2011 the Claimant was located at the offices of Post Trauma Resources in Columbia, South Carolina. The Claimant left the office and talked on his phone for a while. He then went back in the office. He finally left the office and got in his vehicle and drove towards Latta, South Carolina without stopping. On this day the Claimant was driving in a silver vehicle. When the Claimant got to Dillon, South Carolina he met a female who was driving the white car. They talked for several minutes and then the Claimant got out of the car and then bent at the waist looking under the hood of the white car. He was clearly bending at his waist and using his right arm. Again, the Claimant was not using any sort of cane that day.

South Carolina Department of Employment and Workforce – Records show that the Claimant applied for unemployment benefits in the past. At one point while working for G&P Trucking he applied for benefits and represented that he had been discharged. That employer responded that the Claimant had voluntarily quit because he was late for a run that was supposed to be delivered on a date before a specific time and the Claimant showed up too late. In his response, the Claimant had given his side of the story and in his last sentence had reported "I do not really know what is going on."

Medical Evidence

Marlboro Park Hospital records include the DHEC Patient Care Form from the ambulance picking the Claimant up at the scene of the accident. These records confirm that the Claimant had been walking around the scene of the accident. They also confirm that he refused a backboard and cervical collar. The Claimant reported at Marlboro Park Hospital that he had been in a motor vehicle crash after the vehicle steering locked up. He also denied to them any loss of consciousness. (APA p. 8). A CT of the lumbar spine was within normal limits and a CT scan of the cervical spine showed degenerative arthritis but no acute findings. (APA p. 11).

McLeod – Dillon records show the Claimant was seen there on June 19, 2009. The Claimant was diagnosed with a back strain as a result of the automobile accident.

Dillon Internal Medicine Associates records show that on August 15, 2007 the Claimant was seen complaining of high blood pressure. He had had the Department of Transportation physical a few weeks prior and was only given a three months pass because of his blood pressure. The Claimant was also complaining of fatigue as well as suffering from obesity.

On June 22, 2009 the Claimant was seen at Dillon Internal Medicine Associates and diagnosed with hypertension and a muscle strain. As of July 7, 2009 the Claimant followed up and reported that his back might be a little bit better. As of July 7, 2009 x-rays done in the office showed only osteoarthritis and the Claimant was referred to Dr. Stanton, a chiropractor.

In March 2010 the Claimant was complaining of neck pain. The doctor had another CT scan done of his neck and chest. These were normal except for a liver cyst.

Dr. John Stanton, Chiropractor records show the Claimant saw him between July 2009 and September 2009. The Claimant reported that he was impaired in bending, lifting, church events, sleeping, and other such activities.

Dr. Bill Edwards saw the Claimant beginning on September 24, 2009. The Claimant was complaining of back and left leg pain along with some neck pain as well as pain in his right hand. Dr. Edward's report indicates that he reviewed lumbar x-rays showing no evidence of traumatic change or instability and no evidence of significant disc space narrowing or degenerative change. He also reviewed a MRI from August 25, 2009 which showed degenerative changes in the lumbar spine, but no compressive pathology. He noted that was a small annular tear at L4-5 on the left side, but no evidence of herniation. He also felt the Claimant was suffering from a ligament strain in his right thumb. He felt an epidural steroid

injection at L4-5 could alleviate some of the radicular symptoms. He also noted there was no evidence of a surgical problem. He also felt that a cervical MRI may be beneficial.

At Dr. Edwards' direction a cervical MRI was done on October 8, 2009. Dr. Edwards felt the MRI demonstrated no abnormalities except for very minimal age related degenerative changes. He specifically wrote "no traumatic changes noted." He noted that an epidural steroid injection was pending and he would see the Claimant back after that. He also noted he would not anticipate any significant permanent impairment or need for invasive treatment such as surgical intervention. The Claimant underwent a left lumbar epidural steroid injection on November 6, 2009. He followed up with Dr. Edwards on November 24, 2009. Dr. Edwards reassured the Claimant that there was no evidence of any compressive pathology. He indicated that it appears the Claimant had reached maximum medical improvement and has a 10% impairment of the spine. He noted the Claimant should avoid one time lifting greater than 50 pounds.

The Claimant returned to Dr. Edwards on August 31, 2010. He reported continued radicular symptoms in his left leg as his main complaint. Dr. Edwards felt a repeat epidural steroid injection at L4-5 would be reasonable, but there was no change in the impairment rating or previous work restrictions. That subsequent injection was done on September 9, 2010 by Dr. Alexander. Dr. Alexander then did another epidural injection on April 1, 2011 and April 22, 2011. He also did one on May 19, 2011. On June 14, 2011 Dr. Alexander noted the Claimant had seen him and requested that the Workers' Compensation carrier change positions to Dr. Alexander.

In a Questionnaire completed for the Claimant's attorney on August 8, 2011, Dr. Alexander indicated that the Claimant's cervical pain in more likely than not causally related to

his work-related accident of June 15, 2009. The next time Dr. Alexander saw the Claimant was October 17, 2011. He felt the Claimant needed to have a psychological evaluation for spinal cord stimulation.

Post Trauma Resources records show the Claimant first saw that group on April 3, 2010 for an independent medical evaluation. That group did not administer a Minnesota Multiphasic Inventory II (MMPI – II) because he had recently completed the instruments. Dr. Bergmann with that group concluded the Claimant developed psychological symptoms as a result of the injury and would require psychotherapy and some psychotropic medication. The Claimant received therapy and treatment from Post Trauma Resources. In a Form 14B, Physician's Statement, dated May 3, 2011, Dr. Bergmann indicated the Claimant had reached maximum medical improvement on May 3, 2011 and had a 15% impairment to the "whole person." He also indicated that Claimant was unable to return to work and would need future medication and medical management "as long as he experiences chronic pain." The Claimant continued seeing Dr. Bergmann after that date. In his report of October 18, 2011 the Claimant reported that he had a singing engagement and enjoyed that.

Dr. William Kirkley evaluated that Claimant on January 23, 2012. He felt the Claimant needs pain management and that trigger point or epidural steroid injections may be helpful. He also felt the Claimant needed to continue psychological care. In addition, he noted that Claimant might benefit from physical therapy to help his ankles, but if that did not help a MRI of the ankle may be necessary. He noted that there is nothing definitive that could be done for the Claimant's chronic neck and back pain.

Dr. Alexander answered another Questionnaire for the Claimant's attorney on January 15, 2012 and gave his opinion that the Claimant has not reached maximum medical improvement and needs additional evaluation for his neck and back.

This Commissioner has reviewed all of the evidence and observed the witness as he testified and made determinations regarding credibility and veracity. Based upon all the admissible evidence and testimony, the following Findings of Fact and Conclusions of Law are rendered:

FINDINGS OF FACT

1. The Claimant, employer and insurance carrier were subject to the South Carolina Workers' Compensation Act on June 15, 2009.

2. The Claimant was an employee of Luther Hicks Logging on June 15, 2009.

3. The Claimant's average weekly wage and compensation rate are $502.50 and $335.02, respectively.

4. The Claimant injured his neck and back and sustained psychological overlay in the admitted accident on June 15, 2009. He alleges that he also injured his head, shoulders and bilateral upper extremities.

5. The report of Defendants' private investigator was not considered by the undersigned. I reviewed the actual video surveillance and reach my own conclusions rather than rely on or consider the observations of a third person.

6. I find admissible reports of any agency of this state. The Defendants admitted into evidence records from the South Carolina Department of Employment and Workforce. However, I would note that any such record is not dispositive for purposes of Workers' Compensation. (Defendants' APA #15.)

7. The claimant is 44 years of age (testimony of Claimant).

8. Claimant is a high school graduate. Claimant also attended truck driving school and obtained his CDL (testimony of Claimant).

9. Claimant's prior employment includes work as a truck driver (Claimant's Exhibit #1; Defendants' APA #14).

10. Ordinarily, I would find rather irrelevant the length of a Claimant's employment with an employer or Claimant's employment history. However, given some of my other

findings, I find it important to note that from 1995 – 2009, Claimant had 17 different employers, and worked for most of them for 1-8 months (Claimant's Exhibit #1; Defendants' APA#14; Claimant's APA #7, p. 123).

11. Claimant was a 5-month employee when the accident occurred (testimony of Claimant).

12. Claimant's job with Employer was log truck driver (testimony of Claimant).

13. Claimant has prior injuries involving his back (a Workers' Compensation injury involving the right foot, neck, and back, according to the clincher agreement; and motor vehicle accidents, for which he received an impairment rating (5% to the back) and settlements. However, Claimant told the authorized treating physician (Dr. Edwards) and other providers that he had "no previous problems to his back." Claimant was evasive at the hearing on these issues, and was impeached with his deposition testimony (testimony of Claimant; Transcript of Hearing, p. 48).

14. In the accident in issue, Claimant was a restrained driver (Claimant's APA #1, p. 8; Claimant's APA #4, page 45; "took seatbelt off" and page 60).

15. After the accident, Claimant climbed out of the cab of the truck with no assistance. When EMS arrived, Claimant was walking around, and took photos of the truck. Nonetheless, Claimant told various providers that his legs were "pinned" in the cab (testimony of Claimant; Claimant's APA #1, pp. 1 and 5; Claimant's APA #3, p. 36, and other APA submissions as well).

16. At the scene, Claimant refused a cervical collar and backboard (Claimant's APA #1, pp. 1 and 8).

17. Claimant's hearing testimony that (a) he may have lost consciousness, and (b) he told ER personnel that he may have lost consciousness is not credible, and is refuted by multiple APA submissions documenting the fact that claimant denied any loss of consciousness. Contrary to his testimony, Claimant had no amnesia of the event. In sum, there is not one medical record temporal with the accident stating that Claimant either lost consciousness or may have possibly lost consciousness (testimony of Claimant; Claimant's APA #1, pp. 5 and 8, medical evidence in its entirety).

18. Claimant's hearing testimony that he took several photos at the scene of the truck on its side because he did not know why his truck was in a ditch (i.e., he had lost consciousness or was dazed and confused) is not credible, and is refuted by the EMS record; this record states that Claimant himself told EMS personnel that the truck began to shake and he could not get the truck back on the road. If, as Claimant testified to the undersigned, he did not know at the time just after the accident why his truck was in a ditch, the undersigned finds inconsistent Claimant's statement to Dr. Bergmann that Claimant "feared for his life" during the incident as he thought that the trees he was hauling might come through the cab (Claimant's APA #1, p. 1; Claimant's APA #8, p. 127).

19. At the ER, Claimant demonstrated "normal behavior." There is no mention of a possible loss of consciousness or even confusion (Claimant's APA #1, p. 2).

20. There is no question that claimant reported a headache to both EMS and ER personnel on the date of the accident. However, Claimant's CT was "normal," and ER personnel note that there was "no trauma" or "no evidence of trauma" to the head (Claimant's APA #1, pp. 1-2, particularly p. 8, and p. 11; Claimant's APA #2, p. 13).

21. Claimant was discharged from the ER on the date of the accident (Claimant's APA #1, p. 3).

22. Claimant's statement to a chiropractor that he is limited in bending is refuted by Defendants' surveillance video (Claimant's APA #4, p. 58; Defendants' surveillance video).

23. I find that any injury to or problem with Claimant's head (such as headaches) resolved or returned to baseline within approximately 1 month after the date of the accident. I base this finding on medical evidence, including but not limited to the fact that Claimant has pre-existing headaches (as documented in medical evidence from his family doctor), on the fact that Claimant is not credible, the fact that there was "no trauma" to the head (per ER records), and on the fact that Claimant's CT scan (which Claimant underwent because of his complaint of headache) is normal (Claimant's APA #2, pp. 13-14; See also Claimant's APA #4, p. 61: "0 Headache today." p. 66 – pain diagram showing a head complaint on July 13, 2009, and pp. 72-73 – pain diagrams showing no head complaint; Defendants' APA #12, p. 201).

24. If Claimant injured his shoulders or upper extremities in the accident (he did not complain of either on the date of the accident), I find that they resolved by March 2010. I base this finding on Claimant's APA#3, p. 55.

25. Claimant's assorted statements to multiple providers that (a) his feet/ankles were "pinned to the floor," (b) his legs were "pinned in" the cab (claiming a right ankle injury for the first time months after the accident), and (c) the cab was "crushed around him" (when Claimant climbed out unassisted and then walked around) does nothing to bolster Claimant's credibility. The physician who examined Claimant's right ankle because of Claimant's statements found the ankle "*completely benign*" with no tenderness and no swelling. I therefore find that there is no separate leg injury (medical evidence in its entirety; Claimant's APA #3, pp. 36-37; Claimant's APA #7, p. 123; Claimant's APA #8, p. 127).

26. Given the fact that Claimant was (a) restrained/belted, (b) crawled out unassisted, (c) walked around the scene, (d) felt well enough to take photos, and (e) declined a cervical collar, I find that the pictures of the truck post-accident are no indicator of Claimant's injuries – or credibility (Claimant's APA, Exhibit #2).

27. In September 2009 (a few months after the date of accident), the authorized treating physician (Dr. Edwards) found "no spasm" at Claimant's initial evaluation. In August 2010 (one year later), Dr. Edwards again notes "no spasm" (Claimant's APA #6, pp. 104 and 110).

28. Claimant's lumber spine MRI shows evidence of a "small" annular tear and degenerative changes, but **no evidence of herniation or compressive pathology.** There is "no evidence of any surgical problem" (Claimant's APA #3, p. 33; Claimant's APA #6, p. 104; Defendants' APA #11, p. 200).

29. Dr. Edwards noted that claimant's bilateral lower extremities have no tenderness, full range of motion, with normal stability, strength and tone. Similarly, nine months after the date of the accident, Claimant's family doctor noted no abnormality after examination of Claimant's upper and lower extremities (Defendants APA #12, p. 204).

30. Claimant's CT scan of his neck is normal and "unremarkable." Claimant's family physician diagnosed Claimant with a "muscle strain" and Dr. Edwards likewise diagnosed Claimant with a cervical strain/sprain (Claimant's APA #6, p. 111; Defendants' APA #12, pp. 203-204 and 206).

31. Claimant's cervical condition is diagnosed as a cervical strain/sprain by Dr. Edwards without compression, herniation or stenosis. In fact, **Dr. Edwards notes that the MRI shows "no abnormalities except for very minimal age-related degenerative changes** (Claimant's APA #6, p. 104).

32. Claimant's testimony that he has numbness in his fingers is refuted by Dr. Edwards' record that Claimant has no weakness or paresthesias (Claimant's APA #6, pp. 110-111).

33. By August 2010, Claimant's cervical motion is noted to be "essentially normal" (Claimant's APA #6, p. 110).

34. Contrary to his presentation at the hearing (ambulating laboriously with a cane), the authorized treating physician notes (1 year after the accident) that Claimant's gait is "normal." Further, Claimant admitted that he performs in a gospel singing group, and as of the date of the hearing, has performed outside of Raleigh and in Marion. Claimant's group practices weekly for a couple of hours. Claimant's ability to engage in this type of activity (while reporting "9" level pain to physical therapy personnel and other providers) is inconsistent with Claimant's (a) reports to Drs. Bergmann and Deal that he "remains isolated," "inactive," and "withdrawn;" and (b) presentation to Drs. Bergmann and Deal (and to undersigned) that he is "slow moving." Claimant also has a girlfriend per his own testimony (observations of the undersigned; testimony of Claimant; Claimant's APA #8).

35. Claimant drives himself to his appointments. He also drove from Columbia to Dillon (at least 108 miles) to meet his girlfriend. Once there, he raised the hood on her car and bent at the waist several times because of her car difficulties (testimony of Claimant – on the video at 2:28 p.m. he bends at his waist and leans under the hood. He bends at the waist at least five to ten seconds and appears to have no difficulty doing so.)

36. I do not find persuasive the fact that a physician may have prescribed a cane based upon Claimant's complaints to this physician. I base this finding on the fact that authorized treating physician Dr. Edwards – to whose records I give the greatest weight – notes that claimant has a **normal gait and 5/5 motor strength in the lower extremities**. Contrary to

Claimant's testimony regarding lower extremity numbness, Dr. Edwards notes no dermatomal paresthesias (Claimant's APA #6, p. 110; testimony of Claimant; observations of the undersigned).

37. I find that the Claimant's injuries were minor, contrary to his testimony and to his statements providers. I base this finding primarily on the objective diagnostic studies and on the treatment notes of Dr. Edwards.

38. Dr. Edwards found Claimant at maximum medical improvement in November 2009 (just several months after the date of the accident) with a 10% impairment rating and a **50-lb. lifting restriction** (Claimant's APA #6, p. 109).

39. However, after Dr. Edwards released Claimant, Defendants sent Claimant for a 2nd opinion (Dr. Kirkley's opinion seems to be somewhat cursory. While it indicates he reviewed Dr. Edwards' reports, it does not contain the level of detail of Dr. Edward's evaluation).

40. I give greater weight to the records/opinions of Dr. Edwards than I give to any other physician in this case.

41. Claimant is not credible. I base this finding on my observations of Claimant and on the delivery of his testimony. However, this finding is particularly based upon the fact that claimant had a noticeably (significantly) different demeanor, tone of voice, and speed/cadence of speech during cross examination (particularly during the segment regarding the video surveillance) than he had on direct examination when he spoke with a voice so soft that I could barely hear him and with a <u>much</u> slower speed. I also note that Claimant's minimal objective pathology does not warrant the use of a cane, and that the cane prescription was based upon Claimant's subjective complaints. I finally note that when the undersigned asked Claimant to raise his right hand, he sat and stared at both hands for several full seconds as if he could not determine which was his right. The performance did not impress me.

42. It appears to the undersigned that any psychological condition from which Claimant suffers is minimal. At the hearing, I observed Claimant initially "wipe" teams that were not present, until he literally stuck his fingers in his eyes. Further, and very compelling to the undersigned is the fact that <u>nine months after the date of the accident, Claimant reported to his family doctor that he had "no increased nervousness, mood changes or depression"</u> (Defendants' APA #12, p. 204; observations of the undersigned at the hearing).

43. Claimant's sleep apnea, which he had previously, is unrelated to the accident in issue (Defendants' APA #12, pp. 201-202; Claimant's APA#3, p. 47).

44. I give little weight to the report of claimant's own psychologist (Dr. Scearce) as Claimant told this provider that the cab of the truck was "crushed around him," and that he has <u>"intrusive" recollections about the accident</u>. By contrast, Claimant told the undersigned that he did not know why his truck was in the ditch when he climbed out of the cab. **Claimant's MMPI was invalid as to hysteria and paranoia per his own expert** (Claimant's APA #7; testimony of Claimant).

45. Similarly (as Claimant did with Dr. Scearce), Claimant told Drs. Bergmann and Deal that he was "pinned to the floor of the vehicle," a description upon which they in part made their initial diagnosis. These providers note that Claimant's Pain Patient Profile is invalid, indicating at least the potential for symptom magnification.

46. Unfortunately, the authorized psychologists did not administer their own MMPI, and I find that the description of the results by Claimant's expert is lacking. Therefore, Defendants are to send Claimant to an independent psychologist for an MMPI (with sufficiently detailed test results). Once I receive the results, I will adjudicate the remainder of the issues pending before me.

47. The only compensable body parts/conditions in this case are the spine and psychological overlay. Other conditions/body parts alleged by Claimant are not proven by the greater weight of the evidence.

48. Permanency is premature.

49. Claimant's average weekly wage is $502.50, yielding a compensation rate of $335.02.

CONCLUSIONS OF LAW

1. Section 42-1-40 of the South Carolina Code of Laws (Cum. Supp. 1992) is applicable in defining "average weekly wages".

2. Section 42-1-140 of the South Carolina Code of Laws (Cum. Supp. 1992) is applicable in defining "employer".

3. Section 42-1-160 of the South Carolina Code of Laws (Cum Supp. 1992) is applicable in defining "injury and personal injury".

4. Section 42-15-60 of the South Carolina Code of Laws (Cum. Supp. 1992) is applicable in determining the period of time within which medical treatment and supplies shall be furnished.

5. Section 42-17-40 of the South Carolina Code of Laws (Cum. Supp. 1992) is applicable in governing the conduct of hearings and rendering of awards.

ORDER

Based upon the Findings of Fact and Conclusions of Law, the undersigned Commissioner orders as follows:

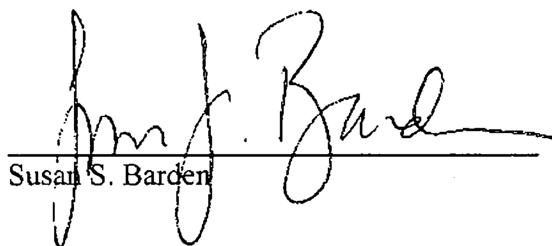
IT IS ORDERED that, as a result of an admitted injury of June 15, 2009, the Claimant sustained compensable injuries to his back with some psychological overlay;

IT IS FURTHER ORDERED that the other body parts and conditions alleged by the Claimant, that being his head, shoulders, bilateral upper extremities, right hand, and ankles, are not compensable;

IT IS FURTHER ORDERED that permanency is premature because the Claimant did not seek it on his Form 50 and it was not an issue at this hearing;

IT IS FURTHER ORDERED that the Defendants are to send the Claimant to an independent psychologist for a MMPI test (with sufficiently detailed test results) to be submitted to this Commissioner so I can adjudicate the remainder of issues before me.

AND IT IS SO ORDERED.



Susan S. Barden

CERTIFICATE OF SERVICE

This is to certify the undersigned has this date served this order in the above entitled action upon all parties to this cause by sending an electronic copy hereof by electronic mail addressed to the attorney or attorneys for said parties or by depositing a copy hereof, postage paid, in the United States certified mail addressed to any unrepresented party.

April 20, 2012

By: Kristi Love, Administrative Assistant to Commissioner Barden

EXHIBIT 2

APPELLATE PANEL DECISION AND ORDER

OF THE

SOUTH CAROLINA WORKERS' COMPENSATION COMMISSION

W.C.C. FILE NO: 0907957

Sylvester Dublin, Jr., Employee, Respondent/Claimant, vs. Luther B. Hicks Logging, Employer, AND Palmetto Timber Fund, Carrier, Appellants/Defendants.	**APPELLATE PANEL DECISION AND ORDER**

Appellate Panel Review held in Columbia, South Carolina on August 28, 2012 per notices timely and properly served on all parties of interest.

Appellate Panel Decision and Order filed: 11-16, 2012.

APPEARANCES: Claimant /Appellants represented by Ronald J. Jebaily, Esquire, of Jebaily Law Firm, P.A., of Florence, South Carolina.

Defendants/Respondents represented by Walter H. Barefoot, Esquire, of Turner Padget Graham & Laney, P.A., of Florence, South Carolina.

STATEMENT OF THE CASE

The parties were heard by Single Commissioner Susan S. Barden, at a hearing on February 1, 2012 in Florence, South Carolina. As a result of that hearing, the Single Commissioner issued an Order filed April 20, 2012, from which the Appellant takes this appeal.

Within the statutory period, the Claimant filed an application for review in this case setting forth his assignments of error. Copies of the application for review were timely and properly served upon all parties.

In his Form 30, Request for Commission Review and Amended Form 30, Request for Commission Review, the Claimant asserts thirty-five (35) errors, as follows:

1. In Finding of Fact Number 13 that Claimant was evasive at the hearing on the issues of his prior injuries, the error being that the finding is against the greater weight and preponderance of the evidence in the record.

2. In Finding of Fact Number 15 that Claimant climbed out of the cab of the truck with no assistance and at the same time told various providers that his legs were pinned in the cab, the error being that the finding is an incomplete version of the facts and is against the greater weight and preponderance of the evidence in the record.

3. In Finding of Fact Number 17 that Claimant was not credible with regard to losing consciousness and having amnesia of the accident, the error being that the finding is based on an incomplete view of the facts is against the greater weight and preponderance of the evidence and constitutes an abuse of discretion.

4. In Finding of Fact Number 18 that concerning Claimant's perceptions during and immediately after the accident, the error being that the finding is based on an incomplete view of the facts is against the greater weight and preponderance of the evidence.

5. In Finding of Fact #22 that Claimant's testimony that he is limited in bending is refuted by Defendant's surveillance video, the error being that the finding is based on an incomplete view of the facts is against the greater weight and preponderance of the evidence.

6. In Finding of Fact #23 that claimant's headaches resolved or returned to baseline, the error being that the finding is based on an incomplete view of the facts is against the greater weight and preponderance of the evidence.

7. In Finding of Fact #24 that any injury to Claimant's shoulders or upper extremities resolved by March 2010, the error being that the finding is based on an incomplete view of the facts is against the greater weight and preponderance of the evidence.

8. In Finding of Fact #26 that the post-accident pictures of the truck Claimant was driving are no indicator of Claimant's injuries or credibility, the error being that the finding is based on an incomplete view of the facts is against the greater weight and preponderance of the evidence.

9. In Finding of Act #34 that Claimant's gait is normal, the error being that the finding is based on an incomplete view of the facts is against the greater weight and preponderance of the evidence.

10. In Finding of Fact #34 that Claimant's activity and personal relationships are inconsistent with psychologists' reports that Claimant remains isolated, the error being that the finding is based on an incomplete view of the facts is against the greater weight and preponderance of the evidence.

11. In Finding of Fact #35 that claimant appears to have no difficulty driving or bending, the error being that the finding is based on an incomplete view of the facts is against the greater weight and preponderance of the evidence.

12. In Finding of Fact #36 that Claimant does not require the use of a cane as recommended by a physician, the error being that the finding is based on an incomplete view of the facts is against the greater weight and preponderance of the evidence.

13. In Finding of Fact #37 that Claimant's injuries were minor, the error being that the finding is based on an incomplete view of the facts is against the greater weight and preponderance of the evidence.

14. In Finding of Fact #41 that Claimant is not credible, the error being that the finding is based on an incomplete view of the facts is against the greater weight and preponderance of the evidence and constitutes an abuse of discretion.

15. In Finding of Fact #42 that Claimant's psychological condition is minimal, the error being that the finding is based on an incomplete view of the facts is against the greater weight and preponderance of the evidence and constitutes an abuse of discretion.

16. In Findings of Fact #44 in giving little weight to the report of Claimant's own psychologist, the error being that the finding is based on an incomplete view of the facts is against the greater weight and preponderance of the evidence and constitutes an abuse of discretion.

17. In Finding of Act #46, in failing to appropriately weigh the reports of the authorized psychologists and in requiring Claimant to undergo an Independent Psychological Evaluation for an MMPI, the failure is based on an incomplete view of the facts is against the greater weight and preponderance of the evidence and constitutes an abuse of discretion.

18. In Finding of Fact #47 that the only compensable body parts/conditions are the spine and psychological overlay, the error being that the finding is based on an incomplete view of the facts is against the greater weight and preponderance of the evidence and constitutes an abuse of discretion.

19. In failing to find Claimant is in need of additional medical treatment for his cervical spine, the error being that the failure is against the greater weight and preponderance of the evidence and constitutes an abuse of discretion.

20. In failing to find Claimant's shoulders and upper extremities are compensable injuries due to the radiculopathy and results from his cervical spine condition, the error being failure is against the greater weight and preponderance of the evidence and constitutes an abuse of discretion.

21. In Finding of Fact #10 that the Claimant had 17 different employers from 1995 – 2009 and worked for most of them for 1-8 months, the error being the finding is against the greater weight and preponderance of the evidence, is irrelevant, and constitutes an abuse of discretion.

22. In Finding of Fact #11 that Claimant was a 5-month employee when the accident occurred, the error being the finding is against the greater weight and preponderance of the evidence and constitutes an abuse of discretion.

23. In Finding of Fact #14 that claimant was a restrained driver, the error being the finding is against the greater weight and preponderance of the evidence and constitutes an abuse of discretion.

24. In Finding of Fact #15 that Claimant refused a cervical collar and backboard at the scene of the accident, the error being the finding is against the greater weight and preponderance of the evidence and constitutes an abuse of discretion.

25. In Finding of Fact #19 that Claimant demonstrated normal behavior at the emergency department, the error being the finding is against the greater weight and preponderance of the evidence and constitutes an abuse of discretion.

26. In Finding of Fact #20 that Claimant did not sustain any trauma to his head, the error being the finding is against the greater weight and preponderance of the evidence and constitutes an abuse of discretion.

27. In Finding of Fact #25 that Claimant did not sustain a separate leg injury, the error being the finding is against the greater weight and preponderance of the evidence.

28. In Findings of Fact #27, #28, #29, #30, #31, #32, and #33 that cite medical records to conclude that Claimant sustained nothing more than a cervical strain, the error, being the findings represent an incomplete view of the evidence and are against the greater weight and preponderance of the evidence and constitute an abuse of discretion.

29. ~ In Finding of Fact #38, that Dr. Edwards found Claimant at maximum medical improvement in November 2009 (just several months after the date of the accident) with a 10% impairment rating and a **50 lb. lifting restriction**, the error being the finding is against the greater weight and preponderance of the evidence and constitutes an abuse of discretion.

30. In Finding of Fact #29, that Dr. Kirkley's opinion seems to be somewhat cursory does not contain the level of detail of Dr. Edward's evaluation, the error being the finding is against the greater weight and preponderance of the evidence and constitutes an abuse of discretion.

31. In Finding of Fact #40, in giving greater weight to the records/opinions of Dr. Edwards than to any other physician in this case, the error being the finding is against the greater weight and preponderance of the evidence and constitutes an abuse of discretion.

32. In Finding of Fact #43, that claimant's sleep apnea is unrelated to the work accident, the error being the finding is against the greater weight and preponderance of the evidence and constitutes an abuse of discretion.

33. In finding of Fact #45 that suggests Claimant's initial diagnosis by Drs. Bergmann and Deal was based on misrepresentation by the Claimant, the error being the finding is against the greater weight and preponderance of the evidence and constitutes an abuse of discretion.

34. In Findings of Fact #45 that suggests Claimant's diagnosis by Drs. Bergmann and Deal was inaccurate based on Claimant's Pain Patient Profile that was invalid and indicated at least the potential for symptom magnification, the error being the finding is against the greater weight and preponderance of the evidence and constitutes an abuse of discretion.

35. In Finding of Fact #46 wherein the single Commissioner erroneously attempted to retain jurisdiction the error being that the retention of jurisdiction is contrary to law and commission policy, and that is represents an abuse of discretion.

Pursuant to *South Carolina Code Ann.* §42-17-50, we, the Appellant Panel have reviewed the Single Commissioner's Decision and Order and weighed the evidence as presented at the initial hearing. We have also considered all issues raised in the briefs of the Appellant and Respondents, as well as arguments held before this Appellate Panel on August 28, 2012.

After careful review, this Appellate Panel of the South Carolina Workers' Compensation Commission has determined that the Single Commissioner's Findings of Fact and Conclusions of Law are all correct. Further, this Appellate Panel has determined that the Single Commissioner's

Order is correct. As a result, the Appellate Panel issues the following Findings of Fact, Conclusions of Law, and Order, those being the same as the single Commissioner, as their own:

FINDINGS OF FACT

1. The Claimant, employer and insurance carrier were subject to the South Carolina Workers' Compensation Act on June 15, 2009.

2. The Claimant was an employee of Luther Hicks Logging on June 15, 2009.

3. The Claimant's average weekly wage and compensation rate are $502.50 and $335.02, respectively.

4. The Claimant injured his neck and back and sustained psychological overlay in the admitted accident on June 15, 2009. He alleges that he also injured his head, shoulders and bilateral upper extremities.

5. The report of Defendants' private investigator was not considered by the undersigned. The Commissioner reviewed the actual video surveillance and reached her own conclusions rather than rely on or consider the observations of a third person.

6. We find admissible reports of any agency of this state. The Defendants admitted into evidence records from the South Carolina Department of Employment and Workforce. However, we would note that any such record is not dispositive for purposes of Workers' Compensation. (Defendants' APA #15.)

7. The claimant is 44 years of age (testimony of Claimant).

8. Claimant is a high school graduate. Claimant also attended truck driving school and obtained his CDL (testimony of Claimant).

9. Claimant's prior employment includes work as a truck driver (Claimant's Exhibit #1; Defendants' APA #14).

10. Ordinarily, we would find rather irrelevant the length of a Claimant's employment with an employer or Claimant's employment history. However, given some of the other findings, we find it important to note that from 1995 – 2009, Claimant had 17 different employers, and worked for most of them for 1-8 months (Claimant's Exhibit #1; Defendants' APA#14; Claimant's APA #7, p. 123).

11. Claimant was a 5-month employee when the accident occurred (testimony of Claimant).

12. Claimant's job with Employer was log truck driver (testimony of Claimant).

13. Claimant has prior injuries involving his back (a Workers' Compensation injury involving the right foot, neck, and back, according to the clincher agreement; and motor vehicle

accidents, for which he received an impairment rating (5% to the back) and settlements. However, Claimant told the authorized treating physician (Dr. Edwards) and other providers that he had "no previous problems to his back." Claimant was evasive at the hearing on these issues, and was impeached with his deposition testimony (testimony of Claimant; Transcript of Hearing, p. 48).

14. In the accident in issue, Claimant was a restrained driver (Claimant's APA #1, p. 8; Claimant's APA #4, page 45; "took seatbelt off" and page 60).

15. After the accident, Claimant climbed out of the cab of the truck with no assistance. When EMS arrived, Claimant was walking around, and took photos of the truck. Nonetheless, Claimant told various providers that his legs were "pinned" in the cab (testimony of Claimant; Claimant's APA #1, pp. 1 and 5; Claimant's APA #3, p. 36, and other APA submissions as well).

16. At the scene, Claimant refused a cervical collar and backboard (Claimant's APA #1, pp. 1 and 8).

17. Claimant's hearing testimony that (a) he may have lost consciousness, and (b) he told ER personnel that he may have lost consciousness is not credible, and is refuted by multiple APA submissions documenting the fact that claimant denied any loss of consciousness. Contrary to his testimony, Claimant had no amnesia of the event. In sum, there is not one medical record temporal with the accident stating that Claimant either lost consciousness or may have possibly lost consciousness (testimony of Claimant; Claimant's APA #1, pp. 5 and 8, medical evidence in its entirety).

18. Claimant's hearing testimony that he took several photos at the scene of the truck on its side because he did not know why his truck was in a ditch (i.e., he had lost consciousness or was dazed and confused) is not credible, and is refuted by the EMS record; this record states that Claimant himself told EMS personnel that the truck began to shake and he could not get the truck back on the road. If, as Claimant testified, he did not know at the time just after the accident why his truck was in a ditch, we find inconsistent Claimant's statement to Dr. Bergmann that Claimant "feared for his life" during the incident as he thought that the trees he was hauling might come through the cab (Claimant's APA #1, p. 1; Claimant's APA #8, p. 127).

19. At the ER, Claimant demonstrated "normal behavior." There is no mention of a possible loss of consciousness or even confusion (Claimant's APA #1, p. 2).

20. There is no question that Claimant reported a headache to both EMS and ER personnel on the date of the accident. However, Claimant's CT was "normal," and ER personnel note that there was "no trauma" or "no evidence of trauma" to the head (Claimant's APA #1, pp. 1-2, particularly p. 8, and p. 11; Claimant's APA #2, p. 13).

21. Claimant was discharged from the ER on the date of the accident (Claimant's APA #1, p. 3).

22. Claimant's statement to a chiropractor that he is limited in bending is refuted by Defendants' surveillance video (Claimant's APA #4, p. 58; Defendants' surveillance video).

23. We find that any injury to or problem with Claimant's head (such as headaches) resolved or returned to baseline within approximately 1 month after the date of the accident. We base this finding on medical evidence, including but not limited to the fact that Claimant has pre-existing headaches (as documented in medical evidence from his family doctor), on the fact that Claimant is not credible, the fact that there was "no trauma" to the head (per ER records), and on the fact that Claimant's CT scan (which Claimant underwent because of his complaint of headache) is normal (Claimant's APA #2, pp. 13-14; See also Claimant's APA #4, p. 61: "0 Headache today." p. 66 – pain diagram showing a head complaint on July 13, 2009, and pp. 72-73 – pain diagrams showing no head complaint; Defendants' APA #12, p. 201).

24. If Claimant injured his shoulders or upper extremities in the accident (he did not complain of either on the date of the accident), we find that they resolved by March 2010. We base this finding on Claimant's APA#3, p. 55.

25. Claimant's assorted statements to multiple providers that (a) his feet/ankles were "pinned to the floor," (b) his legs were "pinned in" the cab (claiming a right ankle injury for the first time months after the accident), and (c) the cab was "crushed around him" (when Claimant climbed out unassisted and then walked around) does nothing to bolster Claimant's credibility. The physician who examined Claimant's right ankle because of Claimant's statements found the ankle "*completely benign*" with no tenderness and no swelling. We therefore find that there is no separate leg injury (medical evidence in its entirety; Claimant's APA #3, pp. 36-37; Claimant's APA #7, p. 123; Claimant's APA #8, p. 127).

26. Given the fact that Claimant was (a) restrained/belted, (b) crawled out unassisted, (c) walked around the scene, (d) felt well enough to take photos, and (e) declined a cervical collar, we find that the pictures of the truck post-accident are no indicator of Claimant's injuries – or credibility (Claimant's APA, Exhibit #2).

27. On September 2009 (a few months after the date of accident), the authorized treating physician (Dr. Edwards) found "no spasm" at his initial evaluation. In August 2010 (one year later), Dr. Edwards again notes "no spasm" (Claimant's APA #6, pp. 104 and 110).

28. Claimant's lumber spine MRI shows evidence of a "small" annular tear and degenerative changes, but **no evidence of herniation or compressive pathology.** There is "no evidence of any surgical problem" (Claimant's APA #3, p. 33; Claimant's APA #6, p. 104; Defendants' APA #11, p. 200).

29. Dr. Edwards noted that claimant's bilateral lower extremities have no tenderness, full range of motion, with normal stability, strength and tone. Similarly, nine months after the date of the accident, Claimant's family doctor noted no abnormality after examination of Claimant's upper and lower extremities (Defendants APA #12, p. 204).

30. Claimant's CT scan of his neck is normal and "unremarkable." Claimant's family physician diagnosed Claimant with a "muscle strain" and Dr. Edwards likewise diagnosed Claimant with a cervical strain/sprain (Claimant's APA #6, p. 111; Defendants' APA #12, pp. 203-204 and 206).

31. Claimant's cervical condition is diagnosed as a cervical strain/sprain by Dr. Edwards without compression, herniation or stenosis. In fact, **Dr. Edwards notes that the MRI shows "no abnormalities except for very minimal age-related degenerative changes** (Claimant's APA #6, p. 104).

32. Claimant's testimony that he has numbness in his fingers is refuted by Dr. Edwards' record that Claimant has no weakness or paresthesias (Claimant's APA #6, pp. 110-111).

33. By August 2010, Claimant's cervical motion is noted to be "essentially normal" (Claimant's APA #6, p. 110).

34. Contrary to his presentation at the hearing (ambulating laboriously with a cane), the authorized treating physician notes (1 year after the accident) that Claimant's gait is "normal." Further, Claimant admitted that he performs in a gospel singing group, and as of the date of the hearing, has performed outside of Raleigh and in Marion. Claimant's group practices weekly for a couple of hours. Claimant's ability to engage in this type of activity (while reporting "9" level pain to physical therapy personnel and other providers) is inconsistent with Claimant's (a) reports to Drs. Bergmann and Deal that he "remains isolated," "inactive," and "withdrawn;" and (b) presentation to Drs. Bergmann and Deal (and to undersigned) that he is "slow moving." Claimant also has a girlfriend per his own testimony (observations of the undersigned; testimony of Claimant; Claimant's APA #8).

35. Claimant drives himself to his appointments. He also drove from Columbia to Dillon (at least 108 miles) to meet his girlfriend. Once there, he raised the hood on her car and bent at the waist several times because of her car difficulties (testimony of Claimant – on the video at 2:28 p.m. he bends at his waist and leans under the hood. He bends at the waist at least five to ten seconds and appears to have no difficulty doing so.)

36. We do not find persuasive the fact that a physician may have prescribed a cane based upon Claimant's complaints to this physician. We base this finding on the fact that authorized treating physician Dr. Edwards – to whose records we give the greatest weight – notes that Claimant has a **normal gait and 5/5 motor strength in the lower extremities**. Contrary to Claimant's testimony regarding lower extremity numbness, Dr. Edwards notes no dermatomal paresthesias (Claimant's APA #6, p. 110; testimony of Claimant; observations of the undersigned).

37. We find that the Claimant's injuries were minor, contrary to his testimony and to his statements providers. We base this finding primarily on the objective diagnostic studies and on the treatment notes of Dr. Edwards.

38. Dr. Edwards found Claimant at maximum medical improvement in November 2009 (just several months after the date of the accident) with a 10% impairment rating and a **50-lb. lifting restriction** (Claimant's APA #6, p. 109).

39. However, after Dr. Edwards released Claimant, Defendants sent Claimant for a 2nd opinion (Dr. Kirkley's opinion seems to be somewhat cursory. While it indicates he

reviewed Dr. Edwards' reports, it does not contain the level of detail of Dr. Edward's evaluation).

40. We give greater weight to the records/opinions of Dr. Edwards than we give to any other physician in this case.

41. Claimant is not credible. This finding is based on observations of Claimant and on the delivery of his testimony. However, this finding is particularly based upon the fact that Claimant had a noticeably (significantly) different demeanor, tone of voice, and speed/cadence of speech during cross examination (particularly during the segment regarding the video surveillance) than he had on direct examination when he spoke with a voice so soft that the Single Commissioner could barely hear him and with a much slower speed. We also note that Claimant's minimal objective pathology does not warrant the use of a cane, and that the cane prescription was based upon Claimant's subjective complaints. We finally note that when the Single Commissioner asked Claimant to raise his right hand, he sat and stared at both hands for several full seconds as if he could not determine which was his right. The performance did not impress the Single Commissioner, or us.

42. It appears to the undersigned that any psychological condition from which Claimant suffers is minimal. At the hearing, the Single Commissioner observed Claimant initially "wipe" teams that were not present, until he literally stuck his fingers in his eyes. Further, and very compelling to us is the fact that nine months after the date of the accident, Claimant reported to his family doctor that he had "no increased nervousness, mood changes or depression" (Defendants' APA #12, p. 204; observations of the undersigned at the hearing).

43. Claimant's sleep apnea, which he had previously, is unrelated to the accident in issue (Defendants' APA #12, pp. 201-202; Claimant's APA#3, p. 47).

44. We give little weight to the report of Claimant's own psychologist (Dr. Scearce) as Claimant told this provider that the cab of the truck was "crushed around him," and that he has "intrusive" recollections about the accident. By contrast, Claimant told the Single Commissioner that he did not know why his truck was in the ditch when he climbed out of the cab. **Claimant's MMPI was invalid as to hysteria and paranoia per his own expert** (Claimant's APA #7; testimony of Claimant).

45. Similarly (as Claimant did with Dr. Scearce), Claimant told Drs. Bergmann and Deal that he was "pinned to the floor of the vehicle," a description upon which they in part made their initial diagnosis. These providers note that Claimant's Pain Patient Profile is invalid, indicating at least the potential for symptom magnification.

46. Unfortunately, the authorized psychologists did not administer their own MMPI, and we find that the description of the results by Claimant's expert is lacking. Therefore, Defendants are to send Claimant to an independent psychologist for an MMPI (with sufficiently detailed test results). Once the results are received, the Single Commissioner (Commissioner Barden) will adjudicate the remainder of the issues pending before her.

47. The only compensable body parts/conditions in this case are the spine and psychological overlay. Other conditions/body parts alleged by Claimant are not proven by the greater weight of the evidence.

48. Permanency is premature.

49. Claimant's average weekly wage is $502.50, yielding a compensation rate of $335.02.

CONCLUSIONS OF LAW

1. Section 42-1-40 of the South Carolina Code of Laws (Cum. Supp. 1992) is applicable in defining "average weekly wages".

2. Section 42-1-140 of the South Carolina Code of Laws (Cum. Supp. 1992) is applicable in defining "employer".

3. Section 42-1-160 of the South Carolina Code of Laws (Cum Supp. 1992) is applicable in defining "injury and personal injury".

4. Section 42-15-60 of the South Carolina Code of Laws (Cum. Supp. 1992) is applicable in determining the period of time within which medical treatment and supplies shall be furnished.

5. Section 42-17-40 of the South Carolina Code of Laws (Cum. Supp. 1992) is applicable in governing the conduct of hearings and rendering of awards.

6. Section 42-15-80 of the South Carolina Code of Laws (Cum. Supp. 1992) is applicable in determining that the Commissioner can order the Claimant to submit to examination.

ORDER

Based upon the Findings of Fact and Conclusions of Law, the Appellate Panel issues the following order:

IT IS ORDERED that, as a result of an admitted injury of June 15, 2009, the Claimant sustained a compensable injury to his back with some psychological overlay;

IT IS FURTHER ORDERED that the other body parts and conditions alleged by the Claimant, that being his head, shoulders, bilateral upper extremities, right hand, and ankles, are not compensable;

IT IS FURTHER ORDERED that permanency is premature because the Claimant did not seek it on his Form 50 and it was not an issue at this hearing;

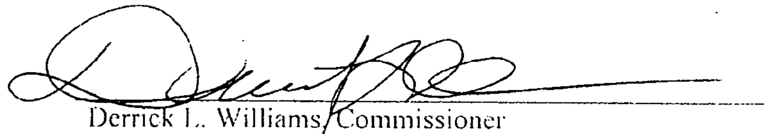
IT IS FURTHER ORDERED that the Defendants are to send the Claimant to an independent psychologist for a MMPI test (with sufficiently detailed test results) to be submitted to Commissioner Barden so she can adjudicate the remainder of issues before her.

FULL AFFIRMATION

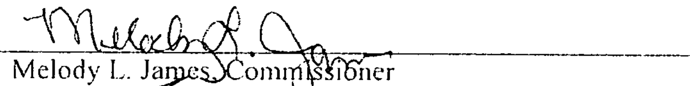
AND IT IS SO ORDERED.

No hearing costs are assessed in this case.

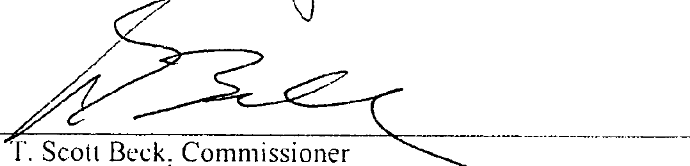
SOUTH CAROLINA WORKERS' COMPENSATION COMMISSION



Derrick L. Williams, Commissioner



Melody L. James, Commissioner



T. Scott Beck, Commissioner

Dated: 11/16, 2012.

Columbia, South Carolina.

CERTIFICATE OF SERVICE

This is to certify the undersigned has this date served this order in the above entitled action upon all parties to this cause by sending an electronic copy hereof by electronic mail addressed to the attorney or attorneys for said parties or by depositing a copy hereof, postage paid, in the United States mail addressed to any unrepresented party.

By Valerie Deller on November 16, 2012

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM THE SOUTH CAROLINA
WORKERS' COMPENSATION COMMISSION
APPELLATE PANEL

Appellate Case No. 2012-213625
W.C.C. File No. 0907957

Sylvester Dublin, Jr., Employee, ... Appellant,

v.

Luther B. Hicks Logging, Employer, and
Palmetto Timber Fund, Carrier, ... Respondents.

PROOF OF SERVICE

I certify this 6th day of February 2013 that I have served a copy of the RETURN TO MOTION TO HOLD APPEAL IN ABEYANCE upon other counsel of record, by mailing same, postage prepaid in the United States mail, addressed to the following:

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SC Court of Appeals

(Signature page to follow.)

February 6, 2013 By:

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