

I.C. NO. W24237, CATHY GOFF, Employee, Plaintiff v. MHI-MISSION HOSPITALS, INC., Employer, SELF-INSURED, Defendant. OPINION AND AWARD by MARY C. VILAS, Deputy Commissioner, N.C. Industrial Commission. Filed 11 April 2012.

This matter was heard before the undersigned in Asheville, North Carolina on April 13, 2011. Plaintiff presented testimony on her behalf and the testimony of Janet Mikos. Following the hearing the parties presented the following depositions: Robert Lacin, M.D. taken on July 1, 2011; Winifred Ubelher, M.Ed., CDMS, CCM taken on July 6, 2011; Michael J. Goebel, M.D. taken on July 6, 2011; James C. Karegeannes, M.D. taken on September 1, 2011; and Eric L. Rhoton, M.D. taken on September 8, 2011. The parties have submitted briefs. All evidence being before the undersigned the record in this matter was closed on October 24, 2011.

A P P E A R A N C E S

Plaintiff: Grimes Teich Anderson LLP, Attorneys, Asheville, North Carolina; Henry E. Teich, Counsel of Record.

Defendants: Brooks, Stevens & Pope, P.A., Attorneys, Raleigh, North Carolina; Joy H. Brewer, Counsel of Record

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The undersigned finds as fact and concludes as matters of law the following, which were entered into by the parties at the hearing and in the Pretrial Agreement as:

STIPULATIONS

1. All parties are properly before the Industrial Commission and are subject to the North Carolina Workers' Compensation Act.
2. MHI-Mission Hospitals, Inc. is the self-insured employer and is on the risk.

3. Plaintiff sustained a compensable injury by accident on May 25, 2009 to her teeth, face, right elbow, and right knee. Plaintiff's average weekly wage was \$806.87 per week, yielding a compensation rate of \$537.94 per week.

4. Plaintiff was paid indemnity compensation pursuant to Form 60, beginning May 26, 2009 until August 25, 2009, at which time indemnity was terminated. On or about April 7, 2010 Defendant filed a Form 24, however it was not served on Plaintiff and was not ruled upon. On or about July 1, 2010, Plaintiff was paid indemnity compensation in the amount of \$7,300.62 for the period August 26, 2009 to November 29, 2009.

5. Plaintiff returned to work with Defendant on or about November 30, 2009 until on or about December 7, 2009.

6. On or about August 23, 2009, Plaintiff received a 4 level cervical fusion by Dr. Eric Rhoton.

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The following were entered into evidence as:

STIPULATED EXHIBITS

- 1. The parties Pre-Trial Agreement marked as Stipulated Exhibit #1.
- 2. A compilation of documents paginated 1 through 321 containing Industrial Commission Forms and pleadings, medical records, Discovery responses, and Employment File marked as Stipulated Exhibit #2.
- 3. Documents paginated 1 through 59 containing job search logs, job search record, and application history marked as Stipulated Exhibit #3.

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ISSUES

The plaintiff presented the following issues:

1. Is Plaintiff’s injury to her cervical spine compensable?
2. What other medical conditions or consequences are compensable and relate to the current work injury?
3. Should Plaintiff receive ongoing temporary total disability benefits?
4. Should Defendants pay medical benefits relating to the cervical fusion?
5. Should Defendants pay 10% late payment penalty on any indemnity benefits?
6. Is there a substantial risk of the necessity of future medical compensation?
7. Should Defendant pay attorneys fees pursuant to N.C. Gen. Stat. §97-88.1?

The defendant presented the following issues:

1. Whether Plaintiff’s cervical condition is causally related to her compensable injury of May 25, 2009?
2. Whether the cervical fusion performed by Dr. Rhoton was necessitated by Plaintiff’s compensable injury of May 25, 2009 and/or reasonably necessary to effect a cure, provide relief, or lessen the period of disability?
3. Whether Plaintiff can establish disability resulting from her compensable injury of May 25, 2009?

* * * * *

Based on a preponderance of evidence in view of the entire record, the undersigned makes the following:

FINDINGS OF FACT

1. Plaintiff, born February 24, 1952, was 59 years old at the time of the hearing of this matter. Plaintiff received a Bachelor of Science degree in nursing and has been a registered

nurse since 1979. She served in the U.S. military as a nurse and received additional training in such areas as infection control and management. Plaintiff retired from the military and began her nursing career in the private sector in 1993. Most of her nursing career was as an operating room nurse.

2. Plaintiff began working for Mission Hospital in December 2005 in St. Joseph Hospital in Asheville. Plaintiff generally performed the role of Circulating Nurse or Scrub Nurse for the operating room.

3. Per the parties' stipulation, Plaintiff's average weekly wage was \$806.87 per week, yielding a compensation rate of \$537.94.

4. Plaintiff sustained a compensable injury by accident on May 25, 2009 when she was on her way to the pre-op holding area to interview a patient and fell, hitting the floor. The major force of the fall was to Plaintiff's wrist, teeth, and mandible. Three front teeth connected by a bridge were knocked out and other teeth were damaged. X-rays of her right wrist, arm and knee revealed a fractured radius of the right elbow, and a fractured patella of the right knee. Plaintiff suffered a laceration to her lip from a tooth that was knocked loose and punctured her lip requiring stitches. Plaintiff denied complaints of neck pain or back pain at the Mission Hospital Emergency Room.

5. Defendant accepted via a Form 60 the injuries to Plaintiff's right knee, right elbow, teeth, and face and initiated temporary total disability benefits in the proper amount.

6. Plaintiff treated with Myron Godfrey, DDS, and oral surgeon John Mattheson. Plaintiff required three implants, restoration of four teeth with crowns, possible extractions, bone graph and a replacement of the damaged partial for three teeth that was broken by the fall. Oral surgery was performed on June 18, 2009. Plaintiff continued to need adjustments to the partial

on June 25, June 30, July 9, and August 4 of 2009, because the “flipper” was cutting the roof of her mouth and for adjustments to the partial. Plaintiff had further appointments for the implants, crowns and the bridge on January 6, 2010 and January 28, 2010.

7. Following the May 25, 2009 emergency room treatment, Plaintiff was referred to Orthopedist James Karegeannes, M.D. on June 2, 2009. Plaintiff had pain while using her right arm, tenderness at the right radial head, and lack of full supination and pronation. Dr. Karegeannes advised Plaintiff to remove her posterior arm splint and discontinue use of the knee immobilizer. He recommended against doing any twisting activity with her arm or any lifting beyond a fork, spoon or simple small device. Plaintiff could walk as tolerated, but should maintain low impact activity. He predicted it would take 3-4 weeks for the fractures in her elbow and knee to begin to heal and 6-8 weeks to completely heal. Dr. Karegeannes took Plaintiff out of work.

8. At the July 10, 2009 office visit, Dr. Karegeannes noted that “she was trying to work on range of motion in her arms and it is not quite straight, and she is not quite able to turn the hand all the way up. Her knee on the other hand is doing well.” Plaintiff was advised to avoid kneeling and squatting on the knee. Dr. Karegeannes indicated that Plaintiff would need to stay out of work the entire 8 weeks. He would check her in 3 months, when “she should be close to maximal medical improvement at that point.” Plaintiff was given a note stating no work from May 25, 2009 to July 26, 2009, modified duty afterwards of limit kneeling and squatting upon return to work.

9. Plaintiff testified that she had constant pain in her right arm after the fall due to the fracture and wrist sprain, and experienced numbness and tingling in the right hand/arm which she associated with her elbow injury. Plaintiff also had intermittent numbness in both arms.

Plaintiff testified that she “just kind of hurt all over”, and was very focused on the teeth injuries. Plaintiff stated in testimony that she expected to be sore for a while after the traumatic fall, and wasn’t worked about the numbness and tingling, thinking it was from the fracture and sore muscles, and that she would get better. When the numbness and tingling progressively became more consistent and got worse, she made an appointment with her primary care provider. She wished she had made an appointment sooner, but she did not realize the symptoms in her hands were from a cervical problem. Plaintiff further stated this series of events regarding the numbness and tingling in a letter to Janet Mikos, Workers’ Compensation Analyst for Defendant.

10. On August 4, 2009 Plaintiff was seen by Dr. Nicole Ogg, her primary care physician, with complaints of neck pain, and numbness in her fingers since a fall on May 25, 2009. Dr. Ogg ordered a cervical MRI.

11. On two occasions prior to her fall, Plaintiff woke up in the morning sleeping on her right arm and noticed numbness and tingling in it. This went away as soon as she got up, and she attributed this to sleeping on the arm. Plaintiff testified that this was not something she would have made an appointment to go see a doctor for, or even think twice about. She simply related this to Dr. Ogg when asked if she had ever experienced a similar symptom. Plaintiff has never had neck problems, and has not sought treatment for her neck previously.

12. On August 10, 2009 Dr. Ogg discussed the MRI scan with Plaintiff by telephone. There was concern about a possible metastatic deposit, and also severe central canal stenosis at C3-4 to C5-6. In speaking with Dr. Ogg, Plaintiff was extremely alarmed about the seriousness of her cervical stenosis, a condition she was unaware that she had, and about the possibility of cancer. A diagnosis of cancer would clearly not be related to Plaintiff’s May 25, 2009 work place fall. Plaintiff wished to see a neurologist and Dr. Ogg referred her to Dr. Rhoton.

13. Janet Mikos is Defendant's workers' compensation analyst. She has worked in this field for 22 years, and has been at Defendant Mission Hospital for 3 years. Plaintiff called Ms. Mikos on or about August 13, 2009 and advised her of the MRI results and told Ms. Mikos that she thought her symptoms were related to the fall. Plaintiff told Ms. Mikos that she believed the May 25, 2009 fall "aggravated this underlying condition ... it did not cause me to have the cervical stenosis. That was there, but I think it aggravated it." Plaintiff was also concerned that her problem may be cancer coming back in her neck. Plaintiff had a prior history of femur cancer.

14. Ms. Mikos advised Plaintiff to see orthopedic surgeon Dr. Michael Goebel, as he would be the workers' compensation surgeon. Ms. Mikos said that they would talk about it and figure out what was health insurance and what was workers' compensation. Plaintiff felt that it was urgent that she be treated as soon as possible, and did not want any delays with the insurance company and workers' compensation, especially if it were to be cancer.

15. The undersigned finds Plaintiff's testimony to be credible.

16. Based on her years as an operating room nurse, Plaintiff preferred a neurosurgeon versus an orthopedic spine surgeon for cervical surgery. She has a lot of respect for Dr. Eric Rhoton's surgical abilities, and liked his education level more than Dr. Goebel. Ms. Mikos did not tell Plaintiff that Defendant would accept compensability of her neck/cervical condition if she went to Dr. Goebel, nor did she offer to send Plaintiff to a different neurosurgeon instead of Dr. Goebel, or ask her to put off the surgery. Ms. Mikos told Plaintiff that she would mark her cervical condition "not related."

17. Ms. Mikos testified that she has sent injured workers to Dr. Rhoton when they already had an established relationship with him. When Plaintiff advised her that she wanted to

see Dr. Rhoton, Ms. Mikos told her that she “was not going to authorized the treatment, but when you get the treatment, have him send the report over, which they did, so we could review it.”

18. Eric Rhoton, M.D. is a Board Certified Neurosurgeon practicing in Asheville. He estimated that he had done over a thousand cervical spinal surgery cases. Dr. Rhoton first examined Plaintiff on August 18, 2009, noting “approximately 3-month history of development of numbness into her arms and hands, with a feeling of weakness developing into her left arm. The numbness is worse in the fingers. She also has some posterior neck discomfort.” Dr. Rhoton notes that Plaintiff reports that her symptoms have been progressively worsening since the May 25, 2009 fall. Dr. Rhoton determined that Plaintiff was developing symptoms consistent with cervical myelopathy – a dysfunction of the spinal cord.

19. After reviewing the August 6, 2009 MRI and examining Plaintiff, Dr. Rhoton diagnosed Plaintiff with cervical spondylosis with high grade canal stenosis at C3-4, C4-5, and C5-6. Bilateral C3-4, C4-5, and C5-6 foraminal stenosis, and mild canal and bilateral foraminal stenosis at C6-7. High signal change within the cord at the C3-4 level, and a low density lesion within the posterior aspect of the C6 vertebral body.

20. Dr. Rhoton discussed Plaintiff’s treatment options of wearing a rigid neck brace to prevent further injury to her spinal cord, or a C3-4, C4-5, C5-6, C6-7 anterior cervical discectomy and fusion to decompress the spinal cord and the nerve roots.

21. On August 23, 2009 Plaintiff underwent a 4 level cervical discectomy and fusion performed by Dr. Rhoton. A C6 vertebral body biopsy was also done during the procedure, ruling out cancer. Following surgery, Dr. Rhoton prescribed physical therapy for her neck at

Park Ridge Physical Therapy, which Plaintiff received from September 24, 2009 until November 18, 2009.

22. Defendant declined to authorize the August 23, 2009 surgery or any subsequent medical treatment for Plaintiff's cervical spine condition on the grounds that Plaintiff's cervical spine condition was unrelated to the May 25, 2009 work injury. Defendants subsequently completed a Form 61 denying compensability for Plaintiff's cervical spine condition and any disability related thereto.

23. Dr. Rhoton testified to a reasonable degree of medical certainty that Plaintiff's fall of May 25, 2009 exacerbated and accelerated her cervical spine condition and caused the arm symptoms of numbness, tingling and pain that Plaintiff was experiencing following the May 25, 2009 fall. Dr. Rhoton's opinion is that the May 25, 2009 fall did not cause the degenerative conditions that Plaintiff had in either her neck or lower back, but "there's a reasonable case to say that the fall exacerbated her neck condition and the neurologic symptoms that she developed particularly."

24. Following rigorous cross examination by counsel for Defendant, Dr. Rhoton opined that Plaintiff's previous numbness in her fingers that Plaintiff attributed to sleeping on her arm on two occasions was not substantial and did not alter his opinion that it was more likely than not that the May 25, 2009 accident aggravated and accelerated her cervical condition.

25. Dr. Rhoton's opinion was that Plaintiff had some degenerative disease and "a tight cervical spinal canal and openings in the bone for the nerve and probably when she fell she traumatized that." "A fall of the magnitude that would knock your teeth out and break your arm and your kneecap would have been a pretty substantial fall...that could have injured the neuro structures and discs, and I think it just probably led to a little bit more swelling in the disc, the

joints, over time, maybe a little bit more of soft tissue swelling.” His opinion was that if you stress the joints and discs in your neck acutely with a fair amount of force, you can accelerate the natural degenerative process. She may have had a tear of the disc capsule, or injury to the disc capsules or facets, that may not have caused acute symptoms right at the moment that she’s seen in the Emergency Room, but still have a significant injury.

26. It seemed reasonable to Dr. Rhoton that Plaintiff thought that the numbness and tingling in her upper extremities was from the injury to her arm and the trauma of the fall, and that she expected to be sore for a while but would get better with time. That when the symptoms continued to get worse instead of better, she went to her primary care physician, Dr. Ogg, on August 4th, who then ordered the cervical MRI, and made the neurosurgical referral to him.

27. In Dr. Rhoton’s opinion, after seeing people who have been traumatized over the last 30 years, people focus on the injury that is most problematic, such as a broken arm and broken knee cap, or having your teeth knocked out and you can’t eat properly. As things start to settle down in one area, it is not uncommon for people to say “well, gee, ... my back hurts too or my neck hurts too, or I’m having symptoms there.” Also, the provider sometimes focuses “on the things that are bothering the patient the most...and don’t ask about every single body part. If the patient has an obvious injury to certain body parts, you kind of focus on those, and then as the smoke clears then other things could come up.” Therefore, if it was a more subtle trauma to the cervical spine and “wasn’t the main focus at the time, then it may take time for those injuries to become apparent.”

28. Defendant obtained a record review from orthopedic surgeon Dr. Michael Goebel, the physician that Ms. Mikos wanted Plaintiff to see rather than Dr. Rhoton. Dr. Goebel did not examine Plaintiff or speak with her.

29. Based upon his review of the medical records, Dr. Goebel did not know if Plaintiff had numbness and tingling after the May 25, 2009 fall, because it was not reported until Plaintiff saw Dr. Ogg on August 4, 2009 for those symptoms. Dr. Goebel stated in his deposition testimony that, in his opinion, a person with a neck injury will complain of neck pain right away or, within 24 to 48 hours. Dr. Goebel further agreed that even a minor traumatic injury can aggravate or accelerate cervical myelopathy.

30. When asked by counsel for Plaintiff if the pain Plaintiff was having from the fall could have confused her as to the cause of the numbness and tingling, Dr. Goebel responded, "I'd have to ask her. I mean, I just don't know." Dr. Goebel testified as to Plaintiff's symptoms of numbness and tingling, "Well, she just didn't report them. I mean, that's all I'm saying." Dr. Goebel agreed that Plaintiff actually had cervical myelopathy. Dr. Goebel advised that he could not relate Plaintiff's cervical spine symptoms to the May 2009 work incident because Plaintiff failed to complain of any symptoms indicative of an injury to the cervical spine until the documented complaints to Dr. Ogg in early August, 2009.

31. Defendants obtained a medical record review from neurosurgeon Dr. Robert Lacin of Raleigh Neurosurgical Clinic, Inc. in Raleigh, North Carolina. Dr. Lacin did not examine Plaintiff or talk with Plaintiff. Dr. Lacin opined that Plaintiff's May 25, 2009 fall did not cause or contribute in any way to Plaintiff's cervical spine condition or the need for surgery due to the absence of traumatic findings on the radiological study in August 2009 and the lack of reported subjective complaints from Plaintiff to any medical professional prior to August 2009 to Dr. Ogg.

32. Dr. Lacin testified that he could not determine Plaintiff's credibility because he has never talked to her. He testified that before he would treat someone, he would "absolutely"

want to talk to them. He said that the patient's history is "as important as the MRI study findings."

33. Dr. Lacin agreed that sometimes a patient can be confused as to the source of a problem. If Plaintiff had experienced numbness and tingling after the fall, it would not be unreasonable for her to assume that these problems were coming from the fracture or associated somehow with the fall. Dr. Lacin stated the opinion was that if her numbness and tingling did, in fact, start after the fall, there may be a connection to the May 25, 2009 fall, which was absolutely an alternate explanation.

34. Dr. Goebel's opinion that a person with a neck injury typically will complain of neck pain right away, or within 24 to 48 hours, contrasted that of Dr. Lacin. Dr. Lacin opined that the fact that patients with a cervical myelopathy, like Plaintiff, do "not complain of any neck pain and had full range of motion of her cervical spine is certainly consistent with the fact that she did not sustain an injury to the cervical spine such as a fracture or a ligamentous injury. On the other hand, patients with a cervical myelopathy, like Ms. Goff usually do not experience neck pain but more so radicular and/or myelopathic symptoms."

35. Dr. Goebel disagreed with Dr. Lacin's opinion that there is no conservative treatment to be attempted in the case of a cervical myelopathy such as Plaintiff had. Dr. Goebel disagreed with Dr. Rhoton, who anticipated that Plaintiff would have ultimately required surgery based on the MRI findings even without the fall.

36. The undersigned finds that there is no dispute among Drs. Rhoton, Lacin, and Goebel that Plaintiff has cervical myelopathy. Neither Dr. Lacin nor Dr. Goebel have testified that a fall could not have aggravated or accelerated Plaintiff's cervical neuropathy and lead to the cervical fusion on August 23, 2009. Dr. Goebel and Dr. Lacin agreed that pain from the fall

could have masked any initial numbness and tingling in her arm, and could thereafter have confused her as to the cause of the numbness and tingling symptoms. Dr. Goebel and Dr. Lacin testified as to the importance of taking a history in determining a patient's credibility, and that their opinions might be different if they talked to the patient.

37. Based on the preponderance of the evidence in view of the entire record and the benefit Dr. Rhoton had in treating Plaintiff over several months, Dr. Rhoton is in a better position to determine Plaintiff's credibility.

38. Based on a preponderance of the evidence in view of the entire record, the undersigned places greater weight on the opinions of Dr. Eric Rhoton as Plaintiff's treating physician, than on the opinions of Drs. Lacin and Goebel.

39. As Plaintiff's treating physician for her upper extremity, Dr. Karegeannes was asked if he would have expected Plaintiff to report numbness and tingling in her upper extremity to him, if she was indeed experiencing it, to which he replied, "That would be speculation. ... Some patients would. Some patients wouldn't. ...sometimes injuries turn up late. And it's hard to know the motivation for patients when they report symptoms to us all the time."

40. Based on a preponderance of the evidence in view of the entire record, Plaintiff's May 25, 2009 fall aggravated and/or accelerated Plaintiff's un-symptomatic and previously undiagnosed cervical myelopathy, and Plaintiff's surgery of August 23, 2009 and the subsequent treatment for her cervical spine are causally related to the compensable work injury of May 25, 2009.

41. Based on the greater weight of the credible medical evidence of record, the treatment that Plaintiff has received thus far for her cervical condition aggravated and/or

accelerated by the May 25, 2009 accident has been reasonable and medically necessary and has been reasonably calculated to effect a cure and provide relief from the May 25, 2009 incident.

42. Defendants are responsible for medical treatment for Plaintiff's cervical neck condition related to the May 25, 2009 accident for so long as is necessary to effect a cure, provide relief, or lessen the period of Plaintiff's disability.

43. The undersigned finds that there is not sufficient medical evidence of record to find that Plaintiff suffers from other conditions to her low back, hips or any other body part not ruled on herein, as a consequence of the May 25, 2009 compensable accident.

44. Plaintiff testified, and the undersigned so finds that her position with Defendant required lifting 35 to 50 pounds, bending of the neck and/or reaching overhead for numerous tasks, such as hanging irrigation fluids, IV's, putting instruments on case cars, and also to check grounding pads, check catheters, and monitoring urine output. Plaintiff's testimony was consistent with a job analysis obtained by Defendant and provided to Dr. Karegeannes for this position indicating lifting requirements of frequent carrying of surgical trays weighing up to 30 pounds, occasional (up to one third of the day) above shoulder work.

45. On September 30, 2009 Dr. Rhoton advised that Plaintiff should avoid strenuous activity, working above shoulder level with bending, extending her neck, or flexing her neck forward. He indicated Plaintiff would be out of work for at least 3 months postoperatively to allow the fusion time to heal because she works as an Operating Room Nurse, requiring physically strenuous activity.

46. On November 6, 2009, Plaintiff saw Rhonda Larrimore, Dr. Rhoton's PA post-surgery. Ms. Larrimore noted that Plaintiff continued to be pleased with her surgery and had no arm pain. Plaintiff did have myofascial pain in the neck and physical therapy was working with

her on that. Plaintiff was advised to avoid any flexion of her neck. Ms. Larrimore indicated that Plaintiff could return to full duty with no restrictions on November 30, 2009.

47. On November 30, 2009 Plaintiff returned to work in the operating room for Defendant. Plaintiff found the lifting and pulling of patients and instruments to be too heavy. Plaintiff had difficulty looking up to hang irrigation fluids due to the lack of flexibility in her neck because of the four level fusion. Plaintiff had to arch her back to be able to see what she was doing with over shoulder work, creating low back and hip problems. On the last day that Plaintiff worked, December 7, 2009, Plaintiff had to wash the back of a 400 pound patient's legs, which required a lot of lifting. She realized that she could not do the work and advised her supervisor, Janet Rayfield, that she was unable to pick up this kind of weight and perform the duties of her job. Plaintiff called Dr. Rhoton's office and received an out of work note as of December 9, 2009.

48. On January 7, 2010 Dr. Rhoton examined Plaintiff and noted that Plaintiff had returned to work and found it to be very physically demanding. To perform her job, Plaintiff had to reach above her neck, which was difficult and ill advised because of her multi-level fusion. Plaintiff was provided an out of work note that she was unable to perform the required duties of surgical nurse due to the recent surgery and she should not lift greater than 20 pounds, no straining, no bending of neck or flexion of the neck.

49. On February 19, 2010 Dr. Rhoton examined Plaintiff and noted reduced range of motion of the cervical spine of "extend[ing] her neck approximately 5 degrees, forward flex approximately 15 degrees, and rotate approximately 10-15 degrees." Plaintiff's radicular arm symptoms had resolved following the cervical fusions. In his opinion, Plaintiff's permanent work

restrictions due to the work injury are “no working above shoulder level or with neck extended or lifting over 20 pounds.” Plaintiff was released from further neurosurgical follow-up.

50. Dr. Rhoton assigned Plaintiff a 10% permanent partial disability of the cervical spine.

51. Plaintiff has not worked since December 7, 2009. Based on a preponderance of the evidence in view of the entire record, the undersigned finds that Plaintiff has been disabled and on a reasonable work search to obtain suitable employment within her work restrictions from May 10, 2010 and continuing at the time of the hearing. Plaintiff’s job search included approximately 180 contacts over this period of time, with supporting documentation in her job search logs. Plaintiff made multiple applications for work at Defendant Mission Hospital. Plaintiff has made multiple applications and has had interviews for positions, but has not been offered a job.

52. Defendant hired Vocational Specialist Winifred Uebelher to perform a Labor Market Survey for positions within Plaintiff’s skill and physical restrictions. In an review of Plaintiff’s job logs, Ms. Uebelher testified that there were at least approximately 19 positions that she felt were within Plaintiff’s restrictions and “looked pretty good.” There were numerous positions within Plaintiff’s job logs that were floor nurse positions and not within Plaintiff’s restrictions in Ms. Uebelher’s opinion.

53. By a preponderance of the evidence in view of the entire record, the undersigned finds, and Vocational Specialist Winifred Uebelher was of the opinion that Plaintiff needs guidance in the type of jobs for which she applies to find suitable employment. Given Plaintiff’s problems finding suitable employment, her physical work restrictions, and the transferable skills

Ms. Uebelher believes Plaintiff to have, Plaintiff would benefit from the assistance of a vocational rehabilitation specialist is finding suitable employment.

54. Janet Mikos called Plaintiff three days following her August 23, 2009 neck surgery to tell Plaintiff that Dr. Karegeannes had approved her to return to work with restrictions, and that they would be stopping Plaintiff's indemnity compensation. Plaintiff told Ms. Mikos that she did not think this was fair as her neck problems were related to the fall, and these problems prevented her from performing the work of an Operating Room Nurse. Plaintiff was not shown the job description or the Job Analysis of Plaintiff's position performed by R. Mike Piercy with Blue Ridge Physical Therapy that she was to perform. Ms. Mikos testified that she stopped payment of Plaintiff's temporary total disability benefits as of August 26, 2009 because Plaintiff had gotten a full release to return to work from Dr. Karageannes". However, this was not accurate, as Dr. Karegeannes did not release Plaintiff for full duty until October 13, 2009. Ms. Mikos then testified that she stopped Plaintiff's indemnity checks based upon Dr. Karegeannes' approval of the Job Analysis for Operating Room Nurse "releasing Cathy Goff, RN to perform the above described duties." However, she did not send Plaintiff the Job Analysis because she did not know that Plaintiff needed to review it, and also because Plaintiff did not request it.

55. Janet Mikos testified that the proper procedure prior to terminating Plaintiff's ongoing benefits would have been to file an Industrial Commission Form 24. She justified her failure to file the Form 24 stating the claim was complicated by trying to find light duty based on Plaintiff's work restrictions and then finding out that Plaintiff was going to have cervical surgery. The undersigned finds Janet Mikos' explanation for failing to file a Form 24

Application to Terminate Compensation with the Industrial Commission prior to terminating Plaintiff's benefits to be not credible.

56. Janet Mikos filed a Form 28 *Return to Work Report* with the Industrial Commission on February 1, 2010 indicating that Plaintiff had returned to work on August 26, 2009. Ms. Mikos testified that she knew that Plaintiff had just had neck surgery on August 23, 2009 and had not, in fact, returned to work on August 26, 2009. The undersigned finds that Defendant, through Janet Mikos, knew or should have known that the filing was false.

57. Janet Mikos subsequently filed a Form 24 *Application to Terminate or Suspend Compensation* on April 16, 2010, some eight (8) months after she terminated Plaintiff's temporary total disability compensation benefits. The Form 24 indicated that "Claimant was released to RTW with restrictions on August 25, 2009 that was approved by the treating physician and supported by an attached Independent Job Analysis (attached)." The Industrial Commission rejected Defendant's Form 24 Application because the date failed to list a response date, and therefore was incomplete.

58. Janet Mikos filed an Amended Form 28 dated June 29, 2010, which was received by the Industrial Commission on July 3, 2010, stating a return to work date of November 30, 2009. Defendant issued a check for the amount of benefits accrued to Plaintiff for the period of August 26, 2009 through November 29, 2009 for indemnity benefits that accrued prior to her actual return to work date. Plaintiff was not represented by counsel until July 20, 2010.

59. By a preponderance of the credible evidence of record, including the testimony of Janet Mikos, the undersigned finds that at the time that Defendant terminated Plaintiff's ongoing temporary total disability benefits on August 26, 2009, they were aware that Plaintiff had undergone neck surgery three days prior, and that Plaintiff believed that the fall aggravated

and/or accelerated her asymptomatic pre-existing cervical condition; Defendant terminated Plaintiff's compensation without filing a Form 24 Application in violation of Industrial Commission Rule 404(2) indicating a return to work on August 26, 2009, knowing that this was not true. The practical effect of this violation was to deprive Plaintiff of proper notice of her right to contest a proposed suspension or termination of benefits before the Industrial Commission pursuant to the Form 24 procedure and/or as an attempt to mislead Plaintiff as to her entitlement to workers' compensation benefits. Given Ms. Mikos' 22 years of experience in administration of workers compensation claims, 3 years of which were for Defendant, her admission that she was aware of the requirement to file a Form 24 Application prior to suspension of benefits, her submission of a Form 28 indicating that Plaintiff had returned to work on August 26, 2009 when she knew this was not the case, and her lack of a credible explanation for her failure to file the Form 24 *Application to Terminate Compensation*, the undersigned finds that Defendant's violation of Rule 404(2) and terminating Plaintiff's benefits was probably deliberate and justifies an award of sanctions pursuant to Rule 802, and to a 10% penalty payable to Plaintiff pursuant to N.C. Gen. Stat. §97-18(g) for the period of August 26, 2009 through November 29, 2009.

60. By a preponderance of the evidence in view of the entire record, including the credible medical and vocational evidence of record that, as a result of the May 25, 2009 injury, taking into account Plaintiff's physical and vocational limitations, Plaintiff has been totally disabled and unable to earn any wages in any employment from May 26, 2009 through November 29, 2009, and December 8, 2009 and continuing, when either Dr. Karegeannes or Dr. Rhoton wrote Plaintiff out of work, allowed Plaintiff to work with restrictions that Defendant was unable to accommodate, and/or Plaintiff had a failed return to work effort. Plaintiff has

further remained disabled and unable to earn her pre-injury wages as a result of her reasonable work search consistent with Dr. Rhoton’s work restrictions thereafter, entitling Plaintiff to ongoing temporary total disability compensation from the time of her injury on May 25, 2009 and ongoing, except for the period during which Plaintiff returned to work November 30, 2009 through December 7, 2009 in a failed return to work effort.

61. Plaintiff has received unemployment benefits for a period of time during her disability. Defendant is entitled to a credit for all wages and workers’ compensation disability payments paid to Plaintiff subsequent to May 25, 2009, excluding the 10% penalty on late disability benefits from August 26, 2009 through November 29, 2009. Defendant is entitled to a credit for unemployment benefits Plaintiff has received.

62. Defendants did not defend this action without reasonable grounds.

* * * * *

The foregoing stipulations and findings of fact engender the following:

CONCLUSIONS OF LAW

1. On May 25, 2009, Plaintiff suffered a fall arising out of and in the course of her employment with Defendant Employer, Mission Hospital, resulting in an admittedly compensable injury by accident. Defendant accepted Plaintiff’s injuries to her teeth, face, right elbow, and right knee. The May 25, 2009 fall aggravated and/or accelerated Plaintiff’s pre-existing cervical myelopathy resulting in radicular symptoms and requiring a four level cervical fusion by Dr. Rhoton on August 23, 2009. N.C. Gen. Stat. §97-2(6).

2. The preponderance of the evidence of record establishes that Plaintiff’s May 25, 2009 fall aggravated and/or accelerated her pre-existing cervical myelopathy causing the radicular symptoms of numbness and tingling in her upper extremities that did not resolve and

became worse leading Plaintiff to consult with her primary care physician, Dr. Ogg. These conditions are compensable and any disability Plaintiff has arising from this aggravated and/or accelerated condition is compensable. *Brown v. Family Dollar Distrib. Ctr.*, 129 N.C. App. 361, 364, 499 S.E.2d 197, 199 (1998).

3. The medical evaluation Plaintiff received for her cervical condition from Dr. Nicole Ogg and the medical treatment Plaintiff received from Dr. Eric Rhoton was reasonably necessary to effect a cure, provide relief, or lessen Plaintiff's disability, and Defendant is obligated to pay for such treatment, for so long as such treatment is reasonably necessary to effect a cure, provide relief, or lessen the period of Plaintiff's disability. N.C. Gen. Stat. §§97-25; 97-25.1.

4. To "obtain compensation under the Workers' Compensation Act, the claimant has the burden of proving the existence of his disability and its extent." *Hendrix v. Linn-Corriher Corp.*, 317 N.C. 179, 185, 345 S.E.2d 374, 378 (1986). To support a conclusion of disability, the plaintiff must show that she is unable to earn the same wages she had earned before the injury, either in the same employment or in other employment, and that the incapacity to earn is caused by Plaintiff's injury. *Hilliard v. Apex Cabinet Co.*, 305 N.C. 593, 595, 290 S.E.2d 682, 683 (1982). The employee may meet this burden in one of four ways: (1) the production of medical evidence that she is physically or mentally, as a consequence of the work related injury, incapable of work in any employment; (2) the production of evidence that she is capable of some work, but that she has, after a reasonable effort on her part, been unsuccessful in her effort to obtain employment; (3) the production of evidence that she is capable of some work but that it would be futile because of pre-existing conditions, i.e., age, inexperience, lack of education, to seek other employment; or (4) the production of evidence that she has obtained other

employment at a wage less than that earned prior to the injury. *Russell v. Lowes Prod. Distribution*, 108 N.C. App. 762, 765, 425 S.E.2d 454, 457 (1993).

5. Plaintiff's May 25, 2009 work injury rendered her medically disabled from any employment from May 26, 2009 to November 30, 2009, the date upon which Dr. James Karegeannes released Plaintiff to return to work for the injuries that she received to her right elbow and right knee. Plaintiff was written out of work by Dr. Karegeannes and/or Dr. Rhoton during this period, thus Plaintiff satisfied prong one of *Russell v. Lowes Prod. Distribution* for this time period. Plaintiff returned to work on November 30, 2009 through December 7, 2009 in a failed return to work effort, and was again written out of work by Dr. Eric Rhoton for her cervical condition on December 9, 2009, thereby satisfying the first prong of *Russell* beginning December 9, 2009. *Russell v. Lowes Prod. Distribution*, 108 N.C. App. 762, 765, 425 S.E.2d 454, 457 (1993); N.C. Gen. Stat. §97-29.

6. Dr. Rhoton released Plaintiff to return to work with restrictions on February 19, 2010. Defendant did not offer Plaintiff work within her restrictions assigned. Plaintiff has been unable to find suitable employment within her restrictions issued by Dr. Rhoton, despite her diligent and reasonable efforts to secure suitable employment. Therefore, Plaintiff remains disabled from any employment, and has satisfied prong two of *Russell*. *Russell v. Lowes Prod. Distribution*, 108 N.C. App. 762, 765, 425 S.E.2d 454, 457 (1993); N.C. Gen. Stat. §97-29.

7. Plaintiff is entitled to temporary total disability benefits beginning May 25, 2009, and continuing until further Orders of the Industrial Commission, except for the period between November 30, 2009 and December 7, 2009 when Plaintiff returned to work in a failed return to work effort, and subject to a credit for wages paid and unemployment benefits paid to Plaintiff. N.C. Gen. Stat. §§97-29; 97-32.1; 97-42.1. Defendant is further entitled to a credit for temporary

total disability benefits paid to Plaintiff from May 26, 2009, except for the ten percent (10%) penalty ordered herein on benefits between August 26, 2009 and November 30, 2009. N.C. Gen. Stat. §§97-29; 97-42.1; 97-18(g).

8. Plaintiff is entitled to receive from Defendant a penalty of ten percent (10%) for late benefits not paid within 14 days after becoming due for the period of August 26, 2009 to November 30, 2009. N.C. Gen. Stat. §97-18(g).

9. Plaintiff is entitled to vocational services to assist her in securing suitable employment. N.C. Gen. Stat. §97-25.

10. Defendants unilaterally, without justification and without permission or Order of the Industrial Commission terminated Plaintiff's benefits in violation of Rule 404(2) and N.C. Gen. Stat. §97-18(b) and therefore are subject to sanctions. I.C. Rule 802.

* * * * *

Based upon the foregoing findings of fact and conclusions of law, the undersigned enters the following:

A W A R D

1. Subject to the attorney's fee awarded below, Defendant shall pay to Plaintiff ongoing temporary total disability compensation in the amount of \$537.94 per week from May 25, 2009 and continuing until further Order of the Industrial Commission, subject to the credits due Defendant in paragraph two (2) of this Award.

2. Defendant is entitled to a credit for temporary total disability already paid and for unemployment benefits and wages that Plaintiff was paid from May 25, 2009 to the present.

3. Defendant shall pay a ten percent (10%) penalty on benefits owed and or paid for the time period of August 26, 2009 to November 30, 2009. Defendant is not entitled to a credit

for this penalty payment to Plaintiff. The full amount of this penalty is to be paid directly to Plaintiff.

4. As a sanction for Defendant's violation of Rule 404(2), Defendant is assessed and shall pay a penalty to the Industrial Commission in the amount of \$500.00.

5. Subject to the provisions of N.C. Gen. Stat. §97-25.1, Defendant shall pay for all related medical expenses incurred or to be incurred by Plaintiff as a result of her injury by accident, including her cervical spine, for so long as such examinations, evaluations and treatments may reasonably be required to effect a cure, provide relief or lessen Plaintiff's disability.

6. An attorney fee of twenty-five percent (25%) of the compensation awarded in paragraph 1 above is approved for Plaintiff's counsel and shall be deducted from the amount accrued and owing Plaintiff and paid directly to Plaintiff's counsel. Thereafter, Plaintiff's counsel shall receive every fourth compensation check due Plaintiff.

7. Hearing costs have already been assessed pursuant to North Carolina Workers' Compensation Rule 611(6).

It is further ORDERED that this case is REMOVED from the Deputy Commissioner hearing docket.

S/

MARY C. VILAS
DEPUTY COMMISSIONER

MCV:w1