

APPELLATE PANEL  
DECISION AND ORDER  
OF THE  
SOUTH CAROLINA WORKERS' COMPENSATION COMMISSION  
WCC FILE NO. 1111085

JOHN L LANE,

EMPLOYEE,

CLAIMANT/APPELLANT,

vs.

DARLINGTON COUNTY,

EMPLOYER,

AND

SOUTH CAROLINA COUNTIES WORKERS'  
COMPENSATION TRUST,

CARRIER,

DEFENDANTS/RESPONDENTS.

Appellate Panel Review held in Columbia, South Carolina  
on February 20, 2013, upon notices timely and properly served  
upon all parties of interest.

Appellate Panel Decision and Order filed

5-29

, 2013

**AFFIRMS IN FULL**

APPEARANCES:

Claimant represented by Stephen J. Wukela, Esquire  
of Wukela Law Firm, Florence, South Carolina.

Defendants represented by Anne Veatch Noonan,  
Esquire of Willson Jones Carter & Baxley, P.A.,  
Mount Pleasant, South Carolina.

## PROCEDURAL HISTORY

John Lane (Claimant) sustained an admitted injury to his cervical spine on May 17, 2011, when he was working as a heavy equipment operator and his back hoe rolled off a truck. The medical evidence shows preexisting and unrelated conditions as follows: cervical fusion at C6-7 in 1989 by Dr. Edwards, MVA with injury to the spine and shoulder in 1990 resulting in a \$30,000 settlement, right shoulder rotator cuff repair in 1997, laminectomy at L2-L3 in 1997 by Dr. Rhea, heart surgery in 1998, left shoulder workers' compensation injury stemming from a fractured clavicle in 2009, resulting in 45 weeks of paid permanent disability, and lumbar decompression at L3-L5 in 2010 by Dr. Edwards. As a result of his May 17, 2011 work accident, Claimant alleged injury to his cervical spine and aggravation of his multiple unrelated preexisting conditions, including his cervical spine, lumbar spine and both shoulders. Dr. Edwards opined that Claimant suffered 15% impairment to the cervical spine only, with no additional impairment due to this work accident. A hearing was held on July 24, 2012, to determine the extent of Claimant's disability.

At the hearing, Claimant argued that he was permanently and totally disabled pursuant to S.C. Code § 42-9-10 based on the injury to his cervical spine. In the alternative, Claimant argued that the preexisting conditions to his cervical and lumbar spine were aggravated by his May 17, 2011 accident, along with his preexisting shoulder conditions, thus making him permanently and totally disabled pursuant to S.C. Code § 42-9-35. Furthermore, Claimant asserted that if he is found totally disabled, Defendant Darlington County does not receive a credit pursuant to S.C. Code § 42-9-170 for the permanent disability payments made in 2009 prior workers' compensation claim, totaling 45 weeks of compensation for an injury to Claimant's left shoulder, pursuant to SC Code §§42-9-150, 42-9-10, or 42-9-35.

Defendants argued that Claimant sustained an injury to his cervical spine only as a result of this work accident, which resulted in a fusion at C5-6 and a 15% permanent impairment rating for the cervical injury from Dr. Edwards, the authorized treating physician and surgeon.

With regard to Claimant's preexisting conditions, Defendants argued that Dr. Edwards specifically opined in his deposition that Claimant's preexisting conditions were not aggravated by this injury. Defendants further contended that there was no medical evidence to prove that any of Claimant's multiple preexisting conditions were aggravated by this compensable accident. Defendants specifically argued that Claimant admitted in his deposition that he suffered from chronic low back pain and had ongoing right and left shoulder pain prior to the May 17, 2011 work accident. Furthermore, he was still taking pain medication and was seeking treatment from doctors immediately prior to the work accident. Moreover, Claimant was out of work pursuant to the Family Medical Leave Act for his unrelated lumbar spine condition and subsequent decompression surgery prior to this work accident (which by Claimant's own admission was not work related). Dr. Edwards also reviewed MRIs of Claimant's lumbar spine, taken both before and after his May 17, 2011 work accident, and concluded that they were unchanged. Therefore, Defendants further asserted that there was no medical evidence showing that the preexisting conditions were aggravated by the work accident and therefore asserted Claimant was only entitled to permanent partial disability benefits pursuant to S.C. Code § 42-9-30.

In the alternative, Defendants argued that if the Hearing Commissioner found Claimant permanently and totally disabled, a credit was applicable for prior weeks paid by Darlington County to Claimant for permanent disability, pursuant to S.C. Code § 42-9-170 .

On October 22, 2012, the Hearing Commissioner issued a Decision and Order finding that Claimant sustained an admitted injury to his neck only. The Hearing Commissioner specifically

noted that Claimant had multiple preexisting injuries (shoulders, neck and low back); however, he found that, based on the medical evidence as a whole and the deposition of Dr. Edwards, Claimant's work injury was to the cervical spine only. The Hearing Commissioner distinguished this work injury from Claimant's preexisting cervical conditions by indicating that this injury was located at the C5-6 level. The Hearing Commissioner noted that Claimant had a long history of preexisting pain and problems affecting his neck, but none were aggravated by this accident per the medical evidence. He found that Claimant suffered 33% permanent partial disability to his back due to his cervical spine injury at C5-6.

Claimant filed a Form 30, Application for Review, appealing the Hearing Commissioner's findings on the extent of Claimant's disability and whether his preexisting conditions were aggravated by his May 17, 2011 work accident

All proffered testimony has been taken. Such, together with all documentary evidence and oral argument, has been delivered to the individual members of the Appellate Panel and has since been under careful consideration.

#### **STANDARD OF REVIEW**

In an Appellate Review, the Appellate Panel shall, pursuant to S.C. Code Ann. §42-17-50, review the award, weigh the evidence as presented at the hearing and, if good grounds be shown therefore, make its findings of facts and reach its own conclusions of law consistent or inconsistent with those of the Hearing Commissioner. *See Green v. Raybestos-Manhattan, Inc.*, 250 S.C. 58, 156 S.E.2d 318 (1967); *see also Lowe v. An-Can Transport Services, Inc.*, 283 S.C. 534, 324 S.E.2d 87 (Ct. App. 1984).

## STATEMENT OF THE FACTS

### **I. Claimant's Testimony**

As outlined thoroughly in the Hearing Commissioner's order, with regard to his neck condition prior to his May 17, 2011 work accident, Claimant testified that he had a cervical fusion to his neck at C6-7 in 1989. Claimant testified that he had some stiffness in his neck and difficulty turning his head to the left immediately prior to this work accident, but nothing extensive. (Hrg. Tr. p. 21). He further testified that because of his neck pain, he was taking the pain medication Lorcet. *Id.* Claimant stated that he was involved in an automobile accident in 1990 and received a settlement of Thirty Thousand and 00/100 Dollars (\$30,000.00) for injuries to his neck and upper back. (Hrg. Tr. p. 37).

With regard to his low back condition prior to his May 17, 2011 work accident, Claimant testified that prior to this accident he had a laminectomy at L2-3 performed by Dr. Rhca in 1997. (Hrg. Tr. p. 30). Claimant further testified that he treated with Dr. Edwards in May 2010, one year prior to this work accident, and complained of severe low back pain with radiating right and left leg pain. *Id.* Claimant underwent lumbar decompression at three (3) levels, L3, L4 and L5, performed by Dr. Edwards in August, 2010. (Hrg. Tr. pp. 30-31). Claimant admitted that the surgery did not relieve his low back pain, but he stated that it did stop his bilateral leg pain. (Hrg. Tr. pp. 42-43). He testified that he missed a significant amount of time from work in the fall of 2010 following his lumbar surgery. (Hrg. Tr. p. 32). He stated that he ultimately took ten (10) weeks of paid leave through the Family Medical Leave Act following his lumbar surgery. (Hrg. Tr. p. 42). He explained that he was released to return to work without restriction in regard to the lumbar spine in October 2010, and further explained that he was not having any pain in his legs at that time. (Hrg. Tr. p. 32). However, Claimant admitted that he was still suffering from

chronic low back pain immediately prior to his May 17, 2011 work accident. (Hrg. Tr. p. 43).

Claimant testified that after his May 17, 2011 work accident his lower back pain became worse and the pain returned in his legs, which he described as running down the back of both of his legs to his knees. (Hrg. Tr. p. 32). However, Claimant admitted that in his follow-up visits throughout August, September and November 2011, he never once mentioned having problems with any body parts other than his neck. (Hrg. Tr. p. 45). Claimant was asked whether he reported any other injuries as a result of this accident to Dr. Edwards at any of his follow-up appointments before being released to maximum medical improvement on November 18, 2011. *Id.* Claimant's response was, "at that time, no." *Id.* He then testified that he retained an attorney in May 2012 and requested a follow-up appointment with Dr. Edwards. *Id.* He presented to Dr. Edwards on May 3, 2012, nearly one year after his May 17, 2011 work accident. At that time he informed Dr. Edwards that he was having low back pain with radiating bilateral leg pain that he believed stemmed from his work accident. *Id.* He testified that the reason for the one year delay was because his neck pain was "so extreme in the beginning." *Id.* He testified, "I mean, there's only one pain that can be a major pain at one time, I mean." (Hrg. Tr. p. 33).

With regard to the condition of his shoulders prior to his May 17, 2011 work accident, Claimant testified that he had preexisting conditions in both shoulders. (Hrg. Tr. p. 23). He underwent surgery on his right shoulder in 1997 to repair a rotator cuff and also due to arthritis. *Id.* He had a prior workers' compensation injury to his left shoulder and clavicle in 2009, while working for Darlington County. (Hrg. Tr. p. 24). He ultimately settled that claim for \$13,794.00, representing forty-five (45) weeks of compensation. (Hrg. Tr. p. 37). Claimant admitted that the pain in both of his shoulders persisted immediately prior to his May 17, 2011 work accident. (Hrg. Tr. p. 26).

When asked to confirm that he was having ongoing right shoulder pain prior to this accident, Claimant testified, "I would have some pain in the shoulder because I've got arthritis in the shoulder." (Hrg Tr. pp. 37-38). Claimant testified that he did not recall his deposition testimony on May 23, 2012, one month prior to the July 24, 2012 hearing, wherein he described the pain that he was having in his shoulders immediately prior to this accident as daily, throbbing pain. (Hrg. Tr. p. 39). The original transcript of the May 23, 2012 deposition was then produced, wherein Claimant was asked specifically, "What kind of problems were you having in your right shoulder that were the arthritis related problems?" Claimant answered, "It still was painful. Not as painful as before because they cut off the jagged parts that was hitting against each other. It was not pain free is what I'm saying. It was not severe, but it was not pain free." He was then asked, "So, prior to the accident, you were still having some pain in your right shoulder." His response was, "Prior, yes." Claimant was then asked if it was a daily pain, and he responded, "Pretty much." (John Lane Depo. Tr. p.42; Hrg Tr. pp. 38-39).

With regard to his shoulder pain following the May 17, 2011 work accident, Claimant admitted that he never told Dr. Edwards in the four (4) months following his August 10, 2011 C5-6 fusion that he was having problems with either of his shoulders. (Hrg. Tr. pp. 44-45). He testified that the reason he never told Dr. Edwards that he was having problems with his shoulders was because Dr. Edwards "doesn't do shoulders." (Hrg. Tr. p. 45).

## **II. Medical Evidence**

The deposition testimony of Dr. William Edwards was submitted into evidence. As more thoroughly analyzed below, Dr. Edwards's clear and unambiguous opinion throughout his deposition was that Claimant suffered only fifteen percent (15%) impairment to the spine as a result of this accident, and that Claimant's preexisting conditions were not aggravated by this work

accident. Dr. Edwards performed surgery on Claimant's lumbar spine in 2010, which was not work related. He confirmed Claimant did not indicate that his lumbar spine was affected by the May 17, 2011 work accident until May 2012. Dr. Edwards testified he was surprised that Claimant waited a year before reporting any low back pain. At which time, Dr. Edwards requested a follow up MRI for the lumbar spine, compared it to the MRI taken before the May 17, 2011 accident, and confirmed that there was no change between the two MRIs. Dr. Edwards testified

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that Claimant did not suffer any permanent injury to his shoulders as a result of this work accident, and he did not believe that the shoulders or any claim of aggravation to the bilateral knees were causally related to the accident.

Dr. Edwards testified that the FCE submitted was not applicable to show his work status from the cervical injury, because the FCE was stopped multiple times by Claimant throughout the testing due to pain and problems with his preexisting and unrelated body parts (shoulders, knees and low back).

The medical evidence submitted reflects that with regard to the lumbar spine, Claimant was seen by Dr. Edwards before this accident on May 6, 2010, wherein Claimant reported a six (6) month history of increasing low back pain. (APA p. 35). The original MRI of the low back from May 2010 showed severe spondylosis and herniation at L3-4 and L4-5. (APA p. 38, 61). Claimant was also diagnosed with bilateral radiculopathy. Dr. Edwards performed a lumbar decompression at L3, L4 and L5 on August 2, 2010. (APA p. 193). Claimant took FMLA and did not return to work until the beginning of 2011. The FMLA records show that Claimant applied for paid leave due to his chronic low back pain as of July 29, 2010. (APA p. 383). Claimant indicated in the FMLA paperwork that he did not know the cause of his low back problems. *Id.*

Claimant was later seen for a medical evaluation for work on January 12, 2011. He listed

that he still suffered from chronic low back pain. (APA p. 382).

The medical records show that Claimant suffered this work injury on May 17, 2011, and instantly reported neck pain. (APA p. 47). Dr. Edwards's May 31, 2011 report shows that Claimant reported that he suffered from only neck and left shoulder pain at that appointment. (APA p. 45). There was no mention of any other body parts. *Id.* He underwent a cervical fusion at C5-6 on August 10, 2011. (APA p. 65). Claimant returned to Dr. Edwards for multiple follow-up visits throughout the remaining portion of 2011, and he did not report any type of low back or leg pain. (APA 49-57).

Claimant was released at maximum medical improvement on November 18, 2011, by Dr. Edwards and assigned a fifteen percent (15%) impairment rating to the spine. (APA p. 57). Claimant was given no specific work restrictions from this accident. *Id.* A Form 14B was prepared by Dr. Edwards reflecting the same. (APA p. 59). The Form 14B indicates that Claimant will need future medical care and treatment to include future pain medications, physical therapy, and continued conservative treatment post surgery. *Id.*

Claimant subsequently followed up with Dr. Edwards on May 3, 2012, one year after his May 17, 2011 work accident. (APA p. 59). Claimant indicated for that first time following his work accident that he was having low back pain. *Id.* Dr. Edwards performed an updated MRI and compared it to the prior MRI performed on May 27, 2010. The MRIs were completely unchanged. (APA p. 63).

With regard to Claimant's shoulders, there is no medical causation showing that Claimant aggravated either his right or left shoulder as a result of his work accident. As noted above, Dr. Edwards specifically testified in his deposition that Claimant did not suffer any permanent injury to either shoulder as a result of this admitted accident.

A Functional Capacity Evaluation was performed on May 1, 2012. (APA p. 483). Claimant stopped testing on six (6) different occasions for his unrelated lumbar spine pain. (APA pp. 490-493, 497, 500). He also stopped testing for his unrelated bilateral knee pain. (APA p. 492). Claimant stopped testing for his unrelated right shoulder pain. (APA p. 501). Claimant stopped testing on two (2) occasions for his unrelated bilateral shoulder pain. (APA pp. 498-499).

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A vocational report performed by J. Adger Brown was submitted by Claimant's attorney stating that Claimant is unable to maintain gainful employment. (APA 506-515). Claimant's most significant symptoms focused on his unrelated low back pain. (APA p. 507). Further, the vocational report relies upon impairment ratings given to unrelated body parts. (APA p. 508).

#### **DECISION/ANALYSIS**

- I. **The Hearing Commissioner correctly found that Claimant did not sustain an aggravation of a preexisting condition to his cervical or lumbar spine and properly awarded disability to Claimant's cervical spine/back only as a result of his May 17, 2011 work accident.**

A work related accident which aggravates or accelerates a preexisting condition, infirmity or disease is compensable. Hargrove v. Titan Textile Co., 360 S.C. 276, 599 S.E.2d 605 (Ct. App. 2004) *citing* Brown v. R.L. Jordan Oil Co., 291 S.C. 272, 353 S.E.2d 280 (1987); Sturkie v. Ballenger Corp., 268 S.C. 536, 235 S.#.2d 120 (1977); Mullinax v. Winn-Dixie Stores, Inc., 318 S.C. 431, 458 S.#.2d 76 (Ct. App. 1995). The right of a claimant to receive compensation for an aggravation of a preexisting condition arises only where there is a dormant condition which has produced no disability but which becomes disabling by reason of the aggravating injury. Hargrove, 360 S.C. 276, 599 S.E.2d 605 (Ct. App. 2004) *citing* Hines v. Pacific Mills, 214 S.C. 125, 51 S.E.2d 383 (1949).

- A. Claimant did not suffer an aggravation of a preexisting injury to his cervical spine, and the Hearing Commissioner correctly awarded disability to Claimant's back for an injury to the cervical spine only as a result of his May 17, 2011 work accident.**

Claimant's preexisting cervical spine condition was not dormant prior to his May 17, 2011 work accident. Claimant's own testimony and the medical evidence illustrates that he was having chronic cervical spine pain immediately prior to this accident. Further, Dr. Edwards testified consistently that Claimant did not sustain an aggravation of a preexisting condition to his cervical spine. Dr. Edwards specifically testified to a reasonable degree of medical certainty that Claimant sustained an injury to his cervical spine only, that he suffered fifteen (15%) impairment to the spine as a result of this accident, and that his prior fusion of the cervical spine was not aggravated by this accident. This testimony is consistent with his Form 14B.

At the July 25, 2012 hearing, Claimant testified that he had a cervical fusion to his neck at C6-7 in 1989. Claimant testified that he had some stiffness in his neck and difficulty turning his neck to the left immediately prior to this work accident, but nothing extensive. (Hrg. Tr. p. 21). He further testified that because of his neck pain he was taking the pain medication Lorcet. *Id.* Claimant admitted that he was involved in an automobile accident in 1990 and received a settlement of Thirty Thousand and 00/100 Dollars (\$30,000.00) for injuries to his neck and upper back. (Hrg. Tr. p. 37). Based on Claimant's testimony, it is clear that he was having problems with his cervical spine prior to his May 17, 2011 work accident, which stemmed from preexisting conditions.

Dr. Edwards testified with regard to Claimant's preexisting cervical condition as follows:

- Q: Okay. I want to go back to where you testified that the prior cervical condition was aggravated. You indicated that the updated, or excuse me, you indicated that you were basing that opinion on the history he gave you, is that correct?
- A: It is probably a decent time to get into this confusion about my earlier answer. My opinion about the preexisting nature of his cervical condition relates to the

fact that some of the findings on the MRI scan were degenerative in nature, not necessarily traumatic and, unfortunately, I let the line of questioning earlier go unchallenged about that. My opinion is [Claimant] had a previous fusion at C6-7 that was not damaged or exacerbated by his – by his industrial injury of May of 2011. It is my opinion that the fact that he had a previous fusion at that level may have led to a slightly increased risk of this level going bad, that is to have suffered this problem when he had his industrial injury. I don't know that that answer clears up any confusion that anybody has but –

Q: It does. And, is that your opinion within a reasonable degree --

A: It is.

Q: -- of medical certainty?

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A: Yes.

Q: Okay. And is it fair to say, then, based on what you just explained that the prior fusion that was performed actually could have been an acceleration for the fusion that we are here on today?

A: It could.

Q: Okay. So that could have worsened this particular injury, but you don't believe within a reasonable degree of medical certainty that this injury aggravated the preexisting fusion.

A: That is correct.

...

Q: Okay. With the opinion that you just gave, what do you think the cervical impairment is from this accident in May of 2011?

A: As I said in my note of November 8, 2011, 15 percent of the spine – of the cervical spine.

Q: Okay. And is that within a reasonable degree of medical certainty?

A: Yes, ma'am.

(Dr. Edwards' Depo. Tr. pp 22-24). Based on Dr. Edwards' deposition testimony taken as a whole, it is clear that his opinion, to a reasonable degree of medical certainty, was that Claimant did not suffer an aggravation of a preexisting condition in his cervical spine and only sustained fifteen percent (15%) impairment to the spine as a result of his May 17, 2011 work accident.

In relying on Dr. Edwards' testimony, the Hearing Commissioner specifically found that "Claimant sustained an admitted injury to his neck. He has many pre-existing injuries (shoulders, neck and low back); however, this injury was to the C5-6 level in his neck. His work-related injury was different from his prior injuries. He does, however, have a long history of preexisting pain and problems affecting his neck which were not aggravated by this accident." Claimant

asserts in his Brief that this finding subdivides the back, a scheduled member, into sub-parts. However, this is not accurate. When the Hearing Commissioner's Finding is read as a whole, it is clear that he merely used the term "C5-6 level" to distinguish Claimant's May 17, 2011 work injury with his previous cervical injury and fusion at C6-7, an injury which Dr. Edwards opined to a reasonable degree of medical certainty was not aggravated as a result of this accident.

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Therefore, the Panel finds that the Hearing Commissioner correctly distinguished that Claimant sustained a separate injury to his cervical spine at the "C5-6 level" as a result of his May 17, 2011 work accident. Further, the Panel specifically and emphatically finds that Claimant's work accident did not aggravate his preexisting cervical spine condition.

**B. Claimant did not suffer an injury to his lumbar spine or an aggravation of a preexisting injury to his lumbar spine as a result of his May 17, 2011 work accident.**

With regard to his low back condition, Claimant testified at the hearing that prior to his May 17, 2011 work accident he had a laminectomy at L2-3 performed by Dr. Rhea in 1997. (Hrg. Tr. p. 30). Claimant further testified that he treated with Dr. Edwards in May 2010, one year prior to his work accident, and complained of severe low back pain with right and left leg pain. *Id.* Claimant underwent lumbar decompression at three (3) levels, L3, L4 and L5, which was performed by Dr. Edwards on August 2, 2010. (Hrg. Tr. pp. 30-31; APA p. 193). He testified that he missed a significant amount of time from work in the fall of 2010 following his lumbar surgery. (Hrg. Tr. p. 32). He stated that he took ten (10) weeks of paid leave through the Family Medical Leave Act following his lumbar surgery. (Hrg. Tr. p. 42). He explained that he was released to work without restriction in regard to the lumbar spine in October 2010, and testified that he was not having any pain in his legs at that time. (Hrg. Tr. p. 32). However, Claimant admitted that he was suffering from chronic low back pain immediately prior to his

May 17, 2011 work accident. (Hrg. Tr. p. 43).

The medical evidence submitted reflects that with regard to the lumbar spine, Claimant was seen by Dr. Edwards prior to this accident on May 6, 2010, wherein Claimant reported a six (6) month history of increasing low back pain. (APA p. 35). The original MRI of the low back from May 2010 showed severe spondylosis and herniation at L3-4 and L4-5. (APA p. 38, 61). Claimant was also diagnosed with bilateral radiculopathy. *Id.*

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Claimant took paid leave through FMLA and did not return to work until the beginning of 2011. The FMLA records show Claimant applied for paid leave due to his chronic low back pain in July 29, 2010. (APA p. 383). Claimant was seen for a medical evaluation for work on January 12, 2011. He indicated in that evaluation that he was still suffering from chronic low back pain. (APA p. 382).

As previously noted, the S.C. Court of Appeals has previously held that the right of a claimant to receive compensation for an aggravation of a preexisting condition arises only where there is a dormant condition which has produced no disability but which becomes disabling by reason of the aggravating injury. Hargrove, 360 S.C. 276, 599 S.E.2d 605 (Ct. App. 2004) *citing Hines v. Pacific Mills*, 214 S.C. 125, 51 S.E.2d 383 (1949). Based on Claimant's testimony and the medical evidence, the Panel finds that Claimant was suffering from a chronic preexisting condition to his lumbar spine prior to his May 17, 2011 work accident, and that preexisting lumbar spine condition was not dormant at the time of his work accident.

Claimant testified that after his May 17, 2011 work accident, his back pain became worse and the radiating pain returned in his legs, continuing down the back of both legs to his knees. (Hrg. Tr. p. 32). However, there is no medical evidence to support this assertion. Instead, the medical records reveal that he did not report any increased lumbar or leg pain immediately

following his work accident. (APA pp. 45-57). Claimant testified that he did not mention his severe low back pain that radiated down the back of his legs to his knees until one year after his work accident, in May 2012. (Hrg. Tr. p. 32). He testified that the reason for the one year delay was because his neck pain was "so extreme in the beginning." *Id.* He testified, "I mean, there's only one pain that can be a major pain at one time, I mean." (Hrg. Tr. p. 33).

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~~The medical evidence confirms that Claimant suffered this injury on May 17, 2011, and~~ instantly reported neck pain. The May 31, 2011 report shows Claimant initially presented to Dr. Edwards following this accident and reported that he suffered from neck and left shoulder pain only. (APA p. 45). There was no mention of any other body parts being injured as a result of that accident in that report. *Id.* He ultimately underwent a cervical fusion at C5-6 on August 10, 2011. (APA p. 65). Claimant returned to Dr. Edwards for multiple follow-up visits throughout the remaining portion of 2011 and never reported any increase in low back pain or leg pain. (APA pp. 49-57).

Claimant testified that he retained an attorney in May 2012. He subsequently followed up with Dr. Edwards on May 3, 2012, nearly a year after his May 17, 2011 work accident. (APA p. 59). At that appointment, Claimant indicated that he was also having increased low back pain. *Id.* Dr. Edwards then performed an updated lumbar spine MRI and compared it to the MRI performed on May 27, 2010, prior to his May 17, 2011 work accident. The MRIs were completely unchanged. (APA p. 63).

Claimant asserted that Dr. Edwards testified that Claimant's lumbar spine condition was aggravated by the May 17, 2011 work accident and that his testimony was uncontroverted. After reviewing Dr. Edwards's deposition testimony, this is not the case. In fact, Dr. Edwards testified with regard to Claimant's preexisting lumbar condition as follows:

- Q: Okay. Are you aware of any medical evidence showing that [Claimant] reported to anyone that he hurt his low back, as well, in the May of 2011, accident?
- A: No.
- Q: Okay. So the opinion that you gave earlier that the low back was aggravated, is that based solely on his subjective history given to you on May 3<sup>rd</sup> of 2012?
- A: Yes.
- Q: Okay. And when did you say he first saw you after the May 2011 accident?
- A: May the 31<sup>st</sup>, 2011.
- Q: So that is almost an entire year of treatment where he did not complain of the low back or tell you that he injured his low back as a result of this accident, is that correct?
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- A: That's correct.
- Q: All right. And you gave -- you indicated in Mr. Wukela's questioning earlier that you would assign a 20 percent impairment rating to the lumbar spine as a result of the May of 2011 accident.
- A: I don't recall answering the question. I recall answering the question that there was a 20 percent impairment to the [lumbar] spine. I don't recall having attributed it to his injury of May of 2011, though.
- Q: Okay. Well, that is my question, then. Do you think that that 20 percent impairment that you related earlier, excuse me, that you discussed earlier is related to his prior --
- A: Yes.
- Q: -- surgery? Okay. And do you think any of that 20 percent permanent impairment was caused by or aggravated by this May of 2011 accident?
- A: Is the question you are asking me do I think his impairment rating is higher now after his industrial injury of May of 2011 than it was before or --
- Q: No, but that -- okay, the --
- A: That's going to be your next question?
- Q: Right. Right. Let me rephrase, then. Do you believe any of the 20 percent impairment - permanent impairment to the lumbar spine is related to or is - I'm sorry, was caused by the accident in May of 2011?
- A: No.

(Dr. Edwards' Depo. Tr. pp. 22-24). Therefore, Dr. Edwards' testimony is clear, in that Claimant did not sustain an aggravation to his preexisting lumbar spine condition. Further, even if Claimant sustained an aggravation of his preexisting lumbar condition, it is clear that Dr. Edwards opined that any of Claimant's permanent impairment to his lumbar spine was attributable to his May 17, 2011 work accident.

Therefore, based on Claimant's testimony that his preexisting lumbar spine condition was not dormant; Dr. Edwards' expert medical opinion finding no causal connection between

Claimant's lumbar spine condition and this accident; and the medical evidence illustrating that Claimant had ongoing problems with his lumbar spine prior to this accident, the Panel finds that the Hearing Commissioner correctly found that Claimant did not sustain any permanent disability or suffer an aggravation of a preexisting condition to his lumbar spine as a result of his May 17, 2011 work accident.

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**II. The Hearing Commissioner correctly found that Claimant did not sustain an aggravation to his preexisting conditions in his left or right shoulders as a result of his May 17, 2011 work accident.**

As stated above, a work related accident which aggravates or accelerates a preexisting condition, infirmity or disease is compensable. Hargrove, 360 S.C. 276, 599 S.E.2d 605 (Ct. App. 2004) *citing* Brown, 291 S.C. 272, 353 S.E.2d 280 (1987); Sturkie, 268 S.C. 536, 235 S.E.2d 120 (1977); Mullinax, 318 S.C. 431, 458 S.E.2d 76 (Ct. App. 1995). The right of a claimant to receive compensation for an aggravation of a preexisting condition arises only where there is a dormant condition which has produced no disability but which becomes disabling by reason of the aggravating injury. Hargrove, 360 S.C. 276, 599 S.E.2d 605 (Ct. App. 2004) *citing* Hines, 214 S.C. 125, 51 S.E.2d 383 (1949).

Claimant testified at the hearing that he had preexisting conditions in both shoulders. (Hrg. Tr. p. 23). He underwent surgery to the right shoulder in 1997 to repair a rotator cuff and also due to arthritis. *Id.* He also had a prior workers' compensation injury to the left shoulder and clavicle in 2009 while working for Darlington County. (Hrg. Tr. p. 24). He ultimately settled that claim for \$13,794.00, representing forty-five (45) weeks of compensation. (Hrg. Tr. p. 37). Claimant admitted that the pain in both shoulders persisted immediately prior to his May 17, 2011. (Hrg. Tr. p. 26).

Claimant testified that he did not recall his deposition testimony on May 23, 2012. one

month prior to the July 24, 2012 hearing, wherein he described the pain that he was having in his shoulders immediately prior to this accident as daily, throbbing pain. (Hrg. Tr. pp. 39). The original transcript of the deposition taken on May 23, 2012, was then produced wherein Claimant was asked specifically, "What kind of problems were you having in your right shoulder that were the arthritis related problems?" Claimant answered, "It still was painful. Not as painful as before because they cut off the jagged parts that was hitting against each other. It was not pain free is what I'm saying. It was not severe. but it was not pain free." He was then asked, "So, prior to the accident, you were still having some pain in your right shoulder." His response was, "Prior, yes." Claimant was then asked if it was a daily pain, and he responded, "Pretty much." (John Lane Depo. Tr. p.42; Hrg Tr. pp. 38-39).

Therefore, based on Claimant's own testimony, he was having significant problems with his left and right shoulder immediately prior to this work accident and his preexisting conditions were not dormant.

In regard to his treatment with Dr. Edwards for his shoulder pain, Claimant admitted that he never told Dr. Edwards in the four (4) months following his cervical fusion that he was having problems with either of his shoulders. (Hrg. Tr. p. 44-45; APA 49-57). He testified that the reason he never told Dr. Edwards that he was having problems with his shoulders was because Dr. Edwards "doesn't do shoulders." (Hrg. Tr. p. 45).

Claimant argues that Defendants did not offer any testimony to contradict that Claimant suffered an aggravation of preexisting shoulder conditions. Claimant further asserts that the Hearing Commissioner erred in his Finding of Fact #15 in finding that the medical evidence does not support the claim that Claimant's right or left shoulders were aggravated by this accident. Neither argument is correct. Dr. Edwards testified in his deposition as follows:

- Q: Are [Claimant's] shoulders related to this work accident in May of 2011, Doctor?  
A: Not that I'm aware of.  
...  
Q: Is his right shoulder part of this Workers' Compensation claim in your opinion?  
A: I don't really know how to answer that. I guess the answer would no.  
...  
Q: And, again, just for the record, within a reasonable degree of medical certainty, neither one of his shoulders...were injured, to your knowledge, in the May of 2011 Workers' Compensation accident, is that right?  
A: That is - that's correct.

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(Dr. Edwards' Depo. Tr. pp. 20-21). Based on Dr. Edwards' testimony and Claimant's own testimony that he was suffering from preexisting conditions in his left and right shoulders, the Panel specifically and emphatically finds that neither Claimant's left nor right shoulder symptoms are causally related to his May 17, 2011 work accident, and instead were preexisting.

With regard to a possible aggravation of Claimant's preexisting shoulder conditions, following Dr. Edwards' above-mentioned testimony, he stated that immediately after Claimant's May 17, 2011 work accident he presented with radicular pain from his cervical spine into his left shoulder. Dr. Edwards's May 31, 2011 report records this radicular pain. (APA p. 45). Claimant's argument extensively relied on Dr. Edwards's testimony that Claimant was having some radicular pain into his left shoulder following his May 17, 2011 work accident. However, immediately following that testimony, Dr. Edwards testified as follows:

- Q: All right. In regards to that left shoulder, you indicated that the left shoulder was affected as a result of the May 17<sup>th</sup> of 2011 accident, but was there any permanent injury to that left shoulder?  
A: Not that I'm aware of.  
Q: Okay. And did [Claimant] sustain any type of permanent impairment as a result of the May 17, 2011 accident to his left shoulder?  
A: Not that I'm aware of.  
Q: Okay. And is that within a reasonable degree of medical certainty?  
A: That's correct.

(Dr. Edwards' Depo. Tr. p. 36). Based on Dr. Edwards's testimony, Claimant did not suffer an aggravation of a preexisting condition in his left shoulder. Further, even assuming that Claimant

did sustain an aggravation to his left shoulder as a result of this accident, he has failed to meet his burden of proving that he sustained any permanent impairment to the left shoulder.

Therefore, the Panel finds that the Hearing Commissioner correctly found that the testimony and medical evidence when taken as a whole did not support a claim that Claimant's right or left shoulders were permanently aggravated by his May 17, 2011 work accident.

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**III. The Hearing Commissioner correctly found that Claimant was not permanently and totally disabled as a result of his May 17, 2011 work accident.**

**A. The Hearing Commissioner correctly found that Claimant was not permanently and totally disabled under § 42-9-10.**

Claimant asserts that he is permanently and totally disabled under § 42-9-10 and bases his contention on a Functional Capacity Evaluation performed at Columbia Rehabilitation Clinic and a Vocational Report completed by J. Adger Brown, Jr.. (APA pp. 483-505; APA pp. 506-515).

The FCE revealed that Claimant could "lift from 9 to 20 pounds at various heights on an occasional basis." *Id.* at p. 483. It limited Claimant to carrying 16 pounds with two hands and further limited Claimant to sedentary to limited light work, avoiding sitting, standing and walking for over 60 minutes at a given time. *Id.* The FCE indicates that Claimant is unable to tolerate occasional reaching, kneeling or squatting. *Id.* Throughout the FCE, Claimant reported that he had to stop testing on several occasions due to his unrelated lumbar, bilateral shoulder and bilateral knee pain. *Id.* at pp. 490-494, 497-501. Claimant confirmed that he stopped the FCE testing for lumbar, bilateral shoulder and bilateral knee pain. (Hrg Tr. pp. 49-50).

As noted above, Dr. Edwards testified in his deposition that Claimant's lumbar pain and bilateral shoulder pain are unrelated to this accident. Likewise, Dr. Edwards opined that Claimant's bilateral knee pain was unrelated to this accident. With regard to Claimant's termination of testing during the FCE based on his lumbar, bilateral shoulder and bilateral knee

pain, Dr. Edwards testified as follows:

Q: In looking at the FCE, you just testified that this is a reliable representation of [Claimant's] functional ability. Now, the FCE talks about all his limitations but actually shows that a lot of these limitations are due to, for example, to his bilateral shoulder pain. Are his shoulders related to this work accident in May of 2011, Doctor?

A: Not that I'm aware of.

Q: Okay. It also talks about "Testing was terminated at the request of the patient secondary to complaints of increased bilateral knee pain." Are his knees part of his workers' compensation claim?

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A: No.

Q: Okay. All right. It has another one, page 11, "Testing was terminated at the request of the patient secondary to complaints of right shoulder pain." Is his right shoulder part of this workers' compensation claim in your opinion?

A: I don't really know how to answer that. I guess the answer to that would be no.

...

Q: Okay. All right. And, again, page 15, again: "Testing was stopped due to limitations based on complaints of increased bilateral shoulder pain." Same on page 15. Page 18 states that the "Testing was stopped due to complaints of increased right shoulder pain." And, again, just for the record, within a reasonable degree of medical certainty, neither one of his shoulders or his knees were injured, to your knowledge, in the May of 2011 workers' compensation accident, is that right, Doctor?

A: That is - that's correct.

Q: So any limitation based on problems with those body parts or testing that he couldn't perform based on those body parts would be discounted from the FCE, in your opinion, as far as his functional ability based for this claim only?

A: Yes.

(Dr. Edwards' Depo. Tr. pp. 20-21). Based on Dr. Edwards deposition testimony, any limitations that Claimant expressed throughout the performance of the FCE due to his lumbar, bilateral shoulder and bilateral knee pain should be discounted from the FCE, because the impairment to those body parts was unrelated to his May 17, 2011 work accident.

Mr. Brown's vocational evaluation heavily relied on the FCE to conclude that Claimant was permanently and totally disabled. (APA pp. 508-509). Since Mr. Brown's vocational evaluation relied heavily on the FCE, it too should be discounted since many of the limitations illustrated in the FCE were due to impairment in body parts that were unrelated to this accident.

Further, Mr. Brown incorrectly relied upon impairment ratings given by Dr. Edwards that were not based on this accident. (APA p. 508)(Stating that Dr. Edwards gave impairment ratings in the high 20% range to the whole person based on Claimant's multiple prior surgeries and impairments).

Therefore, the Panel finds that the Hearing Commissioner correctly discounted the findings in the FCE and vocational evaluation, which were based on injuries to unrelated body parts, and correctly found that Claimant only sustained permanent disability to his cervical spine only pursuant to S.C. Code § 42-9-30.

**B. The Hearing Commissioner correctly found that S.C. Code § 42-9-35 did not apply in this claim because Claimant did not sustain an aggravation of a preexisting condition.**

As presented above, based on the medical evidence, Claimant's testimony and Dr. Edwards' testimony, the Panel specifically and emphatically finds that Claimant did not suffer an aggravation of any of his several preexisting conditions. Therefore, the Panel finds that the Hearing Commissioner correctly found that Claimant was not entitled to total and permanent disability benefits pursuant to S.C. Code § 42-9-35.

#### **FINDINGS OF FACT**

After a thorough review of the evidence, including the hearing testimony, and medical evidence, exhibits, and other documentary evidence submitted by the respective parties pursuant to the Administrative Procedures Act, the Commission File in this matter, and arguments of counsel, WE, THE APPELLATE PANEL, AFFIRM THE FINDINGS OF FACT OF THE SINGLE COMMISSIONER, IN FULL:

1. That Employee, Employer, and Carrier are subject to and bound by the terms and provisions of the South Carolina Workers' Compensation Act, as amended, with John L. Lane as

Employee-Claimant and Darlington County as Employer and South Carolina Counties Workers' Compensation Trust as Carrier, Defendants.

2. That Claimant was an employee of the above-named Employer on and prior to May 17, 2011, on which date he did sustain an injury to the cervical spine arising out of and in the course of his employment, and proper notice was given to Employer. This was an accepted claim, and Claimant has received appropriate medical benefits and is presently receiving temporary total compensation.

3. That the average weekly wage of Employee at the time of the above-described accident was \$460.75, making a compensation rate of \$307.18 applicable in this matter.

4. That Claimant reached maximum medical improvement on November 18, 2011 for the injuries resulting from the May 17, 2011 accident.

5. That Defendants were entitled to stop payment of temporary total compensation effective November 18, 2011, and are entitled to a credit for the overpayment of temporary total compensation since November 19, 2011, against the award for permanent partial disability ordered herein.

6. That Claimant sustained 33% permanent partial disability to back due to his cervical spine at the C5-6 level as a result of the accidental injury on May 17, 2011.

7. That Claimant sustained an admitted injury to his neck. He has many pre-existing injuries (shoulders, neck, low back); however, this injury was located at the C5-6 level in his neck. His May 17, 2011 work injury was different from his prior injuries. He does have a long history of pre-existing pain and problems affecting his neck, however, which were not aggravated by this accident.

8. That Dr. Edwards found that Claimant only sustained a 15% impairment to the neck as a result of his May 17, 2011 work accident. Dr. Edwards further notes that only Claimant's neck was part of this claim; not Claimant's shoulders. This Panel finds that this was the ultimate testimony of Dr Edwards. We point out that Dr. Edwards's initial testimony in his deposition was confusing; however, his final opinion was clear in that only the neck suffered a permanent injury as a result of this accident, and his preexisting condition in his neck was not aggravated as a result of this accident, including his prior C6-7 fusion. There is no medical evidence to the contrary, and therefore Claimant did not meet his burden of proof for an aggravation of preexisting conditions.

9. That although Claimant and Defendants raised several complex and interesting legal arguments, based on the complete record as a whole, this Panel finds that § 42-9-30(21) applies to this case. Claimant's two lumbar MRIs (prior to the injury and after the injury) are essentially unchanged. Claimant sustained an injury to his neck only, which is well documented in the medical evidence. Great weight was given to the reports and deposition of Dr. Edwards in this case in finding that the neck is the only affected body part.

10. That there is no credit awarded to the Defendants for the prior settlement for the 2009 work injury, totaling 45 weeks, since the current permanency finding does not reach the 500 week threshold.

11. That as to Claimant's arguments under § 42-9-150, § 42-9-170, and § 42-9-35, the Panel finds these are not applicable as based on the evidence as a whole. Therefore, Claimant is not permanently and totally disabled under any part of the statute. Claimant has sustained an injury affecting his neck only.

12. That based on the evidence as a whole, the Panel finds Claimant sustained a 33% permanent partial disability to his back for his cervical spine injury as a result of his May 17, 2011 work accident. This finding is based on the medical evidence, Dr. Edwards's reports and deposition, Claimant's testimony, the lack of restrictions placed by Dr. Edwards, the FCE, and the record as a whole.

13. That Defendants are responsible for all causally-related medical treatment to date,  
as well as continued medical treatment by Dr. Edwards under Dodge and as listed on the Form 14B for the cervical spine injury located at C5-6.

14. That based on the deposition testimony of Dr. Edwards and the record as a whole, Claimant's injury from this accident was located at disks C-5 and C-6. This injury is at a different level than his prior injuries which were not aggravated by this accident.

15. That the medical evidence does not support Claimant's allegations that his preexisting lumbar spine or low back condition was aggravated by this accident. The medical evidence also does not support a claim that the right or left shoulders were aggravated by this accident. There is no medical evidence to support the claim that Claimant's legs or knees were aggravated by this accident. In contrast, the medical evidence shows Claimant's multiple alleged physical conditions were unrelated to his work accident, but for the cervical spine injury located at C5-6.

16. That Claimant suffered permanent partial disability pursuant to 42-9-30 only. However, it should be noted that the Vocational Report focused mostly on Claimant's severe and unrelated lumbar pain as his "primary focus." With regard to the Functional Capacity Evaluation, a significant portion of testing was terminated by Claimant due to complaints of unrelated pain and physical limitations for unrelated body parts.

17. That the Hearing Commissioner's finding that Claimant's injury was at the C5-6 level in the cervical spine was done for clarification purposes only, as Claimant has preexisting injuries to the cervical spine, including a C6-7 fusion. We specifically find that the Hearing Commissioner in no way subdivided the cervical spine into different parts for a determination of permanency, but instead properly awarded Claimant 33% permanent partial disability to his back for his cervical spine injury pursuant to § 42-9-30(21).

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### **CONCLUSIONS OF LAW**

In view of those Findings of Fact, and as provided in the South Carolina Code of Law, WE, THE APPELLATE PANEL, AFFIRM THE CONCLUSIONS OF LAW OF THE SINGLE COMMISSIONER, IN FULL:

1. Under § 42-1-130, Claimant was a covered employee at the time in question; and under § 42-1-140, Defendant/Employer was a covered employer under the Act.
2. Under § 42-1-160, Claimant sustained an injury to his cervical spine by accident arising out of and in the course and scope of his employment on May 17, 2011.
3. Under §§ 42-9-10 and 42-1-120, Claimant was entitled to compensation for a period of temporary total disability until November 18, 2011, the date on which Claimant reached maximum medical improvement.
4. Under § 42-15-60, Claimant is entitled to medical treatment for cervical spine disks C5-C6 pursuant to *Dodge v. Brucolli* as outlined on the Form 14B prepared by Dr. Edwards.
5. Under § 42-9-30, Claimant sustained 33% permanent partial disability to the back for his cervical spine. From such award, Defendants are entitled to a credit for the overpayment of temporary total compensation since November 18, 2011.
6. Claimant did not meet his burden of proof to show an aggravation of his preexisting

conditions to the lumbar spine, bilateral shoulders, or any other body part. Claimant suffers multiple preexisting conditions and has undergone multiple surgeries in the recent past that were unrelated to this claim. However, the medical evidence and evidence as a whole, including Claimant's own testimony regarding his ongoing pain and problems preceding this accident, do not support a finding that these body parts are related to his admitted accident or that they were aggravated by this admitted accident.


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7. The Hearing Commissioner properly distinguished the injury resulting from the May 17, 2011 work accident with Claimant's preexisting cervical spine conditions by finding that this injury was located at the C5-6 level; however, he in no way subdivided the cervical spine, but instead properly awarded Claimant disability to the back pursuant to § 42-9-30(21) based on an injury to his cervical spine.

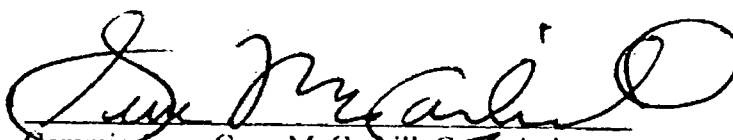
**ORDER/AWARD**

**IT IS HEREBY ORDERED** that Commissioner William's Decision and Order dated October 22, 2012, is affirmed, in full. Commissioner William's Decision shall remain in effect.

**IT IS SO ORDERED.**

  
\_\_\_\_\_  
Commissioner Andrea C. Roche, Commissioner

  
\_\_\_\_\_  
Commissioner T. Scott Beck, Commissioner

  
\_\_\_\_\_  
Commissioner Gene McCaskill, Commissioner

CERTIFICATE OF SERVICE

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

***By Valerie Deller on May 29, 2013***

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