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, Employee

Appellant,

v.

Palmetto State
Transportation, Employer,
and Cherokee Insurance
Company, Carrier

Respondents,

BRIEF OF RESPONDENTS

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II. DID THE COMMISSION ERR IN FINDING APPELLANT FAILED TO MEET HER BURDEN OF PROVING ENTILEMENT TO PERMANENT AND TOTAL DISABLITY BENEFITS AND WAS THE COMMISSION'S DECISION/AWARD OTHERWISE SUPPORTED BY SUBSTANTIAL EVIDENCE IN THE RECORD?

STATEMENT OF THE CASE

Jennie Cox ("Appellant") sustained compensable facial, mandibular (jaw), dental, and left shoulder injuries arising out of and in the course of her employment as an over the road truck driver for Palmetto State Transportation ("Palmetto") on May 31, 2012. Specifically, Appellant was overseeing the unloading of freight from her trailer at a facility in Georgia when a machine fell on top of her, knocked her to the floor of the loading dock where she struck her jaw and mouth, and pinned her underneath for a brief period. Her primary injuries were a broken jaw and several missing teeth for which she received emergency treatment and extensive follow up treatment with multiple dental and facial reconstruction specialists. She also developed left shoulder pain, which was treated conservatively. Palmetto's carrier, Cherokee Insurance Company ('Cherokee") accepted compensability of the claim and provided medical and compensation benefits in accordance with the South Carolina Worker's Compensation Act ("Act"). Appellant received approximately 48 weeks of temporary total disability benefits (TTD) before ultimately returning to full duty work as a truck driver. She remained gainfully employed for Palmetto as a truck driver earning at least her pre-accident average weekly wage ("AWW") for over three and a half years before resigning her employment in June of 2016. Appellant cited chronic pain, fatigue, and malnourishment as the

reasons for her resignation.

This matter initially came before Commissioner Aisha Taylor on February 2, 2017 for a Hearing to award permanent disability. Appellant alleged entitlement to permanent and total disability benefits (PTD) under S.C. Code §42-9-10 based on total destruction of her earning capacity due to her work injuries, including an alleged aggravation of her preexisting psychological condition. Specifically, Appellant alleges that her dental and jaw injuries, coupled with worsening anxiety and depression, have caused malnourishment and weight loss resulting in disabling fatigue. (R. p. 518-519). Defendants disputed Appellant's entitlement to PTD claim but acknowledged her entitlement to scheduled disability compensation under §42-9-30 and WCC R. 67-1101 for the individual injuries to her shoulder, mandible, teeth, and facial nerve. Defendants disputed the alleged aggravation of her preexisting psychological condition, as well as her claims of disabling malnourishment, as not being supported by competent medical evidence in the Record. By Order dated May 23, 2017, Commissioner Taylor found, *inter alia*, that Appellant's accident and injuries aggravated her preexisting depression and awarded her PTD based on "her combined injuries." (R. p. 10).

Defendants thereafter appealed Commissioner Taylor's findings and PTD award to the Full Commission Appellate Panel ("Panel"). By Order dated May 21, 2018 the Panel reversed Commissioner Taylor's entire Order and remanded the case to a jurisdictional commissioner for entry of an award of permanent partial disability benefits ("PPD") for specifically enumerated scheduled members pursuant to S.C. Code §42-9-30 and WCC Regulation 67-1101. Specifically, the Panel states, in pertinent part, on page 24 of its Order that it "**REVERSES AND REMANDS** the Decision and Order of the Hearing Commissioner dated May 23, 2017. The Findings of Fact and Conclusions of Law set forth herein, shall become, and hereby are, the law of the case." The Panel

further states in its Finding of Fact # 1 that "Claimant did sustain compensable injuries to her teeth, mandible, left shoulder, and facial nerve, as well as scarring to her chin." Finally, the Panel ordered that a "Hearing Commissioner should determine Claimant's permanency award for her compensable injuries sustained because of her May 31, 2012 injury pursuant to this Order." (R. p. 40).

Commissioner Scott Beck heard the case on February 12, 2019 pursuant to the Panel's remand instructions. Despite the Panel's mandate, Appellant sought additional relief not addressed by the Panel's Order, specifically, an order for psychological evaluation and treatment. Defendants countered that the Panel clearly reversed ALL the original Hearing Commissioner's findings, orders, and award, including her finding of a compensable psychological aggravation. The Panel, as the ultimate fact finder, then found that the scope of Appellant 's compensable injuries was limited to those enumerated in its Finding of Fact # 1- teeth, mandible, left shoulder, facial nerve, and scarring to her chin. In reply, Appellant argued the Panel did not make a specific finding denying compensability of Appellant's psychological injury; therefore, that issue remains unresolved and enables the undersigned to grant their requested relief.[1]

In addition, Appellant argued that Commissioner Beck was not limited to awarding scheduled disability for Appellant 's injuries under §42-9-30 and sought entry of a permanent and total disability award per §42-9-10. In support of her PTD arguments, Appellant introduced additional evidence generated after the original Hearing before Commissioner Taylor, including an addendum from the Appellant's vocational expert and medical records from providers with dates of service after the

[1] Although it was not specifically referenced in the Panel's remand instructions, S.C. Code §42-15-60 (B)(2) requires the Commission to determine a claimant's entitlement to ongoing and/or reasonably anticipated future medical treatment along with any permanency award. Per this statutory mandate, Defendants stipulated at the Remand Hearing to provide lifetime repair, replacement, and/or removal of Claimant's mandibular appliance and dental implants, as well as physical therapy for Claimant's shoulder, if necessary. Commissioner Beck accepted the stipulation.

original Hearing. Defendants objected to these submissions, contending that Commissioner Beck must render scheduled disability awards per the Panel's remand instructions based on the existing Record at the time of the Panel's decision. Moreover, the evidence was also irrelevant to the issues presented on remand. The objection was sustained, and Robert Brabham's report dated July 16, 2018 and records from Appellant's primary care provider, Dr. Ellis, generated after the original Hearing were specifically excluded. However, Appellant's counsel was granted leave to proffer additional evidence that was not part of the original Record.

By Order dated May 21, 2019 Commissioner Beck awarded the following PPD compensation per the Panel's instructions:

a) 45 weeks of compensation ($32,646.15) for 15% loss of use of the shoulder;
b) 25 weeks of compensation ($18,136.75) for injury to the mandible;
c) 22 weeks of compensation ($15,960.34) for loss of 11 teeth;
d) 2 weeks of compensation ($1450.94) for injury to the facial nerve; AND
e) 1 week of compensation ($725.47) for scarring/disfigurement to the chin.

Commissioner Beck further denied Appellant's request for further psychological evaluation/treatment on grounds that such relief was not permitted by the Panel's Order, which specifically only instructed him to enter scheduled disability awards for the specifically delineated injured body parts. Commissioner Beck also reasoned that he could not order additional psychological evaluation/treatment because the Panel found, at least implicitly, that Appellant was at MMI by determining that entry of a permanency award was ripe. *See* Smith v. NCCI, Inc., 369 S.C. 236, 631 S.E.2d 268 (Ct.App.2006) (essentially, workers' compensation benefits accrue along a time continuum: temporary total disability benefits are available from the date of injury through the date of maximum medical improvement; post-MMI benefits may then be awarded either as a

permanent total or partial disability, or as a percentage of impairment to a scheduled member).

Appellant thereafter appealed Commissioner Beck's Order back to the Panel. Appellant raised numerous exceptions to the Order, but her grounds for appeal can essentially be consolidated as follows: 1) Commissioner Beck erred by denying her request for further psychological evaluation/treatment; 2) Commissioner Beck erred by excluding evidence from consideration at the remand Hearing that was not part of the existing Record; and 3) Commissioner Beck erred in limiting his permanency award according to the Panel's instructions and by not finding her permanently and totally disabled. Appellant did not appeal the amounts of Commissioner Beck's PPD awards. Defendants argued that all findings of fact, conclusions of law, orders and awards made by Commissioner Beck complied with the Panel's remand instructions and are legally and factually correct as stated. The Panel affirmed Commissioner Beck's PPD awards via Order dated October 18, 2019. Further, the Panel amended its prior Order to clarify that Appellant has indeed reached MMI and that her alleged psychological aggravation claim is denied. Appellant now appeals to this Court.

FACTUAL BACKGROUND

Following emergency treatment of her broken jaw, including implantation of a prosthetic mandibular device, Appellant was treated in follow up by numerous medical and dental providers with multiple specialties, including a plastic surgeon (Dr. Fowler); an oral surgeon (Dr. Cobb), a prosthodontist (Dr. Ridgell); and occupational medicine (Dr. Newsom and Dr. Svazas). Appellant has maxillary and mandibular appliances in her jaw that may require replacement or revision. (R. p. 510). Regarding her left shoulder injury, Appellant was initially seen by Dr. Stacy Newsom. Appellant underwent an MRI of the shoulder which showed no injury and was deemed to be nonsurgical. Appellant started physical therapy with for her shoulder pain. Dr. Newsom 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.

By November 9, 2012, the Appellant had completed physical therapy on her shoulder and was released to return to work by Dr. Newsom. (R. p. 489) The Appellant and Palmetto both agreed that Appellant's position as a driver with Palmetto State did not require her to lift over 35 pounds because Palmetto State is a "no touch" freight hauler. In other words, the drivers do not have to load/unload the freight. [R. p. 489]. With this understanding, Dr. Newsom released the Appellant to return to work without need for any special accommodations. (R. p. 489). Dr. Newsom also found that Appellant had a 2% impairment to her left shoulder. Id.

On January 31, 2013, Appellant had her remaining 9 teeth removed. On April 29, 2013, the Appellant had 5 dental implants inserted. On July 7, 2013, Appellant had 6 dental implants. During this period of time, Appellant continued to work as an over-the-road truck driver but for when she was recovering for 4 to 6 weeks following each procedure. Both before and after the accident, the Appellant was driving as a team driver, and running a dedicated route from Greenville, South Carolina to Brownsville, Texas. While driving as a team driver, Appellant would still drive 10 hours straight before having her team driver relieve her, just as she would if she had been a solo driver. (R. p. 548-550). In 2013, she earned $57,602.75, which was near her average income for a full year.[2] (R.p.).[3] Appellant returned to work after the last of her implant surgeries on August 12, 2013. Between August 12, 2013, and October 6, 2014, the Appellant continued to work full time as a driver.

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[2] Claimant testified she made between $60,000 and $70,000 a year.

[3] This and select subsequent citations reference documents submitted into the record before the Commission below and designated by Respondents as matter to be included in the Record on Appeal that for whatever reason were not included. Respondents will move to Supplement the Record on Appeal and submit an Appendix to the Record containing these additional records.

In 2014, the Appellant earned $75,464.77, which was above her pre-accident average weekly wage. (R.p.). Appellant request no additional medical care or treatment for her work-related injuries other than routine follow-up with the oral surgeon.

On October 6, 2014, Appellant complained of a recurring left shoulder pain. She was seen by Dr. Brian Svazas. (R. p. 505). She complained that she had trouble reaching behind her and when driving her zero-clearance mower. (Id.) She stated that her range of motion and strength in the left arm were doing quite well. (Id.) She noted some soreness when driving long runs when she uses her left arm to steer and her right arm to flip switches. (Id.) She did not sleep on the left side but otherwise had no difficulties with her left arm. (Id.) On exam, she could put her arm through full ranges of motion. She had no weakness in the arm. (Id.) She was pain free on supraspinatus and infraspinatus testing with no weakness with either maneuver. (Id.) She had pain in the lateral scapular border when reaching behind her with an audible click. (Id.) She reported that the pain was alleviated with Tylenol. (Id.). Dr. Svazas found that "the patient is functioning at 100%, as she has returned to her truck driver position and is thriving in this career." (R. p. 506). He noted that the left shoulder appeared to be problematic for her and he recommend additional physical therapy. (Id.) Dr. Svazas concluded by stating that she was fit for full duty as a truck driver, that she was at MMI, and revised her shoulder impairment to a 6% rating with the possibility of future physical therapy on the shoulder if she desired. (Id.)

Appellant continued to work full time as a driver for Palmetto following Dr. Svazas' release. Palmetto is not a "forced dispatch" company, meaning the Appellant was not required to take every trip that was offered to her. (R. p.568-570). She was free to turn down any runs she desired and work as much, or as little, as she wanted. (R. p.568-570). She admitted it was rare she would be forced to

move any freight. (R. p. 562). Appellant testified that she accepted every run offered to her during this period of time. (R. p.568-570).

On April 27, 2015, Dr. Cobb found the Appellant to be at MMI for her facial injuries and assigned the following impairment ratings: 7% to the mandible, 2% facial disorder for a scar, and 1% to the facial nerve. He recommended that Appellant's diet should consist of 85% normal foods and 15% soft or semi-solid foods to ease her difficulties with chewing due to her jaw injury. (R. p. 501). Dr. Ridgell also completed a WCC Form 14B on April 9, 2015, noting Appellant could return to work without restrictions. (R. p. 510). On July 5, 2015 Dr. Fowler performed surgery for partial removal of retained hardware in her jaw. Dr. Fowler released her to return to work without restrictions in August 2015.

In October 2015, Appellant went from "team driving" to single driving because the route she had run as a team driver was no longer available. Appellant earned $63,693.25 with Palmetto in 2015. (R.p.). Appellant continued to drive solo until March 3, 2016 when she reported inability to work due to "pain all over." Appellant confirmed that she had suffered no new injury that caused her to suffer "pain all over." For purposes of this claim Appellant later alleged that her pain was due to fatigue secondary to malnourishment and extreme weight loss from inability to eat her recommended diet of 85% of a normal food and 15% semi-soft foods.

After Appellant stopped working in March 2016, she took several months off. During this period, she continued seeing her primary care provider, Dr. Ellis. Dr. Ellis had been Appellant's family doctor since at least 2011, including treatment for routine health maintenance and anxiety and depression diagnoses before Appellant's accident. Appellant returned to work again on or about June 1, 2016, before quitting two weeks later. Appellant never return to work again. ***Dr. Ellis, nor any***

other doctor, wrote Appellant out of work or otherwise specifically opined Appellant is disabled from working beyond June 2016.[4]

STANDARD OF REVIEW

Judicial review of a Commission decision is governed by the S.C. Administrative Procedures Act (APA)- S.C. Code §1-23-380. The APA "mandates that the Commission take the evidence, judge the credibility and weight of that evidence, and form that judgement determine the facts of the case. Rogers v. Kunja Knitting Mills, Inc., 312 S.C. 377, 381, 440 S.E.2d 401, 403 (Ct. App. 1994). A reviewing court should affirm the Commission's decision unless it is clearly erroneous in view of the substantial evidence in the whole record. Lark v. Bi-Lo, Inc., 276 S.C. 130, 276 S.E.2d 304 (1981). Under the 'substantial evidence rule" he Court may not substitute its judgement for that of the Commission as to the weight of the evidence. *id.* Substantial evidence is not a mere scintilla of evidence nor the evidence viewed blindly from one side of the case; rather, it is evidence, when considering the record as whole, allows reasonable minds to reach the same conclusion as the Commission. Gattis v. Murrells Inlet VFW No. 10420, 353 S.C. 100, 576 S.E.2d 191 (Ct. App. 2002). The possibility of drawing two inconsistent conclusions from the same evidence does not preclude the Commission's findings from being supported by substantial evidence. Houston v. Deloach & Deloach, 378 S.C. 543, 663 S.E.2d 85 (Ct. App. 2008).

The Commission is the ultimate fact finder in workers compensation cases. Shealy v. Aiken

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[4] At her deposition on August 28, 2016, Claimant indicated that she wanted to return to work but she just needed "all over" therapy or "full body" therapy (APA p. 372-376). Palmetto, acting as a benevolent employer, agreed to pay for Claimant to attend a work-hardening program. Additionally, Claimant testified in her deposition that she thought being a solo driver contributed to her fatigue. On October 6, 2016, Palmetto offered her a job as a team driver following her completion work hardening. (APA p. 304). ***Claimant never contacted Palmetto State again about driving again and never attempted to drive again for them even as a team driver.***

County, 341 S.C. 448, 535 S.E.2d 438 (2000). The final determination of witness credibility and the weight to be accorded evidence is reserved to the Commission. Brunson v. American Koyo Bearings, 395 S.C. 450, 718 S.E.2d 755 (Ct. App. 2011). In the case of expert evidence, "[e]xpert medical testimony is designed to aid the Commission in coming to the correct conclusion; therefore, the Commission determines the weight and credit to be given to the expert testimony. Tiller v. National Healthcare Center, 334 S.C. 333, 340, 513 S.E.2d 843, 846.

ARGUMENTS

Appellant appears to raise two broad issues regarding the Commission's action in this case-one procedural and the other substantive. Regarding the former, Appellant essentially contends the Commission erroneously complicated the adjudication of this case via the Panel's remand to a jurisdictional hearing commissioner for entry of a PPD award following the Panel's denial of Appellant's PTD claims. Appellant also contends that the jurisdictional commissioner, as well the Panel on appeal and review of the PPD award, erred by excluding medical and other expert reports generated after the original evidentiary record was closed and by failing to order further psychological evaluation/treatment. Respondents submit that the procedure employed by the Commission was in accordance with the Act and Commission regulations. As such, the Commission's Order was not based upon an unlawful procedure and its award was not otherwise affected by an error of law. *See* S.C. Code §1-23-380 (5) ("[t]he court may reverse or modify the decision if substantial rights of the appellant have been prejudiced because the administrative findings, inferences, conclusions, or decisions are: .. (c) made upon unlawful procedure; (d) affected by other error of law…"). Further, the jurisdictional commissioner and the Panel properly excluded Appellant's proffered evidence because such evidence was immaterial and irrelevant to the issues

specially before them at the respective times in question.

As for Appellant's substantive arguments, Respondents submit that substantial evidence in the Record supports the Commission's denial of her psychological and PTD claims. Specifically, the medical evidence fails to "connect the dots" between her compensable work injuries, her alleged malnourishment/weight loss, chronic fatigue, diffuse all over body pain, and her alleged disability. *See* S.C Second Injury Fund v. Liberty Mutual Ins. Co., 353 S.C. 117, 576 S.E.2d 199 (Ct. App. 2003) (the burden lies with claimant to demonstrate causation by a preponderance of the evidence) and Hall v. Desert Aire, Inc., 376 S.C. 338, 656 S.E.2d 753 (Ct. App. 2007) (a claimant has the burden of proving facts sufficient to allow recovery of compensation for disability under the Act). Moreover, the Commission correctly dismissed the clearly erroneous opinions of Appellant's psychological/vocational expert regarding both the medical causation and disability issues presented.

I. The Commission employed proper procedure for adjudication of this claim following remand by the Panel.

The Commission has broad discretion in procedural matters. Marquard v. Pacific Columbia Mills, 278 S.C. 323, 324, 295 S.E.2d 870, 871 (1982). Moreover, an administrative tribunal or *quasi*-judicial body is "allowed a wide latitude of procedure..." Hallums v. Michelin Tire Corp., 308 S.C. 498, 504, 419 S.E.2d 235, 239 (Ct. App. 1992).

A. Commissioner Beck and the Panel properly denied Appellant's demands for further psychological evaluation and treatment because such relief was not permitted by the Panel's Order and the issue was already ruled upon by the Panel.

In this case, the Panel stated that it "REVERSES AND REMANDS the Decision and Order of the Hearing Commissioner dated May 23, 2017. The Findings of Fact and Conclusions of Law set forth herein, shall become, and hereby are, the law of the case." (emphasis added). This action

constitutes a complete reversal of Commissioner Taylor's entire Order, including her findings regarding the alleged psychological injury. The clause "set forth herein" clearly refers to the Panel's findings, which never included a finding that Appellant sustained a compensable psychological injury or aggravation. Rather, the Panel specifically made Finding of Fact #1 that "Claimant did sustain compensable injuries to her teeth, mandible, left shoulder, and facial nerve, as well as scarring to her chin." Finding of Fact # 1 is the only finding regarding the scope of Appellant's compensable injuries, which, again, does not include a finding of a compensable psychological injury. Likewise, the Panel's remand instructions are equally crystal clear - "[t]he Hearing Commissioner should determine Claimant's permanency award for her compensable injuries sustained because of her May 31, 2012 injury pursuant to this Order." (emphasis added).

Despite the Panel's clear findings and instructions, Appellant argues that the psychological issue still remained outstanding for Commissioner Beck's consideration. However, this argument flies on the face of the Panel's actual Order and procedural norms. It is elementary that he Panel is empowered to make its own findings and conclusions consistent or inconsistent with those of the single commissioner. McGuffin v. Schlumberger-Sangamo, 307 S.C. 184, 414 S.E.2d 162 (SC 1992). Upon review of a single commissioner's Order and award, the panel may "reconsider the evidence, receive further evidence, rehear the parties or their representatives and, if proper, amend the award." S.C. Code §42-17-50. Inherent in the Panel's jurisdiction to "amend the award" is the authority to delegate the matter to a single commissioner for further findings if it so chooses. *See* S.C. Code §42-17-40 ("the commission or any of its members shall hear the parties at issue … and shall determine the dispute in a summary manner.") Further, WCC Regulation 67-707 (A) states "[w]hen 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." Next, when an appellate tribunal remands a case, the lower tribunal has only the jurisdiction and authority mandated by the higher tribunal. Prince v. Beaufort Memorial Hospital, 392 S.C. 599, 709 S.E.2d 122 (Ct. App. 2011). Therefore, matters heard and decided by the higher tribunal cannot be reheard, reconsidered, or relitigated in the lower tribunal. Ackerman v. McMillan, 324 S.C. 440, 477 S.E.2d 267 (Ct. App. 1996).

For these reasons, Commissioner Beck properly concluded he had no jurisdiction or authority on remand to award relief on an issue already decided by the Panel. The Panel's denial of Appellant's claims of a psychological injury and PTD were *res judicata* as to all further proceedings before the Commission following remand. In sum, the Commission's award was not affected by an error of law warranting reversal.

B. Commissioner Beck properly excluded evidence generated after the original Record before the Panel because such evidence was irrelevant to the scope of his review and jurisdiction per the Panel's remand instructions.

Again, the Panel remanded this case to the jurisdictional hearing commissioner solely for a determination of Appellant's entitlement to PPD compensation per S.C. Code §42-9-30 and WCC R. 1101 for the body parts/conditions it specifically found compensable- the left shoulder, mandible, facial nerve, loss of teeth, and scarring/disfigurement to the chin. Obviously, only evidence relevant to that determination would be admissible at the Hearing before Commissioner Beck, including evidence in the already existing record. The evidence Appellant proffered consists of an Addendum to her expert's vocational report and medical records form her primary care provider regarding her alleged psychological condition that were generated after the Record was closed for the Panel's initial

determination.

First, the excluded addendum from Dr. Brabham desperately seeks to rehabilitate numerous factual misstatements and dubious conclusions made in his original report that the Panel concluded was erroneously relied upon by Commissioner Taylor for her award of permanent and total disability. [See Full WCC Order}. Appellant's argument that Dr. Brabham's addendum was only generated to "address the Commission's concerns" (See Claimant's Brief p.14) does not pass the smell test. The Panel did not find Dr. Brabham's initial report to be equivocal or request any clarifications on the issues he addressed in accordance with WCC Regulation 67-707 (A) ("[w]hen 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"). Rather, the Panel's initial Order was very clear regarding what little credence it was giving Brabham's report. Evidence manufactured specifically to counter an unfavorable ruling after the fact is *per se* inadmissible because it clearly does not qualify in any respect as newly discovered evidence. *See* WCC Regulation 67-707 (C)(2).

Next, Dr. Brabham's attempt to bolster his opinion regarding Appellant's total vocational disability under S.C. Code §42-9-10 is irrelevant to a determination of Appellant's entitlement to scheduled PPD benefits under S.C. Code §42-9-30 and WCC Regulation 67-1101. *See* Stephenson v. Rice Services, 323 S.C. 113, 473 S.E.2d 699 (SC 1996) (with scheduled disability injuries the compensation award depends on the character of the injury rather than loss of earnings or other vocational factors). Likewise, the excluded evidence from Appellant's primary care provider purportedly seeks to bolster her psychological claim. As such, this evidence is only relevant to an issue already decided by the Panel. The Panel entered its own findings and conclusions denying the alleged psychological claim that became the law of the case on remand, including instructions for

the jurisdictional commissioner to enter PPD awards. Therefore, the Commissioner and the Panel properly exclude this evidence as irrelevant and immaterial.

Next, Dr. Brabham's Addendum to his vocational assessment was irrelevant to the determination of Appellant's entitlement to PPD awards pursuant to S.C. Code §42-9-30 and WCC R. 67-1101 in accordance with the Panel's remand instructions to Commissioner Beck. Under the "medical model" of compensation under § 42-9-30 where disability is presumed, the nature and character of the injury controls the amount of the award. *See* Stephenson v. Rice Services, 323 S.C. 113, 473 S.E.2d 699 (SC 1996) (with scheduled disability injuries the compensation depends on the character of the injury rather than loss of earnings and other vocational factors). For this reason, Commissioner Beck and the Panel did not err in failing to admit the report.

Finally, Appellant was collaterally estopped from relitigating the issues of permanent and total disability and compensability of her alleged psychological claim before the Panel following Commissioner Beck's entry of PPD awards. *See* Robert E. Lee & Co. v. Commission on Public Works, 250 S.C. 394, 158 S.E.2d 185 (1967) (when a party makes the same arguments it made in a former appeal, the decision in the former appeal is the law of the case); *See also* Higgins v. Winn-Dixie, 252 S.C. 353, 166 S.E.2d 297 (1969) (an appellate courts' findings from a previous appeal in the same case is the law of the case). If she cannot get a second bite at the proverbial apple before the Panel, it is manifestly self-evident she cannot relitigate the PTD and psychological issues before a single commissioner. Ackerman v. McMillan *supra* (matters decided by a higher tribunal cannot be reheard, reconsidered, or relitigated by the lower tribunal). Therefore, the Commission did not err by failing to consider the proffered evidence.

C. Commissioner Beck properly awarded Appellant PPD benefits in perfect accord with the Panel's remand instructions and the Panel properly affirmed same.

As noted previously, the Panel clearly outlined the extent of Commissioner Beck's authority on remand- enter PPD awards per §42-9-30 and WCC R. 67-1101 for "loss of use" of the mandible, teeth, facial nerve, and shoulder, and compensation for scarring/disfigurement to Appellant's chin. Pursuant to the Panel's specific instructions, Commissioner Beck properly concluded he was not empowered to reconsider the issue of permanent and total disability or the alleged psychological claim. Appellant's arguments that Commissioner Beck improperly limited the scope of the remand Hearing and/or unlawfully constrained Appellant's recovery, are patently without merit. Ackerman *supra.* Commissioner Beck simply followed the Panels' directives in accordance with its Order.

The only issue the Panel properly considered in the Review Hearing of Commissioner Beck's award was whether he followed the Panel's remand instructions. Based on her Form 30 Petition for Review, Grounds for Appeal, and Brief to the Commission, Appellant did not dispute the actual amounts of Commissioner Beck's PPD awards. As such, his findings in support of such are not subject to further review. Green v. City of Columbia, 311 S.C. 78, 427 S.E.2d 685 (Ct. App. 1993) (only issues contained within the application for review are preserved for appeal to the Full Commission and the findings of fact and law by the hearing commissioner are the law of the case unless within the scope of the appellant's exceptions). Moreover, issues raised on appeal, but not argued in the Brief, are deemed waived or abandoned and will not be considered by the appellate court. Fields v. Melrose Ltd. Partnership, 312 S.C. 102, 439 S.E.2d 283 (Ct. App 1993). Therefore, the Commission properly affirmed Commissioner Beck's scheduled disability awards.

II. Substantial evidence in the Record supports the Commission's denial of Appellant's permanent and total disability claims.

Simply put, Appellant has failed to meet her burden of connecting the proverbial dots between her admittedly compensable physical injuries, the alleged aggravation of her preexisting anxiety/depression, her weight loss/malnourishment, and chronic pain/fatigue. Moreover, she has also failed to meet her burden of proving she is disabled from working in the first instance, much less that such disability is due to compensable injuries under the Act. *See* S.C. §42-1-120 ("disability" defined as "incapacity *because of injury* to earn the wages which the employee was receiving at the time of injury in the same or any other employment.") (emphasis added); *See also* Pollack v. Southern Wine & Spirits, 405 S.C. 9, 747 S.E.2d 430 (SC 2013) (the entitlement to benefits is premised on a nexus between the work-related injury and the inability to earn wages. An injured employee will be entitled to TTD compensation when his incapacity to earn wages is *due to* or *because of* the injury).

A. The Commission applied the correct law governing compensability of psychological aggravation and medically complex claims under the Act.

To be clear, Appellant alleges disability due to a psychological aggravation injury, malnourishment/weight loss due to her jaw/dental injuries and/or chronic fatigue and diffuse "all over" pain caused by her physical work injuries. The Commission found that this alleged chain of causation between Appellant's physical injuries and ultimately her alleged disability is sufficiently complex to require a heightened standard of proof requiring more than lay testimony and administrative expertise.

First, regarding compensability of psychological conditions, S.C. Code § 42-1-160 (D) states, in pertinent part, "[s]tress, mental injuries, and mental illness alleged to have been aggravated by a

work-related physical injury may not be found compensable unless the aggravation 1) admitted by the employer/carrier; 2) noted in a medical record of an authorized treating physician that, in the physician's opinion, the condition is at least in part causally related or connected to the injury or accident...; 3) found to be causally related to the injury or accident after evaluation by an authorized psychiatrist or psychologist; or 4) noted in a medical record or report of the employee's physician as causally related or connected to the injury or accident." (emphasis added).

Second, the Commission determined this was a "medically complex" case, which is defined by statute as "sophisticated cases requiring highly scientific procedures or techniques for diagnosis or treatment, excluding MRIs. CAT scans, x-rays, or other similar diagnostic techniques." S.C. Code §42-1-160 (E). The statute further provides that in "medically complex cases" the employee must establish compensability by "medical evidence" *id.* The statute further defines "medical evidence" as "expert opinion or testimony stated to a reasonable degree of medical certainty, documents, records, or other material that is offered by a licensed health care provider."

Due to the complexities of medical science, particularly with respect to diagnosis, methodology and determinations of causation, courts have held that where the exact nature and probable genesis of a particular type of injury involves complicated medical questions far removed from the ordinary experience and knowledge of laymen, only an expert can give competent opinion evidence as to the cause of the injury. *See* Click v. Pilot Freight Carriers, Inc., 300 N.C. 164, 265 S.E.2d 389 (1980). [5] Further, as the Supreme Court noted in Wynn v. Peoples Natural Gas Co., 238 S.C. 1, 118 S.E.2d 812 (1961), "reliance on lay testimony and administrative expertise is not justified

[5] Because the South Carolina Worker's Compensation Act was fashioned after the North Carolina Act, the opinions of the North Carolina Court construing such Act are entitled to great weight with this Court. Carter v. Penney Tire & Recapping Co., 200 S.C. 64, 261 S.E.2d 341 (1973).

when the medical question is no longer an uncomplicated one and carries the fact finders into realms which are properly within the province of medical experts... [t]he increasing tendency to accept awards unsupported by medical testimony should not be allowed to obscure the necessity of establish medical causation by expert testimony in all but the simple and routine cases." *Citing* Larson's Workers Compensation Law, Section 79.54.

The maxim *"post hoc, ergo propter hoc,"* denotes "the fallacy of ... confusing sequence with consequence," and assumes a false connection between causation and temporal sequence. *Black's Law Dictionary* p. 1186 (7th ed.1999). As such, Courts have treated the maxim as inconclusive as to proximate cause. In a case where the threshold question is the cause of a complicated medical condition, the maxim of *"post hoc, ergo propter hoc,"* is not competent evidence of causation. *See* Young v. Hickory Business Furniture, 353 N.C. 227, 538 s.E.2d 912 (2000). The claimant has the burden of proving facts that will bring the injury within the workers' compensation law, and such award must not be based on surmise, conjecture, or speculation. Clade v. Champions Laboratories, 330 S.C. 8, 496 S.E.2d 856 (S.C. 1998).

B. Appellant failed to meet her burden of proving compensability of her alleged psychological aggravation claim and alleged malnourishment/fatigue claims via competent "medical evidence."

1) *Psychological claim*

Appellant points to the medical records from her primary care provider, Dr. Jennifer Ellis, and the opinion evidence from her psychological expert Robert Brabham, Ph.D., to support compensability of her psychological claim. *See* Michau v. Georgetown County, 396 S.C. 589, 723 S.E.2d 805 (SC 2012) (medical treatment records offered to prove causation need not be stated to a

reasonable degree of medical certainty whereas expert opinion evidentiary reports or testimony must be so stated). However, Dr. Ellis' medical records fail to "connect the dots" on causation and Dr. Brabham's opinion is simply not credible.

First, Dr. Ellis's medical records do not establish causal connection between Appellant's compensable physical injuries and an alleged aggravation of her preexisting anxiety/depression in accordance with S.C. Code §42-1-160 (E) and (G). In her record dated April 22, 2016, which is approximately one month following Appellant's abrupt resignation, Dr. Ellis merely states "long discussion about relationship between job/injury/mood/weight. believe wt. loss/fatigue multifactorial. will increase Prozac further to address." [R.p. 295]. Earlier notes in the 4/22/2016 record highlight the vagueness of Dr. Ellis's opinion on causation and significance of Appellant's psychological condition to this claim. Specifically, Dr. Ellis notes the following in the "History of Present Illness" section: "[t]he patient returns for follow up of her depression. Since last visit she has been doing better.... She feels the following symptoms have improved: sadness. And she feels like the following symptoms have worsened" none have worsened. She is currently experiencing fatigue. She denies difficulty concentrating, difficulty performing routine daily activities, insomnia, loss of interest in pleasurable activities, out of control feelings, and panic attacks. She has the following issues going on that are affecting the condition: job stress." [R. p. 294] (emphasis added).

Yet, Appellant introduced **no evidence** regarding the *substance* of these discussions and/or any conclusions or opinions Dr. Ellis drew as it relates to causal relation to Appellant's work injuries. Appellant never sought to depose Dr. Ellis or otherwise clarify the apparent conflicts and inconsistencies in her notes as it relates to her psychiatric condition. This failure is especially glaring in light of the timing of the record coinciding roughly with Appellant's sudden resignation after

having worked at essentially full duty earning the same pre-accident wages for three and a half years after her accident.

Likewise, the purported expert opinion evidence from Robert Brabham, Ph. D also falls woefully short of meeting Appellant's burden of proving compensability of her alleged psychological aggravation claim. Respondents reiterate that expert opinions are NOT outcome determinative. *See* Sharpe v. Case Produce, Inc., 336 S.C. 154, 519 S.E.2d 102 (SC 1999) (in affirming the Commission's denial of claim compensability, the Supreme Court held that the Court of Appeals erred in reversing the Commission's denial by relying solely on a purported medical causation opinion that the injury occurred as Appellant alleged and ignoring other lay evidence in the record relied upon by the Commission to support its finding that Appellant's alleged accident did not occur). The Commission need not accept or believe medical or other expert testimony, *even when it is unanimous, uncontroverted, or uncontradicted by an opposing opinion.* Pack v. S.C. Dept. Of Transportation, 381 S.C. 526, 673 S.E.2d 461 (Ct. Apps. 2009) (emphasis added). Expert medical testimony is designed to aid the fact finder in coming to the correct conclusion involving a complex issue beyond the layperson's understanding; therefore, the fact finder determines the weight and credit to be given. Tiller v. National Health Center, 334 S.C. 333, 513 S.E.2d 843 (SC 1999). "Once admitted, expert testimony is to be considered like any other testimony." *Id.* "While medical testimony is entitled to great respect, it should not be held conclusive irrespective of other evidence." *Id.* The fact finder may disregard it if the record includes other competent evidence supporting a different conclusion." *Id.* (emphasis added). In deciding whether substantial evidence supports a finding of causation, it is appropriate to consider both the lay and expert evidence. Sharpe, 336 S.C. at 161, 519 S.E.2d at 106.

The Commission properly dismissed Dr. Brabham's opinion on Appellant's psychological status for a myriad of reasons supported by other evidence in the Record. First, Dr. Brabham fails to reconcile the discrepancy between the following undisputed facts a) that in the nearly 5 years between her accident and the initial Hearing of this matter before the Commission Appellant never requested psychological evaluation or treatment from the Respondents as a consequence of this claim; b) never sought an Order from the Commission compelling Respondents to provide any psychological evaluation/treatment; c) there is no evidence that Appellant has undergone psychological counseling or therapy because of the work accident, and d) Appellant denied outright that she needed any counseling in her deposition (APA 25, Cox 8/29/16 depo., p. 70). In fact, by the time the Appellant was deposed on August 29, 2016, she had been off her depression medications for several months and was not taking anything at all for depression. (APA 25, Cox 8/29/16 depo. p. 35). Dr. Brabham himself noted that Appellant admitted to him that she "does not wish to be referred for additional mental health services, however helpful such services might be for her." [R. p. 356]. In sum, the substantial evidence in the record confirms that the psychological consequences of Appellant's work injuries were at most temporary and/or otherwise insignificant. As such, the Commission certainly did not err in finding that Appellant did not sustain a permanent disabling psychological overlay injury.

Moreover, Brabham's fundamental misunderstanding of Appellant's disability status following her accident undermines the veracity of all his conclusions in their entirety. Specifically, Brabham attempts to buttress his opinion that Appellant is totally disabled due to her work injuries by stating, ***"[t]o her credit, Ms. Cox tried to return to work, and actually drove a one-week 'run.' However, she was 'exhausted' while doing so, and since that time, she has been unable to return to any***

gainful employment whatsoever, as a result of her on-the-job injuries on 5-31-12." (R. p. 349). Dr. Brabham's clearly erroneous belief, of course, flies in the face of the undisputed fact that Appellant worked full-time at full duty as an over the road truck driver for all of 2013, 2014, and 2015. During those years Appellant earned $57,602.75, $75,464.77, and $63,693.25, respectively. During that period, she did not complain of, or seek treatment for depression, fatigue, malnourishment, or chronic pain, and never down a single run.

Again, the Commission is the ultimate fact finder and sole arbiter as to the weight and credibility of the evidence presented. Brunson v. American Koyo Bearings *supra.* As such, the Court absolutely cannot substitute its judgment for that of the Commission as to the weight of the evidence. Lark v. Bi-Lo, Inc. *supra.* For these reasons, the Panel did not err in finding that Dr. Brabham's lack of elementary knowledge regarding a crucial aspect of Appellant's claim undermines his report in its entirety. [Panel's 5/21/18 Order, R. p. 35]. *See* Tiller v. National Health Center *supra* (the fact finder determines the weight and credit to be given to expert testimony).

2) *Causal link between work injuries and alleged malnourishment and fatigue claims*

Substantial evidence in the Record supports the Panel's finding that Appellant failed to meet her burden of proving malnourishment and/or fatigue causally related to her work injuries. [Panel 5/21/18 Order Finding of Fact # 15, R. p. 38]. To establish entitlement to compensation benefits under the Act for fatigue or exhaustion due to malnourishment, Appellant was required to produce medical evidence confirming that diagnosis, caused by her work injuries, and resulting in permanent injury and/or disability. Again, Dr. Ellis's medical records fail to make the connection, as she merely sates her belief that the cause of Appellant's weight loss is "multifactorial." [R. p . 295]. Dr. Ellis never clarified whether consequences of Appellant's physical work injuries are one of those multiple

factors. The fact that Dr. Ellis acknowledges that Appellant's weight loss is a multifactorial issue underscores its medical complexity, which requires a heightened standard for compensability under the Act via the presentation of "medical evidence" supporting same. Dr. Ellis's records do not constitute "medical evidence" to this effect within the meaning of S.C. Code §42-1-160 (G). [6]

Next, Dr. Brabham, as noted by the Panel, is not a medical doctor; he is merely a licensed *psychologist.* As such, he is not qualified to render a medical diagnosis related to the Appellant's alleged malnourishment, much less opine on causation. In fact, Dr. Brabham, to his credit despite an otherwise dubious report, does not even attempt to address the malnourishment issues. Likewise, none of the other medical doctors who evaluated and treated Appellant's dental and mandibular injuries addressed the issue either, even though they would have certainly been qualified to do so. In sum, there is no expert opinion evidence supporting a causal link between Appellant's work injuries and her alleged malnourishment.

C. Substantial evidence in the Record supports the Commission's rejection of a causal link between Appellant's alleged "disability" and her psychological condition, malnourishment, and/or chronic pain claims.

Again, the Record is devoid of any medical evidence linking any alleged aggravation of Appellant's preexisting psychological and malnourishment condition with resulting "disability." *See* S.C. Code §42-1-120 (defining compensable "disability" as incapacity to earn wages in the same or similar employment *due to* a compensable work injury). Dr. Ellis's records never suggest that

[6] Causal connection is also affirmatively belied by the fact that Claimant had issues keeping on weight before her work accident. In July 2011 Dr. Ellis noted Claimant was under "dietary management." [APA p. 303]. In December 2011, Dr. Ellis and Claimant discussed her dietary habits further and was counseled on weight management [APA pp. 308 and 313].

Appellant is permanently and totally disabled due to any aggravation of her psychological condition. In fact, her records actually belie that proposition. In completing Appellant's short term disability paperwork, Dr. Ellis indicated that the "disability" that Appellant suffered from beginning in March of 2016 was not related to an accident, should only last 1-2 months, her projected return to work date was May 30, 2016, and she should have no permanent work restrictions/limitations [APA p. 322]. Dr. Ellis never corroborated, or was asked to corroborate, Appellant's position that she is disabled within the meaning of the Act. For these reasons, Dr. Ellis's records do not meet Appellant's burden of proof of a permanent psychological aggravation injury resulting in permanent and total disability.

Moreover, Dr. Ellis's records do not attribute any "disability" due to Appellant's alleged malnourishment/fatigue either. On May 9, 2016 Dr. Ellis advised Appellant that she is unable to continue recommending that Appellant remain out of work indefinitely. [R. p. 382]. Dr. Ellis notes that Clamant "agrees would be reasonable to return to work if maintains currents level of weight" [*sic*]. Id. Evidence in the Record from dates thereafter establish that Appellant's weight remained fairly stable, including the following:

March 3, 2016	101.6 pounds
March 11, 2016	103.8 pounds
May 9, 2016	107 pounds
May 23, 2016	109.6 pounds
September 30, 2016	117.2 pounds
October 21, 2016	120.1 pounds

Simply put, Dr. Ellis never remotely suggests that Clamant is totally disabled for any reason, much less disabled due to her alleged psychological and/or malnourishment conditions. As, there is no medical evidence supporting Appellant's prayer for an award of permanent and total disability under

S.C. Code §42-9-10.

Not only does Appellant fail to meet her burden of proving total disability via Dr. Ellis's medical records, other evidence in the Record, including medical evidence, also affirmatively establishes that Appellant is *not* totally disabled due to her work injuries. **Specifically, every authorized specialized provider who treated Appellant for her shoulder, facial, and dental injuries released her to return to full duty work as an overt the road truck driver without restrictions/limitations, including: Dr. Newsom [R. p. 489], Dr. Svazas [R. p. 506], Dr. Ridgell [R. p. 510]and Dr. Cobb [R. p. 513].** As noted previously, Dr. Ellis also opined that Appellant was fit for full duty as a truck driver. Moreover, the undisputed fact that Appellant worked full duty as an over the road truck driver for over three years earning essentially her same pre-accident wages in and of itself belies the notion that her current alleged total disability is due to her work injuries.

Appellant's expert psychologist and vocational expert, Dr. Brabham, was specifically retained in anticipation of litigation. Not surprisingly, his assessment of her physical condition is contrary to every other physician who physically examined and/or actually treated/evaluated Appellant's injuries. He opined that Appellant was permanently and totally disabled due to constant intractable pain, noting "[s]he continues to experience significant pain at such levels as to interfere with her ability to sustain physical activity;" "due consideration must be afforded to the pain she experiences on a daily basis which requires that she spend 2-3 hours per day resting and reclining;" and "the combination of her multiple physical and psychiatric conditions clearly results in an inability to sustain gainful employment." [R. p.356, p. 357, and p.358]. The Commission properly rejected

Brabham's assessment for a number of reasons. [7]

First and foremost, as noted previously, Dr. Brabham was not aware of and/or ignored the undisputed fact that Appellant worked full time at fully duty running cross country loads as a driver for OVER THREE (3) YEARS following her accident. This elementary misunderstanding of an essential factor in the case taints the credibility of his entire report.

Second, Dr. Brabham further ignored or failed to recognize that Appellant suffered from a sleep disorder before her injury, as recorded in the 2011 records of Dr. Ellis, and there is no medical report corroborating Dr. Brabham's assertion that Clamant "developed major problems with sleep following her injuries." Appellant was prescribed Restoril for sleep dating back to 2011 [APA p.] and there is no increase or additional medications added to the Appellant's regimen due to her accident/injuries. Third, and again as noted previously, Dr. Brabham is not a medical doctor, so he is simply not qualified to provide an independent assessment of Appellant's alleged pain syndrome. Dr. Brabham can certainly rely on a treating medical provider's diagnosis and assessment of Appellant's pain for his vocational opinion; HOWEVER, no other medical provider has documented, assessed, or treated the level of pain noted in Brabham's report. She was never referred for pain management evaluation/treatment with a specialized provider by her authorized treating physicians, or her primary care provider- Dr. Ellis. No medical provider ever prescribed her ongoing pain or NSAID medications on a palliative basis following her release at MMI. Appellant herself has never requested that Respondents provide such evaluation/treatment, and she has never sought an Order from the Commission compelling Respondents to provide such a referral. The inference here is that

[7] Interestingly, Claimant never argued her permanent and total disability was due to severe debilitating pain in her arguments to the Commission. She attributed it only to her alleged malnourishment/fatigue and psychological claims. [See R. p. 518-519]

Appellant's shoulder pain is adequately managed by over the counter analgesic medications (Tylenol and Ibuprofen) and topicals (Salonpas patches) as Appellant confirmed in her testimony.

Finally, it should be noted that Dr. Brabham's report does not even address the *location* of Appellant's pain- is it her shoulder? her intrascapular or trapezius region? her neck? her jaw? headaches? He never specifies. Dr. Brabham's sloppiness in failing to clarify yet another fundamental point further eviscerates the credibility of his report. .

For these reasons, Dr. Brabham's report can best be characterized as nothing more than a regurgitated recital of Appellant's self-serving complaints of pain and disability totally unsupported by any qualified independent/objective medical assessment and contrary to other undisputed facts of the case, including the assessments of other medical providers and Appellant's work history immediately following the accident.[8] All we are left with then is Appellant's self-serving arguments that she is unable to work. Without medical support this mere allegation cannot support an award of total disability under the Act. See Wynn, *supra* ("[N]either [of Appellant's doctors] corroborated or was asked to corroborate that statement, and that on the contrary both of these physicians testified in substance that respondent is able to work if he will avoid undue physical or mental strain. In the face of these facts, and of this testimony, respondent's bare statement that he is unable to work is insufficient, in our opinion, to afford reasonable basis for the conclusion that he is totally disabled.").

For all the aforementioned reasons, substantial evidence in the Record supports the Commission's denial of Appellant's permanent and total disability claims under the Act.

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[8] The totally subjective nature of Dr. Brabham's report is self-evident- ("She indicated ....; "She attempts to perform;" "She indicates she must spend 2-3 hours of the day reclining/resting....;" "She takes naps;" "The inability to remain in an upright position for a full 8-hour day...." "In a 5-day work week she indicated she would be unable to remain at any job for a full 8-hour workday due to pain....;" "She admits she has inadequate patience...." "She indicated...." "She noted she could no longer attend....." "She noted she has difficulty concentrating...."). None of the complaints have ever been made to a medical doctor.

III. Additional sustaining grounds support the Panel's denial of Appellant's permanent and total disability claim.

SCACR 220 (c) provides that the Court may affirm any ruling of the lower court or tribunal based upon any ground(s) appearing in the Record on Appeal. The Panel made Finding of Fact # 14 in its May 21, 2018 Order stating, "Claimant admitted that she was offered a tandem job by her employer, which she believed would allow her to return to work, *but she declined to take her employer up on that offer to drive as a team driver and declined to return to work."* S.C. Code §42-9-190 specifically bars a claimant's entitlement to compensation for refusal of "employment *procured for him* suitable to his capacity" at any time "during the continuance of such refusal." The question of whether Appellant refused employment is a question of fact for the Commission's determination. Davis v. UniHealth Post Acute Care, 402 S.C. 541, 741 S.E.2d 770 (Ct. App. 2013).

Substantial evidence in the Record of this case supports the Panel's finding that Appellant refused suitable employment offered by Palmetto, thus barring her entitlement to total disability compensation under §42-9-190. Defense counsel wrote Appellant's attorney on October 6, 2016 confirming Palmetto's ability to accommodate Appellant and offering her a job as a team driver. [APA p. 340]. [9] Prior to that offer, Dr. Ellis had encouraged Appellant to seek a less demanding position but clearly anticipated she should be able to return to work as she wrote a "note to ease back to work." (R. p. 385). Dr. Ellis later referred Appellant for "work hardening" in September 2016. After Appellant voiced her subjective concerns with weakness and fatigue preventing her from returning to work, Palmetto, as a benevolent employer, agreed to be financially responsible for the

[9] Tandem driving allows drivers to split driving duties on a particular within DOT guidelines. It allows one driver to rest/sleep while the other drives ad is generally regarded as less physically taxing.

work hardening program as a means to assuage her concerns and bring her back. The work hardening progress note from October 24, 2016 states, in pertinent part, "Pt. has been progressing well in terms of her overall strength per objective measurements... Pt. continues to have difficulty with heavier lifting activities, repetitively, due to weakness and *neck/back* discomfort... [s]he has been progressing towards all goals unmet at this time." Unmet goals including lifting/carrying greater than 50 pounds on a frequent basis and push/pull 100 pounds on a frequent basis.

However, those unmet goals actually exceed the parameters required to perform an over the road driving job for Palmetto. As previously noted by Dr. Newsom when she released Appellant to return to work, Appellant was a "no touch" driver, meaning she was not required to load/unload freight. Moreover, her lifting capacity was only 35 pounds on a consistent basis. [R. p. 489]. There are no specific limitations on Appellant's ability to perform essential driving only duties. As such, Palmetto's good faith offer of employment as a team driver was suitable to her capacity within the meaning of the statute barring compensation.

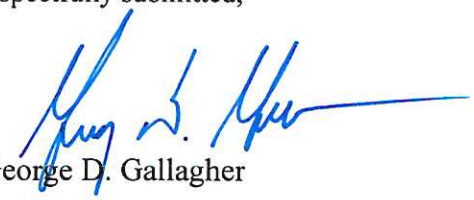
Next, Appellant refused that suitable job offer without justification. Under examination by defense counsel Appellant merely states, "[a]nd they've been told why I don't want to go on team."[R. p. 554]. She never gave any further explanation as to why she did not want to go on team. Regardless of why she did not "*want* to go on team," there is no medical evidence that she is physically unable to return to work as a tandem driver, which is the more relevant factor. On redirect examination of Appellant, her counsel implies she declined the offer because of unmet goals of her work conditioning program. [R. p. 574-575]. However, as noted previously, those unmet material handling and lifting capacity goals are not necessary tandem driver capacities/functions. Moreover, Appellant acknowledged under recross examination that she was not even aware of these arbitrary

goals when she declined the job offer. [R. p. 581-582]. For these reasons, Appellant's refusal of Palmetto's suitable employment offer was unreasonable. Therefore, §42-9-190 bars her entitlement to permanent and total disability compensation.

CONCLUSION

For all the aforementioned reasons, Respondents submit that the Commission's Orders must be AFFIRMED.

Respectfully submitted,



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