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SC Court of Appeals

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM
SOUTH CAROLINA WORKERS' COMPENSATION COMMISSION
W.C.C. FILE NO: 1206236

Appellate Case No. 2019-001936

Jennie Cox,…………………………………………………………………..Appellant,

v.

Palmetto State Transportation, Employer, and
Cherokee Insurance Company, Carrier,…………………………………..Respondents,

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INITIAL BRIEF OF APPELLANT

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STATEMENT OF ISSUES ON APPEAL

I. WHETHER THE FULL COMMISSION ERRED IN FAILING TO CONSIDER AND ASSIGN APPROPRIATE WEIGHT TO ALL OF THE AVAILABLE EVIDENCE IN DETERMINING THE EXTENT OF APPELLANT'S INJURIES, INCLUDING BUT NOT LIMITED TO, PROFFERED MEDICAL EVIDENCE OBTAINED AFTER THE INITIAL HEARING IN THIS MATTER IN ORDER TO ADDRESS COMMISSION CONCERNS REGARDING A PREVIOUSLY SUBMITTED MEDICAL REPORT.

II. WHETHER THE FULL COMMISSION ERRED FAILING TO FIND APPELLANT IS ENTITLED TO PERMANENT AND TOTAL DISABILITY BENEFITS AS A RESULT OF HER WORK RELATED INJURIES?

STATEMENT OF THE CASE

This matter was originally heard by Commissioner Aeisha Taylor who, after a full hearing on the merits of the matter, issued an order finding the Appellant, Jennie Cox, to be permanently and totally disabled as a result of her work-related injuries. Respondents appealed from Commissioner Taylor's order. By Order dated May 21, 2018, the Full Commission reversed Commissioner Taylor's finding of permanent and total disability and remanded the case for further action. Rather than remanding the matter to Commissioner Taylor, the Full Commission instructed that the matter be heard on remand by a different Commissioner.[1] After a hearing on the matter, at which Appellant was allowed to offer only limited testimony, Commissioner Beck

[1] Generally, when the Commission remands a case back to the Single Commissioner level for further action, the Commission almost always remands the case to the Commissioner who originally heard the matter. Here, however, the Commission elected to forbid the original Commissioner from hearing the case on remand despite the lack of any findings as to Commissioner Taylor being unavailable, disqualified, incapable, or unwilling to follow the Full Commission's directives on remand. Although Appellant is not aware of has case or statutory authority expressly indicating that the Commission acted outside its authority in remanding the case to a different Commissioner, it appears counter-intuitive, at the very least, that the Commission could effectively assign its authority as the ultimate finder of fact back to a different Single Commissioner. To be sure, the Commission's decision to do so in this case exacerbated procedural complexities already inherent

issued his order dated May 21, 2019 finding that, inter alia, Ms. Cox is entitled to permanent partial disability and lifetime medical benefits as a result of her injuries, but specifically finding that his award was limited in scope due to the mandates of the Full Commission Order. Appellant filed a second timely appeal to the Full Commission. Following oral arguments, the Commission issued its order affirming Commissioner Beck's order. This appeal followed.

STATEMENT OF FACTS

It is undisputed that on May 31, 2012 Jennie Cox sustained extensive compensable injuries by accident arising out of and in the course of her employment with Palmetto State Transportation as a CDL truck driver. The accident occurred while she was on a delivery in Georgia, when she was removing freight; a machine fell on her, causing her to fall to the ground face-first, rendering her unconscious. As a result of the accident, she injured her head, teeth, mandible, left shoulder, neck and facial nerves. Further, as a result of the injuries Appellant has sustained, she suffers from worsening depression due to chronic pain and inability to maintain gainful employment, severe weight loss, and debilitating fatigue.

The facts and circumstances attendant to this case, including the medical records, psychological evaluations/independent medical evaluations, deposition and hearing testimony all support Appellant's position that she has been rendered totally and permanently disabled as a result of the injuries in question and that she is entitled to lifetime medical care.

Ms. Cox is 67 years old, divorced and has two adult daughters. She graduated from Woodmont High School in 1970 and attended TEC, but did not graduate. She obtained her Truck Driver's Class "A" license in 1985, and has worked in that capacity thereafter. At the time of the accident, Appellant had worked for Employer for eleven (11) years, and worked for US Food Service for six (6) years prior to that. Appellant testified that she had no prior

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to Commission remand.

physical injuries and was in good health at the time of her injuries. She testified that she did suffer from pre-existing depression related to the death of her grandson who was killed at age 16 in a car accident.

On May 31, 2012, Appellant was on a delivery in Georgia, when she was removing freight from her truck; a machine fell on her, causing her to fall to the ground face first knocking her unconscious. She was rushed to Grady Memorial in Georgia and then brought by EMS to Greenville Memorial Hospital with injuries to her head, face, mouth and neck, left shoulder, chest, low back and problems breathing. On June 1, 2012, James Fowler, M.D. performed extensive surgical intervention to address Appellant's injuries. Records indicated he performed a bilateral subcondylar mandible fracture, left body comminuted mandible fracture, avulsed maxillary and mandibular teeth, maxillomandibular fixation with screws, open reduction and internal fixation left body mandible fracture and dental tooth extraction.

Appellant was subsequently seen by Stacey Newsom, M.D. at the Center for Health and Occupational Services for chest wall pain and left shoulder pain. Dr. Newsome indicated chest wall contusions and left shoulder contusion with weakness and possible rotator cuff injury. Dr. Newsome instructed Appellant to continue with Lortab for pain, deep breathing exercises and imposed work restrictions limiting Appellant to sedentary work with a five (5) pound lifting restriction and prohibited her from operating commercial motor vehicle.

Appellant had a follow-up with Dr. Fowler on June 11, 2012, after which Dr. Fowler opined that Appellant was to remain in a "levered and wired occlusion for one more week." On July 5, 2012, Appellant underwent surgery to remove the IMG screws.

On July 6, 2012, Appellant underwent an MRI of the left shoulder at Innervision MRI & Imaging with an impression of "degenerative changes and mild tendinopathy in the suprae and infraspinatus tendons." On July 17, 2012, Appellant returned to Innervision for an x-ray of the

chest with an impression of COPD without acute findings. Appellant then returned to Dr. Newsome on July 17, 2012 to review the findings of the MRI and x-ray. Dr. Newsome's diagnosis was chest wall contusions resolving and left shoulder contusion improving. Appellant was to continue the same restrictions with the additional restrictions ordered by Dr. Fowler.

On July 24, 2012, Appellant began treating with Larry W. Cobb, D.M.D at Piedmont Oral Surgery to discuss surgical oral restoration. Dr. Cobb noted Appellant had multiple jaw and teeth fractures and determined he would allow them to heal for an additional three months before attempting restorative procedures. Dr. Cobb also ordered a CT for September and sought preauthorization for implants and restoration.

Appellant again saw Dr. Newsome on August 7, 2012, at which point Dr. Newsome noted left shoulder weakness and tendinosis and chest wall contusion. She recommended physical therapy for strengthening prior to return to full duty. Dr. Newsome stated Appellant could return to work with restrictions of no lifting, pushing or pulling more than 15 pounds occasionally and no operating commercial motor vehicle. Appellant started physical therapy with Proaxis Therapy on August 22, 2012 for her left shoulder pain.

On August 28, 2012, Appellant went to her family doctor, Jennifer T. Ellis, M.D., for a follow-up. Dr. Ellis noted that her depression and insomnia had been getting worse since her last visit and Appellant was also experiencing loss of appetite and loss of interest in pleasurable activities since her work related injury.

On September 4, 2012 Dr. Cobb examined Appellant and stated she was healing well and scheduled a CT. The CT scan on October 3, 2012 also showed she was healing well. Dr. Cobb referred her to Donald L. Ridgell, DM.D. for his evaluation. Appellant saw Dr. Ridgell on October 4, 2012, wherein Dr. Ridgell examined Appellant and agreed with Dr. Cobb that a full mouth extraction of Appellant's natural teeth with implant replacement was the best solution.

Dr. Ridgell further noted that he would continue to work along-side Dr. Cobb for the maintenance and upkeep of the implants.

On October 30, 2012 Dr. Cobb opined that Appellant had "a full work up including a physical examination CBCT evaluation to determine the best treatment necessary to restore her teeth for maximum function. She has a very complicated case secondary to her normal petite size and small jaw. This has been further compromised by the very significant jaw injuries including multiple bone fractures and loss of teeth. Her remaining teeth are terminal due to the lack of bone support. These will all have to be removed. She has very minimal maxiallary bone and will lose more when her teeth are removed. She will require extensive bone grafting before any definitive treatment can be achieved. Either one or both bone plates will need to be removed from the mandible before any treatment can be implemented there as well." Dr. Cobb set out the treatment in 5 stages with an estimated cost of $34, 215.00, not including the prosthetic work to be done by Dr. Ridgell.

On November 5, 2012, Appellant saw Dr. Fowler for a follow up examination. Dr. Fowler noted that Appellant had been seen by a prosthodontist and was scheduled for dental restoration. He specifically noted that Appellant's nutrition has been affected in that she had to work to get enough nutrition in and was eating pureed food. Dr. Fowler recommended a softer food diet and that Appellant maintain her nutrition as needed with calorie supplements including Ensure or Carnation Instant Breakfast.

Appellant was discharged from Proaxis on November 6, 2012, after completing 20 visits, to an independent home exercise program. Following her discharge from physical therapy, she returned to Dr. Newsome on November 9, 2012. Dr. Newsome opined that her left shoulder injury was at MMI with an impairment rating of the left shoulder of 2% and stated Appellant could return to work on November 9, 2012 without restrictions with regard to her left shoulder.

On January 31, 2013, Appellant began her restoration with Dr. Cobb as follows:

a) 01/13/13 bilateral sinus graft, removal of superior bone plate and surgical removal of teeth numbers 4, 6, 11, 21, 22, 26, 27, 28, 29;

b) 04/29/13 surgical implant placement of teeth numbers 20, 23, 25, 27, 30; and

c) 07/17/13 surgical implant placement of teeth number 3, 5, 6, 11, 12, 14.

During the process of her oral reconstructive surgery, Dr. Cobb referred Appellant to a nutritionist. He stated that she is "very malnourished. The success of our treatment depends on her ability to heal. I believe that all of our treatment may be in jeopardy if her overall nutrition does not improve."

On July 15, 2013, Appellant returned to Dr. Ellis for a follow-up. Dr. Ellis stated Appellant is doing "about the same." "She is currently experiencing fatigue, weight loss of 25 pounds over the past year and loss of appetite. Appellant states she gets hungry and tries to eat but it hurts." Dr. Ellis refilled her anxiety and insomnia medications of Alprazolam Oral 0.5 mg and Restoril Oral Capsule 30 mg.

Upon her healing from the restoration surgeries, Appellant returned to work on August 12, 2013. Appellant testified that although she did her absolute best to perform her work duties in the same manner as before the accident, she continued to have difficulties and was never able to perform her duties as well as before she was injured. Significantly, despite her commendable attempt to return to work, Appellant continued to experience pain, inability to maintain proper nutrition except through the use of nutritional supplements, and suffered from weaknesses, fatigue and inability to concentrate.

On October 6, 2014, Appellant returned to the Center for Health & Occupational Services for reevaluation of her left shoulder. Appellant was seen by Brian Svazas, M.D. and advised him that she was having some difficulties in the left shoulder with it being sore after long truck runs.

Appellant also discussed difficulties with the left ear with intermittent hearing diminution. Dr. Svazas advised that he believed the complaints she had in the left scapular border were likely related to her work injury to the shoulder. He advised that physical therapy could help clear up some of the soft tissue areas. Dr. Svazas found her at MMI with a 6% left shoulder rating and opined that "she may need some ongoing therapy to this shoulder going forward."

Dr. Ridgell opined on April 9, 2015 that Appellant will need future medical care by way of "maintenance procedures annually- more expensive than natural teeth, replace or refurbish appliances every 6-8 years and oral surgeon visit in 5 years for radiograph/CT scan." Dr. Ridgell continues to see Appellant every 6 months.

Appellant last saw Dr. Cobb on April 27, 2015 where he released her to MMI with the following impairment ratings: 15%- diet limited to soft or semi solid foods, 85% of normal function, 4% interincisal range of Motion- 30mm, 3% lateral excursion range of motion0 5-6mm, 2% facial disorder- scar, 1% nerve disorder- permanent numbness of lower lip and chin on left side, for a 25% whole person. He also stated that she will need prosthetic maintenance and replacement.

Appellant continued to have pain in her jaw and returned to Dr. Fowler on June 8, 2015 and again on June 15, 2015 with draining sinus to the left jaw in the region of a previous ORIF and plate and screw placement for a compound fracture of an atrophic mandible. Appellant went out of work again on June 20, 2015 due to these issues and on July 5, 2015 Dr. Fowler performed surgery for removal of the indwelling device of the mandibular bone along with removal of plate and screws, bone biopsy and bone grafting.

Dr. Fowler released her to return to work, which Appellant did in August 2015. Appellant had a follow-up appointment with Dr. Fowler on October 12, 2015, wherein Dr. Fowler stated "she has residual numbness from the left mental nerve that may be permanent."

In October 2015, Appellant went from running team driving to single driving.

Throughout these surgeries for her mouth, Appellant continued to see Dr. Ellis for routine follow ups and prescription refills for her depression that continued to get worse. At her appointment on March 3, 2016, Dr. Ellis noted that since Appellant has gone to single driving, it was physically and mentally wearing her out. Dr. Ellis further noted it was still uncomfortable for her to eat as her- “teeth not lined up” and that Appellant had lost a significant amount of weight as a result. Dr. Ellis took her out of work until she could gain some weight. Appellant went to her dentist, William A Cofer, D.M.D. on April 14, 2016 to get his opinion as to the pain she continues to have chewing and earing her food. Dr. Cofer opined “I believe the reason she is having difficulties chewing and eating is due to the numbness on the left side of her lower jaw. She has had a loss of sensation since her accident…..Unfortunately; it is unlikely that she will regain any meaningful sensation due her accident.” Over the next several months, Appellant was able to show good weight improvement and return to work on June 1, 2016. However, Appellant testified she did not experience a corresponding return at her pre-accident strength. In fact, Appellant indicated her lack of strength, consistent fatigue and inability to maintain concentration rendered truck driving an unsafe occupation for her to continue. She testified credibly and without challenge from the Employer that she had conveyed her concerns to her supervisor and he indicated that the company would not be comfortable accepting the liability implications stemming from her symptoms. Appellant did not receive temporary total benefits for this period of time she was out of work.

Appellant ran nonstop runs for a few weeks with constant pain over her entire body. On June 14, 2016 she notified the Employer that she was in too much pain, could not work and needed additional treatment.

While awaiting authorization for additional treatment from the Employer, Appellant’s

attorney sent her for an Independent Medical Evaluation with Walter Grady, DO on July 21, 2016. Upon physical examination of the Appellant and review of her prior extensive medical treatment history, Dr. Grady gave Appellant an impairment rating of 17% to the left upper extremity, 28% to left shoulder impairment and 10% whole person.

Appellant's attorney also scheduled a physiological and vocational evaluation with Robert E. Brabham, Ph.D. on August 8, 2016. Dr. Brabham has opined that "she would be unable to effectively perform the essential duties in any gainful work activity." Although the weight to be properly accorded Dr. Brabham's report was called into question at the initial appellate panel hearing, Dr. Braham subsequently issued a letter confirming his continued belief that he correctly assessed the Appellant's condition and inability to maintain gainful employment due to a combination of her work-related injuries. Commissioner Beck determined he was not at liberty to consider Dr. Brabham's follow-up correspondence in light of the Full Commission's order; however, the correspondence has been proffered.

Appellant sought treatment at the Wellness Center on her own on August 17, 2016, as she was in pain and Employer had not approved physical therapy as requested. She was making progress at the Wellness Center and her primary care doctor, Dr. Ellis, opined that she should continue there. Employer eventually authorized work hardening at CORA Rehabilitation. Appellant completed treatment three (3) times a week for several hours for a total of 20 visits between October 24, 2016 and December 19, 2016 at CORA Rehabilitation. Notably, CORA's December 19, 2016 Functional Capacity Test results indicated Appellant is not able to perform several of the minimal material handling requirements for a truck driver.

Appellant testified at the initial hearing, and has reiterated time and again, that she loved her job and wanted to continue working, however, due to the pain, weakness, fatigue and anxiety she experiences is not able to perform the job. As well, Appellant also remains unable to

conduct her day-to-day living activities in the same manner as before her injuries.

STANDARD OF REVIEW

The Administrative Procedures Act (APA) establishes the standard of judicial review of workers' compensation decisions. Pierre v. Seaside Farms, Inc., 386 S.C. 534, 689 S.E.2d 615 (2010); Lark v. Bi-Lo, Inc., 276 S.C. 130 276 S.E.2d 304 (1981). Under the APA, an appellate Court can reverse or modify the decision of the Commission where the substantial rights of the appellant have been prejudiced because the decision is affected by an error of law or is clearly erroneous in view of the reliable, probative, and substantial evidence considering the record as a whole. Transp. Ins. Co. v. South Carolina Second Injury Fund, 389 S.C. 422, 699 S.E.2d 687 (2010); Pierre, 386 S.C. at 540, 689 S.E.2d at 618; Tiller v. National Health Care Ctr. of Sumter, 334 S.C. 333, 338, 513 S.E.2d 843, 845 (1999); S.C. Code Ann. § 1-23-380(A)(6). Substantial evidence of the quality required to sustain the findings of the Commission is not a mere scintilla of evidence, nor the evidence viewed blindly from one side of the case, but is evidence which, considering the record as a whole, would allow reasonable minds to reach the conclusion the administrative agency reached in order to justify its action. Tiller, 334 S.C. at 338, 515 S.E.2d at 815; Miller v. State Roofing Co., 312 S.C. 452, 441 S.E.2d 323 (1994); Stokes v. First Nat'l Bank, 306 S.C. 46, 410 S.E.2d 248 (1991). Further, an appellate court may reverse or modify the Commission's decision if substantial rights of the appellant have been prejudiced because the administrative findings, inferences, conclusions or decisions are affected by other error of law. Stephen v. Avins Constr. Co., 324 S.C. 334, 478 S.E.2d 74 (Ct. App. 1996). Finally, South Carolina appellate courts have long recognized that it is logical for the Commission, which did not have the benefit of observing the witnesses, to give weight to the findings of the Single Commissioner. McGuffin v. Schlumberger-Sangamo, 307 S.C. 184, 414 S.E.2d 162 (1992).

ARGUMENTS

I. THE FULL COMMISSION ERRED IN FAILING TO CONSIDER AND ASSIGN APPROPRIATE WEIGHT TO ALL OF THE AVAILABLE REVELEVANT EVIDENCE IN DETERMINING THE EXTENT OF APPELLANT'S INJURIES INCLUDING, BUT NOT LIMITED TO, PROFFERED MEDICAL EVIDENCE OBTAINED AFTER THE INITIAL HEARING IN THIS MATTER IN ORDER TO ADDRESS COMMISSION CONCERNS REGARDING A PREVIOUSLY SUBMITTED MEDICAL REPORT.

A. **The Full Commission erred in determining by implication that the Appellant's compensable injuries were limited to specific body parts to the exclusion of Appellant's psyche or other bodily systems.**

The Full Commission's remand order proved extremely challenging to dechipher and give effect to the Commission's at times cryptic instructions. By way of example, Commissioner Beck stated in his order that, "[t]he remand order specifically instructs me to determine permanency on the following compensable body parts specifically delineated in the Panel's order: teeth, mandible, left shoulder, facial nerve, and scarring to the skin." Commissioner Beck interpreted the Commission's instructions in this regard as prohibiting him from considering the Appellant's other injuries in determining permanency. Appellant argued below that exclusion of her other injuries from the permanency equation could not have been the Commission's intention inasmuch as the remand order did not explicitly limit the Hearing Commissioner's authority to determine that the Appellant also suffered malnourishment, injury to her psyche and/or other body parts or systems as a result of her work-related injuries. Such an interpretation certainly seemed to fly in the face of the abundance of evidence Appellant presented at the initial hearing establishing the damaging effect that her work-related injuries continue to have on her psyche and ability to maintain proper nourishment. Nonetheless, despite ample evidence to the contrary and despite the lack of any explicit language in the remand order to this effect, the Commission ultimately agreed that it had intended to exclude these injuries from consideration in determining permanency.

Rather than an intentional nuance of the Order on remand, the Commission's decision in this regard was clearly an after-thought to its unsupported finding that the Appellant was not permanently and totally disabled, and was in no way supported by the reliable evidence in the record. Particularly in light of the lack of any medical evidence challenging the opinions of Appellant's care givers with respect to injuries beyond those listed by the Commission, it would appear the Commission adopted the interpretation that would most easily allow for the affirmation of the order on remand rather than acknowledging and correcting an oversite.

Because the Commission erred in finding the Appellant did not suffer additional, discrete injuries to her psyche and other bodily systems negatively impacting her ability to maintain proper nourishment, the order on appeal should be reversed.

B. Likewise, the Commission erred in finding the Appellant is not entitled to ongoing treatment for her psychological injuries.

Commissioner Beck found, and the Commission agreed, that "[b]ecause I am constrained by the Panel's specific instructions to only enter an award for PPD to the enumerated body parts, I cannot order Respondents to provide Plaintiff with psychological evaluation and treatment." Again, despite the lack of any language in the remand order explicitly limiting the Commissioner's authority to determine that the Appellant is entitled to additional evaluation and treatment for the psychological injuries she has suffered, the Commission adopted the finding as its own. This finding is especially egregious in light of the fact that the Appellant presented an abundance of evidence at the initial hearing establishing the damaging effect that her work-related injuries continues to have on her psyche and ability to maintain proper nourishment, and her need for continued medical care. Despite the lack of contradictory evidence, the Commission inexplicably determined Appellants evidence was to be ignored. The Commission's findings in this regard are unsupported and must be reversed.

C. The Commission erred in refusing to consider Dr. Braham's Supplemental Report.

Regulation 67-707 provides, in pertinent part, that:

> A. When additional evidence is necessary for the completion of the record in a case on review the Commission may, in its discretion, order such evidence taken before a Commissioner.

Here, Dr. Braham prepared the proffered supplemental report with the specific intent of clarifying the Commission's concerns about his familiarity with Appellants work history at the time he rendered offered his initial opinions regarding the extent of her psychological issues. It is a clear abuse of discretion for the Commission to first reject Dr. Braham's expert medical opinion due to concerns that he may have been mistaken about certain facts and circumstances pertaining to Appellant's work history, then refuse to even take into consideration Dr. Braham's assurances as to the basis for his opinion. In the interest of arriving at a fair award for the Appellant, the Commission should have considered existing and newly offered evidence regarding the compensability of Appellant's psychological and systemic injuries.

II. The Commission erred in failing to find Appellant is permanently and totally disabled.

The Commission seemingly first took issue with the drafting of Commissioner Taylor's Order itself, essentially finding that the Commissioner failed to make findings of fact sufficient to support the award of permanent total disability. This position is untenable. The Commissioner's Order is 12 pages long and contains a through account of the extensive medical history attendant to this case. The Order specifically notes that in determining the facts to be included in the Order, she considered Ms. Cox's live testimony, her deposition testimony, and all of the submitted medical APAs. Although Commissioner Taylor did not recount in verbatim fashion each individual medical finding in the "Findings of Fact" section of her Order, she refers to medical opinions, testimony and documentation which is more fully set for in the "Evidence of the Case" portion of the Order. By way of example, Commissioner Taylor expressly notes in Finding of Fact number 7 that "Appellant has been unable to work since June 2016 and is permanently and totally disabled . . . *as a result of her combined injuries*. This finding is based on a preponderance of the evidence as a whole, including the medical evidence, the credible testimony of the Appellant, and the vocational assessment of Robert Brabham, Ph.D., ..." (Emphasis added). The fact that the Commissioner did not repeat the specific descriptions of the medical reports and testimony that were already included in the Order and, more importantly, had clearly been the subject of the Commissioner's review before rendering her decision, cannot be reasonably said to render the Commissioner's decision unsupported. Respondent's argument in this respect amounts to a clear attempt to elevate form over substance.

The Full Commission erroneously found that Commissioner Taylor erred as a matter of law in failing to declare this matter a "medically complex" case requiring expert testimony that Appellant remains malnourished and that her weight loss resulted in her inability to work. This position is untenable as well.

Commissioner Taylor correctly rejected Respondent's assertion that this is a medically

complex case requiring expert testimony to establish causation in the first instance. Although the Respondent cites South Carolina Code Annotated 42-1-160 (E) for the prospect that "[i]n medically complex cases an employee shall establish by medical evidence that injury arose out of the employment," Respondent pointedly omits the remainder of the code section, which provides that "for purposes of this subsection 'medically complex cases' means sophisticated cases requiring highly scientific procedures or techniques for diagnosis or treatment **excluding** MRIs, CAT scans, X-Rays or other similar diagnostic procedures." (Emphasis added).

In this case, there has been no showing that "highly scientific procedures" were necessary to determine a diagnosis of malnourishment. Dr. Cobb had no trouble diagnosing the Appellant with malnourishment in May of 2013 and in referring her to a nutritionist for treatment. Likewise, the fact that weight loss is merely one symptom among many that can result from malnourishment is not a medically complex concept. Along with notable unintended weight loss, symptoms of malnutrition in adults include but are not limited to: muscle weakness and fatigue, tiredness and lack of energy, increased susceptibility to infections, delayed and prolonged healing from wounds, irritability and dizziness, and depression. As Dr. Cobb noted, Ms. Cox's ability to heal from her injuries was seriously jeopardized by her malnutrition. There is no medical complexity in discerning the causal connection between Ms. Cox's malnutrition and her being knocked unconscious and face-first onto the ground and the catastrophic damage to her face and jaw, the loss all of her teeth, the necessity of multiple surgeries to repair the damage, the loss of her ability to chew solid foods, her weight loss, and the permanent dietary changes she is forced to endure.

There also exists no overly complex process necessary to determine that the long term effects of extreme yo-yo weight loss in a naturally thin woman of Ms. Cox's age, together with

the forced replacement of the solid food diet she had consumed and which had kept her healthy for her entire life with semi-solid food and/or liquid nutrition. Commissioner Taylor did not err in refusing to set aside her ability to employ common knowledge and her own ability to understand and, if necessary, research the issues involved in this case in favor of declaring the matter to be medically complex. Because this is not a "medically complex case" within the meaning of 42-1-160, no error of law effects the Order in this regard.

Moreover, the Commissioner did not err in considering and giving weight to the uncontested testimony of Jennie Cox with respect to her own medical progression following her injuries. The fact finder in workers' compensation is given discretion to weigh and consider all the evidence, both lay and expert, when deciding whether causation has been established. Ballenger v. S. Worsted Corp., 209 S.C. 463, 467, 40 S.E.2d 681, 685 (1946); Tiller, 334 S.C. at 340, 513 S.E.2d at 846. In fact, while medical testimony is entitled to great respect, the fact finder may disregard it if other competent evidence is presented. Id. Expert medical testimony is intended to assist the fact finder in coming to the correct conclusion, not mandate the fact finder's decision to the exclusion of all other evidence. Corbin v. Kohler Co., 351 S.C. 613, 624, 571 S.E.2d 92, 98 (Ct. App. 2002) (citing Tiller, 334 S.C. at 340, 513 S.E.2d at 846).

Commissioner Taylor acted appropriately and within her discretion in determining the weight to afford to Ms. Cox's testimony and to the reports of the medical providers, including Dr. Brabham. Commissioner Taylor found Ms. Cox' testimony credible that her problems with fatigue, weakness, and difficulty concentrating only occurred after and as a result of her ongoing battle with maintaining her weight and getting proper nutrition after the accident. No evidence was introduced to contradict Ms. Cox's account that she had ample energy and ability to

concentrate prior to her accident and the difficult recovery period that followed, and that she suffered in both areas as a result of the ongoing effects of her injuries. It is uncontroverted that she sought help on her own in an attempt to regain her pre-accident abilities when Respondents refused to authorize help for her despite repeated requests. Ms. Cox also testified credibly that she experienced worsening depression and difficulty sleeping as a result of her work related injury and eventual inability to work. It is uncontroverted that prior to the accident, Ms. Cox was an excellent and valued employee who enjoyed her work as a commercial truck driver. She testified that not being able to work was, for her, almost like a death. She suffered physically, emotionally and financially from not being able to work, particularly in light of Respondent's refusal to pay her TTD for more than year. As noted by Dr. Brabham, it defies logic that someone with Ms. Cox's demonstrated work history would suddenly feign an inability to continue working. Commissioner Taylor did not err in determining that Ms. Cox' medical difficulties were a result of her on-the job-injury.

Respondent's allegation in their brief that Appellant worked "without difficulty" in 2013, 2014, and 2015 is patently false. Appellant had several major medical procedures in 2012 resulting directly from her injuries and was forced to miss a great deal of work that year. These procedures, including the removal of all of her teeth and extensive bone grafting to try an rebuild her jaw, severely compromised her ability to maintain proper nourishment. By May of 2013, Ms. Cox was "*very malnourished*" to the extent that her ability to heal from her treatments was jeopardized. (Dr. Cobb). By July of 2013, despite efforts to improve her nutrition, Ms. Cox was suffering from a 25 pound weight loss due to loss of appetite and pain thwarting her attempts to eat and her physician noted she tired easily and was experiencing significant fatigue. (Dr. Ellis July 15 2013). In 2014 and 2015 Ms. Cox was also experiencing greatly increased anxiety/depression and was also complaining of disruptive pain, particularly in her left shoulder

and scapula. Ms. Cox experienced these painful symptoms particularly after long truck drives. It is undisputed these continued difficulties with her shoulder were related to her previous work injuries. She was reevaluated for shoulder pain, her physician assigned impairment rating was tripled, and the authorized treating physician noted that she would need ongoing therapy for her shoulder. It is further worth noting that from the time of her accident until late 2015, Ms. Cox ran team driving and was able to rely on her driving partner to perform any physical tasks she might have been unable to do. There is no evidence that the fatigue Ms. Cox began experiencing after her accident ever abated. In fact by early 2016, by which time Ms. Cox was attempting to drive without a partner, performing her job duties had become increasingly difficult. By this time, running her required routes alone was "wearing her out" so much that she was compelled to seek additional medical care from her Employer, which was refused. After a week long run in March of 2016, Ms. Cox experienced such profound exhaustion that she expressed her fear to her employer that it was not safe for her to drive anymore. In March of 2016, Ms. Cox's own physician noted that Ms. Cox was experiencing ever increasing and unabated diminishment of her strength, endurance, and lack of energy, such that she did not feel like she had the energy to return to work.

Importantly, Respondent's allegation that Ms. Cox has an 85% solid food diet is also **false**. Dr. Cobb's report indicates Ms. Cox suffered a permanent 15% loss of masticatory function and retains only 85% of normal function, resulting in a diet entirely limited to soft or semi soft foods. Ms. Cox testified at the hearing that eating is still quite painful for her, such that she is unable to consume most of the foods she enjoyed prior to the accident, and she has to supplement her diet with liquid "meals" such as Ensure in order to help stave off malnourishment. Ultimately, Dr. Cobb assigned a 25% whole person impairment due to the extensive injuries to Ms. Cox's jaw (mandible/maxilla) and teeth.

To the extent the Panel reversed Commissioner Taylor's findings on the issues, and prohibited the Hearing Commissioner on Remand from fully considering and rendering a ruling taking all of the evidence offered previously into account in determining whether Appellant is permanently and totally disabled due to her work related injuries, the Panel erred in reaching this determination.

A. **Commissioner Taylor did not err in considering the report of Dr. Brabham and the Hearing Commissioner on remand should have been allowed to consider both Dr,. Brabham's initial report and his subsequent correspondence which was proffered into evidence. To the extent the Panel found to the contrary, such findings were erroneous**.

It is well settled that it is within the purview of the hearing Commissioner to asertain the proficiency of an expert and to determine the appropriate weight to afforded expert medial and lay evidence. Ballenger v. S. Worsted Corp., 209 S.C. 463, 467, 40 S.E.2d 681, 685 (1946); Tiller, 334 S.C. at 340, 513 S.E.2d at 846. Expert medical testimony is intended to aid the finder of fact in coming to the correct conclusion. Corbin v. Kohler Co., 351 S.C. 613, 624, 571 S.E.2d 92, 98 (Ct. App. 2002) (citing Tiller, 334 S.C. at 340, 513 S.E.2d at 846).

In the instant case, Respondent initially pointed to a single sentence of Dr. Brabham's eleven page initial report and declared that Dr. Brabham had completely misunderstood Ms. Cox's case in its entirety. Specifically, Respondent asserted that Dr. Brabham arrived at his opinion under the mistaken belief that Ms. Cox had only worked for one week after her accident. However, Dr. Brabham does not reach this conclusion in his report. While Dr. Brabham does mention a week long drive that utterly exhausted Ms. Cox, Dr. Brabham does not indicate when the one week drive took place, nor does he indicate that Ms. Cox did not work before or after

making the one week drive. Ms. Cox did in fact relay a number of times that after a one week drive in March of 2016, she was so exhausted and had had such a difficult time making the solo run that she advised her employer that she feared for her own safety and for the safety of others. When she asked her employer if he was willing to accept liability if she continued to drive under those circumstances, he advised her that no, he was not willing to accept responsibility if she continued driving. In fact, in order to assume Dr. Brabham was laboring under the belief that Ms. Cox only returned to work for one week, one would have to also assume that Dr. Brabham did not give even cursory review to the medical records that he *quotes extensively* throughout the remainder of his report, which reports clearly indicate Ms. Cox returned to work for an extended period of time after her injuries.

In any event, there can be no question but that Commissioner Taylor was well aware of the Respondent's position as to Dr. Brabham's report, which was clearly expressed at the hearing, such that the Commissioner considered any perceived shortcomings in exercising her authority to determine the weight to be afforded Dr. Brabham's report. Likewise, it is again within the fact finders purview to determine whether and to what degree, if any, a heightened degree of expert proficiency is necessary to assist the fact finder in reaching a reasoned decision. Commissioner Taylor did not err in affording the weight she determined was appropriate to Dr. Brabham's report.

Finally, and perhaps at this juncture most importantly, the Appellant sought clarification from Dr. Brabham himself regarding whether he fully understood the facts and circumstances attendant to this case and whether he would in any way alter his original findings in light of the concerns raised during the initial appeal to the Panel. Dr. Braham's correspondence indicating he was fully aware of the circumstances of the case and his unequivocal reaffirmation of his

original findings should be taken into account in determining the weight to be afforded his opinions in this matter. The Hearing Commissioner and the Panel erred in finding to the contrary.

B. The Panel erred in failing to find that there exists ample evidence in the record to support Commissioner Taylor's original finding that Ms. Cox is permanently and totally disabled, and the Hearing Commissioner on Remand should, at a minimum, have been allowed to consider all of the evidence in reaching a determination as to permanency, including whether Appellant is permanently and totally disabled.

In support of Commissioner Taylor's original determination as to permanent and total disability, Respondents would direct this Panel's attention, first and foremost, to the Appellants own expert's Functional Capacity Exam Results. After denying Ms. Cox's requests for additional medical evaluation and treatment, Respondents sent Ms. Cox to CORA Rehabilitation Clinics in October of 2016 for work hardening.[2] The reports stemming from Ms. Cox's treatment at CORA indicate she fully participated in the program and was able to make some progress towards the goals of the work hardening program. After six weeks of participation in the program, Ms. Cox was discharged from the program with orders to undergo Functional Capacity Exam. (APA pg. 381). Ms. Cox underwent the Functional Capacity Exam as instructed. The FCE results indicated that Ms. Cox **is not able to perform the duties required in the commercial driving field**. (APA 383). Clearly, Respondents own FCE results support Commissioner Taylor's findings that Ms. Cox is permanently and totally disabled from continuing her work as a commercial driver.

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[2] Notably, Ms. Cox had previously sought similar services on her own in an attempt to regain the strength and endurance needed to maintain her employment during a time period when Respondent's

In addition to the CORA Functional Capacity Exam results, the record is also replete with additional evidence, fully noted above, that supports Commissioner Taylor's findings that Ms. Cox has been rendered permanently and totally disabled as a result of the injuries she sustained on May 31, 2012. Ms. Cox made a commendable effort in returning to work as soon as she was able to after her May 31, 2012 accident. She worked through continuing treatment and continuing efforts to recover from the injury and treatment. As evidence by her medical records documenting the substantial problems she developed with malnourishment, including her ever increasing fatigue, weakness, and depression over her declining ability to maintain gainful employment, Ms. Cox's recovery process was problematic. Although this is not a case where a Appellant was instantaneously rendered permanently and totally disabled, it is clear that Ms. Cox "fought the good fight" until she was no longer able to do so. The fact that she pushed herself to continue working for as long as she possibly could before being forced to admit that her injuries have forever changed her ability to continue in her profession should not now be used as a basis for denying her benefits to which she is entitled. Commissioner Taylor's ruling in this regard should have been affirmed. Failing an outright affirmation of Commissioner Taylor's findings of permanent and total disability, the Panel should have at a minimum slowed the Hearing Commissioner on Remand to consider the entire record, including the proffered subsequent report of Dr, Brabham, in adjudicating the matter on Remand.

CONCLUSION

For all of the foregoing reasons, this Court should reverse the Order of Commission and remand this matter for entry of an order finding the Appellant to be permanently and totally disabled due to a combination of her injuries, including psychological injury.

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refused to offer her additional medical treatment despite her

repeated requests.