

THE STATE OF SOUTH CAROLINA
In The Supreme Court

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APPEAL FROM THE SOUTH CAROLINA
WORKERS' COMPENSATION COMMISSION

S.C. Supreme Court

Avery B. Wilkerson, Appellate Panel Chairman, Commissioner

WCC File No.: 0818219
Ct. App. Case No.: 2011196087
Sup. Ct. Case No.: 2013001174

JOE OSMANSKI, EMPLOYEE,

PETITIONER,

V.

WATKINS & SHEPARD TRUCKING, INC.,
EMPLOYER, AND ZURICH NORTH AMERICAN
INSURANCE COMPANY, CARRIER,

RESPONDENTS,

APPENDIX
Volume 1 of 2

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The South Carolina Court of Appeals

Joe A. Osmanski, Employee, Appellant,

v.

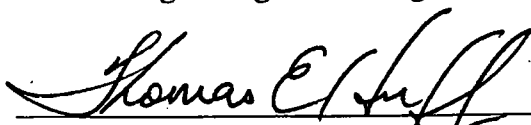
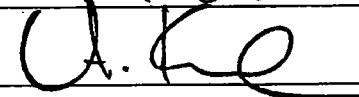
Watkins & Shepard Trucking, Inc., Employer, and Zurich
North America Insurance Company, Carrier, Defendants,

Of whom, Zurich North America Insurance Company,
Carrier, is the Respondent.

Appellate Case No. 2011-197087

ORDER

After careful consideration of the petition for rehearing, the Court is unable to discover that any material fact or principle of law has been either overlooked or disregarded, and hence, there is no basis for granting a rehearing. Accordingly, the petition for rehearing is denied.

	J.
	J.
	J.

Columbia, South Carolina

cc:

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FILED

May 3, 2013

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

Joe A. Osmanski, Employee, Appellant,

v.

Watkins & Shepard Trucking, Inc., Employer, and Zurich
North America Insurance Company, Carrier, Defendants,

Of whom Zurich North America Insurance Company,
Carrier, is the Respondent.

Appellate Case No. 2011-197087

Appeal From The Workers' Compensation Commission

Opinion No. 2013-UP-127

Heard February 6, 2013 – Filed March 27, 2013

AFFIRMED

Kevin B. Smith, of the Hoffman Law Firm, of North
Charleston, for Appellant.

Jason Lockhart, of McAngus Goudelock & Courie, LLC,
of Columbia, for Respondent.

PER CURIAM: Joe A. Osmanski appeals the decision of the Appellate Panel of the South Carolina Workers' Compensation Commission (Appellate Panel) denying him benefits for his claim arising from an injury to his left arm, arguing the Appellate Panel erred in (1) failing to apply a clear and convincing standard of proof to Watkins & Shepard Trucking, Inc. (WST) and Zurich North American

Insurance Company's (Zurich) defense of fraud in the application, (2) barring Osmanski's claim for fraud in the application, (3) denying Osmanski benefits on the ground that his injury was not accidental, and (4) failing to award Osmanski benefits pursuant to section 42-9-35 of the South Carolina Code (Supp. 2012) for the aggravation of a pre-existing condition. We affirm.

1. As to Osmanski's argument that the Appellate Panel failed to apply a clear and convincing standard of proof to WST and Zurich's defense of fraud in the application, we find no error. Our supreme court has previously applied a preponderance of evidence standard to this defense. *See Brayboy v. WorkForce*, 383 S.C. 463, 568, 681 S.E.2d 567, 466 (2009) (applying a preponderance of the evidence burden of proof to the determination of whether a claimant's employment relationship is to be vitiated based upon fraud in the application). Accordingly, the Appellate Panel did not err in failing to apply a clear and convincing evidence standard to WST and Zurich's fraud in the application defense.

2. As to Osmanski's argument that the Appellate Panel erred in barring Osmanski's claim due to fraud in the application, we find no error. Substantial evidence supported the Appellate Panel's finding that (1) Osmanski made a material misrepresentation regarding a prior injury to his left arm when applying for employment with WST; (2) WST relied upon this misrepresentation when hiring Osmanski; and (3) Osmanski's injury to his left arm giving rise to his claim for benefits was causally related to his misrepresentation. *See* S.C. Code Ann. § 1-23-380 (Supp. 2012) (providing that an appellate court "may not substitute its judgment for the judgment of the [Appellate Panel] as to the weight of the evidence on questions of fact" and must affirm the decision of the Appellate Panel if it is supported by substantial evidence). Specifically, we find substantial evidence indicated that Osmanski previously injured his left arm in an accident, resulting in several surgeries, including a left elbow replacement. Because of this injury, Osmanski's treating physician permanently restricted him to lifting no more than ten to fifteen pounds with his left arm. In addition, evidence indicated Osmanski failed to disclose the prior injury or his restrictions to WST during the application process and that WST relied upon this information when hiring him. Finally, it is undisputed that Osmanski's injury was causally related to the impairments to his left arm resulting from his prior injury. Accordingly, the Appellate Panel did not err in applying the fraud in the application offense to bar Osmanski's claim. *See Brayboy*, 383 S.C. at 467, 681 S.E.2d at 569 ("[A]n employment relationship may be vitiated when there is a material misrepresentation in the employment contract."); *see also Cooper v. McDevitt & St. Co.*, 260 S.C. 463, 468, 196 S.E.2d 833, 835 (1973) (providing that an

employment relationship may be vitiated if (1) the employee knowingly and willfully made a false representation as to his physical condition; (2) the employer relied upon the false representation and the reliance was a substantial factor in the hiring of the employee; and (3) the injury had a causal connection to the false representation).

3. As to Osmanski's claim that the Appellate Panel erred in denying Osmanski benefits on the ground that his injury was not accidental, we find no error. Substantial evidence supported the Appellate Panel's finding that Osmanski's injury was not unexpected due to the impairments resulting from the prior injury to his left arm. *See* S.C. Code Ann. § 42-1-160 (Supp. 2012) (defining a compensable injury as one "by accident arising out of and in the course of employment"); *Stokes v. First Nat'l Bank*, 306 S.C. 46, 50, 410 S.E.2d 248, 250 (1991) ("[I]n determining whether something constitutes an 'injury by accident' the focus is not on some specific event, but rather on the injury itself."); *Capers v. Flautt*, 305 S.C. 254, 256, 407 S.E.2d 660, 661 (Ct. App. 1991) ("The word accident has been applied by our courts in the workers' compensation context to mean an unlooked for or untoward event that the injured person did not expect, design or intentionally cause." (internal quotation marks omitted)). Because Osmanski knew the requirements of the position with WST exceeded the restrictions placed upon him by his treating physician as the result of the prior injury to his left arm, Osmanski's injury was not unexpected and, thus, was not compensable. *See Capers*, 305 S.C. at 257, 407 S.E.2d at 661-62 (finding that a claimant's contact dermatitis resulting from the performance of his duties as a dishwasher was not accidental when a physician had previously diagnosed the claimant with the condition and declared him totally disabled from work involving exposure to soaps, detergents, and/or water); *Havird v. Columbia YMCA*, 308 S.C. 397, 00, 418 S.E.2d 329, 331 (Ct. App. 1992) (finding substantial evidence supported the Appellate Panel's denial of benefits to a claimant who suffered from varicose veins as the result of prolonged standing because the claimant knew prolonged standing would worsen his condition).

4. As to Osmanski's claim that the Appellate Panel erred in failing to award Osmanski benefits pursuant to section 42-9-35 of the South Carolina Code (Supp. 2012), we find this argument is not preserved for our review. *See Robbins v. Walgreens & Broadspire Servs., Inc.*, 375 S.C. 259, 266, 652 S.E.2d 90, 94 (Ct. App. 2007) (holding that an argument not raised to and ruled upon by the Appellate Panel is not preserved for appellate review).

AFFIRMED.

HUFF, WILLIAMS, and KONDUROS, JJ., concur.

APPELLATE PANEL
DECISION AND ORDER
OF THE
SOUTH CAROLINA WORKERS' COMPENSATION COMMISSION
W.C.C. FILE NO.: 0818219

JOE A. OSMANSKI,

EMPLOYEE,
CLAIMANT/APPELLANT,

V.

WATKINS & SHEPARD TRUCKING, INC.,

EMPLOYER,

AND

ZURICH NORTH AMERICAN INSURANCE
COMPANY,

CARRIER,
DEFENDANTS/RESPONDENT.

Appellate Panel Review held in
Columbia, South Carolina on April 18, 2011.

Appellate Panel Decision and Order

filed 7/26, 2011.

APPEARANCES:

Claimant/Appellant represented by
Paula Amick, Esq., of George Sink, P.A.
of Columbia, South Carolina
and

Kevin Smith, Esq., and David Pearlman, Esq., of The Steinberg Law Firm, L.L.P.
of Charleston, South Carolina.

Defendants/Respondent represented by
Jason W. Lockhart, Esquire of McAngus Goudelock & Courie, L.L.C.
of Columbia, South Carolina.

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SC Court of Appeals

STATEMENT OF THE CASE

The hearing was scheduled pursuant to the Form 50 filed by the Claimant on January 20, 2010. The Claimant maintained that he sustained a compensable injury to the left upper extremity while in the course and scope of his employment with the Defendants on November 1, 2008. The Claimant maintained that he was entitled to authorized medical treatment with Dr. Shealy and temporary total disability benefits from November 1, 2008 to the present and continuing.

In response, the Defendants maintained that the Claimant would be unable to satisfy his burden of proving a compensable injury to the left upper extremity while in the course and scope of his employment with the employer. In addition, the Defendants took the position that the Claimant was not entitled to benefits on the basis that the Claimant engaged in fraud in the application, when he obtained employment with the employer in November 2006, where the Claimant misrepresented his physical condition to the employer in November 2006.

A hearing was held on April 29, 2010, and in an Order dated November 10, 2010, the Single Commissioner held that the Claimant's allegations of a left upper extremity injury were denied in their entirety based on the Claimant's failure to carry his burden of proof in showing he suffered a compensable injury by accident arising out of an in the course and scope of his employment with the Defendants on November 1, 2008. . The Commissioner further found that Claimant did not sustain an accidental injury pursuant to Capers and that Claimant engaged in fraud in the application in violation of Cooper v. McDevitt and Street. The Claimant then timely filed a Form 30, Request for Commission Review. This matter was heard before the Full Commission on April 18, 2011 where both parties presented oral arguments in support of their positions.

EVIDENCE OF THE CASE

The Claimant was the only witness to testify on his behalf. The Claimant testified that he is currently 45 years of age, and resides in Pelion, South Carolina with his wife and nine children. (Hr'g Tr. p. 24, Deposition of Claimant pp. 5-6). The Claimant stated that he last completed the 11th grade, but has not obtained his GED or high school equivalent. (Hr'g Tr. pp. 24-25). The Claimant indicated that he sustained injuries to the left elbow, right elbow, left shoulder, right shoulder, left wrist, and right wrist as a result of a work-related injury that occurred in December 1987. (Hr'g Tr. pp. 25-26; Deposition of Claimant pp. 9-10). The Claimant testified that he sought and received medical treatment with Dr. Chidgey as a result of the injuries sustained in his 1987 work-related accident. (Hr'g Tr. pp. 25-28; Deposition of Claimant pp. 12-14). Dr. Chidgey determined that the Claimant reached maximum medical improvement on March 20, 2002 and assigned a 20% impairment rating to the left upper extremity. (Defendants' APA #19, p. 88 (c)). The Claimant stated that he received weekly workers' compensation benefits, as a result of his 1987 work-related accident, for approximately 7 years, and eventually received a settlement in the amount of approximately \$86,000.00. (Deposition of Claimant, p. 15).

The Claimant testified that he contacted Watkins & Shepard Trucking, Inc. (the "Employer") in 2006 regarding possible employment as a truck driver. (Deposition of Claimant, p. 21). The Claimant stated that he was extended an offer of employment by Rodney Stephens, who instructed the Claimant to travel to Hickory, North Carolina for purposes of completing activities prior to the Claimant's beginning employment with Watkins & Shepard Trucking, Inc. as a truck driver. (Deposition of Claimant, pp. 21-22). The Claimant indicated that, while in Hickory, North Carolina, he underwent a D.O.T. physical, which was conducted by Dr. Osbahr.

(Hr'g Tr. p. 35, Deposition of Claimant, p. 22). Most notably, the Claimant testified that he informed Dr. Osbahr of his previous work-related left upper extremity injury, and informed Dr. Osbahr that he had undergone multiple surgeries on the left upper extremity, including a left elbow replacement. (Hr'g Tr. pp. 36-39). The Claimant stated that he also underwent a lift test, pursuant to the request of the Employer, and successfully completed the lift test. (Hr'g Tr. p. 39, ll. 3-22). The Claimant testified that he did not tell anyone at Watkins & Shepard Trucking, Inc. asking him about prior injuries. (Hr'g Tr. pp. 40-41; Deposition of Claimant, p. 22, ll. 19-25, p. 23, ll. 23-25, p. 24, ll. 1-17). The Claimant testified that he was of the opinion that he was able to perform his job duties as a truck driver with Watkins & Shepard Trucking, Inc. (Hr'g Tr. pp. 39-40).

The Claimant testified that he began working with Watkins & Shepard Trucking, Inc. in October 2006 as a truck driver, and that his job duties and responsibilities required the Claimant to engage in physical activities such as lifting, pulling and pushing. (Hr'g Tr. p. 40, ll. 8-21, p. 42, ll. 15-19). Most notably, the Claimant stated that he did not experience any problems with his left upper extremity, while working with Watkins Shepard Trucking, Inc., prior to his November 2008 work-related accident. The Claimant indicated that he injured his left upper extremity while in the course and scope of his employment with the Employer on November 1, 2008. (Hr'g Tr. pp. 43-44). More specifically, the Claimant testified that he hyperextended his left elbow while attempting to break down freight weighing 100-150 lbs while in the course and scope of his employment with the Employer. (Hr'g Tr. pp. 43-44; Deposition of Claimant, pp. 30-31).

The Claimant testified that he has sought and received medical treatment from multiple physicians, for the injuries he sustained in his alleged November 2008 work-related accident,

including Dr. Bethea, Dr. Chidgey, Dr. McIntosh, and Dr. Shealy. (Hr'g Tr. p. 44). The Claimant stated that he has sought and received medical treatment from Dr. Shealy, who is an orthopaedic physician in Charleston, South Carolina, in the form of 3 surgeries, including the replacement and repair of the Claimant's left elbow prosthesis. (Hr'g Tr. pp. 44-45; Claimant's APA ## 7-8). The Claimant indicated that he has not been released from the care of Dr. Shealy, and is currently being placed out of work by Dr. Shealy due to his work-related left upper extremity injury. (Hr'g Tr. pp. 45-46).

On cross-examination, the Claimant testified that he was released from the care of Dr. Chidgey in March 2002. (Hr'g Tr. pp. 55-57; Deposition of Claimant, p. 14, ll. 10-24). Most notably, the Claimant stated that, when he was released from the care of Dr. Chidgey in March 2002, he was aware that he had been provided with a permanent restriction by Dr. Chidgey of no lifting in excess of 10-15 pounds with the left upper extremity. (Hr'g Tr. pp. 55-57; Defendants' APA #19, pp. 88(a)-(c)). The Claimant indicated that his job duties and responsibilities with Watkins & Shepard Trucking, Inc. were outside of the permanent work restrictions, which he had been provided by Dr. Chidgey. (Hr'g Tr. pp. 55-57, pp. 64-65). The Claimant testified that he was of the opinion that he was physically capable of performing his job duties and responsibilities with Watkins & Shepard Trucking, Inc., despite the permanent work restriction that had been placed upon the Claimant by Dr. Chidgey, and that he would have informed the Employer of the above-referenced permanent work restriction had the Employer questioned the Claimant as to whether he possessed any permanent work restrictions. (Hr'g Tr. pp. 57-59). Most interestingly, the Claimant stated that, while he was not questioned by Watkins & Shepard Trucking, Inc. regarding any permanent work restrictions prior to his beginning employment with the Employer, he did not voluntarily inform Watkins & Shepard Trucking, Inc. that he

possessed a permanent lifting restriction, with regards to the left upper extremity, prior to this beginning employment with Watkins & Shepard Trucking, Inc. in November 2006. (Id.).

The Claimant testified that he possessed limited range of motion of the left elbow and some occasional numbness of the left upper extremity prior to his November 2008 work-related accident. (Hr'g Tr. p. 61). Despite the deposition testimony of Dr. Osbahr, the Claimant stated that he informed Dr. Osbahr of his 1987 work-related accident as well as the multiple surgeries, which the Claimant underwent as a result of his 1987 work-related accident. (Hr'g Tr. pp. 46-49, 62-63). The Claimant indicated that he did not misrepresent any impairment, which he possessed with regard to the left upper extremity, when completing forms associated with his D.O.T. physical as he was under the impression that he did not possess any impairment to the left upper extremity as a result of his 1987 work-related accident. (Hr'g Tr. pp. 60-62; Deposition of Claimant, p. 47). The Claimant indicated that he was of the opinion that his prior work-related left upper extremity injury did not prevent the Claimant from performing his job duties and responsibilities with Watkins & Shepard Trucking, Inc. as a truck driver. (Hr'g Tr. p. 59).

The deposition of Larry Chidgey, M.D., was taken on March 15, 2010. Dr. Chidgey is an expert in the orthopedic medicine. Dr. Chidgey testified that he began treating the Claimant in 2000 for treatment of a severe left elbow injury. (Deposition of Dr. Chidgey, pp. 4-5). Dr. Chidgey testified that he provided the Claimant with treatment in the form of two surgeries, including placement of an artificial elbow joint in September of 2000 and a procedure on the ulnar nerve of the Claimant's left elbow. (Deposition of Dr. Chidgey, p. 5). Dr. Chidgey testified that on February 11, 2002 he recommended a 10lb lifting restriction indefinitely for the Claimant's left upper extremity due to the Claimant's total elbow arthroplasty. (Deposition of Dr. Chidgey, p. 8). Thereafter, on March 22, 2002, Dr. Chidgey recommended a lifting

restriction of 10-15 lbs after the Claimant underwent a functional capacity evaluation. (Deposition of Dr. Chidgey, p. 9). Dr. Chidgey testified that the Claimant was informed of these restrictions and understood the restrictions that had been recommended by Dr. Chidgey. (Deposition of Dr. Chidgey, p. 7, 10, 21). Dr. Chidgey testified that he released the Claimant on March 22, 2002 and assigned a 14% impairment rating to the upper extremity. (Deposition of Dr. Chidgey, p. 10; Defendants' APA #19, p. 88 (c)). Although Dr. Chidgey testified that the Claimant's work restrictions were permanent unless things changed, Dr. Chidgey also testified that there was no medical evidence to suggest that the Claimant's condition had changed between March 2002 and the date of the Claimant's alleged November 2008 work-related accident. (Deposition of Dr. Chidgey, p. 12).

Dr. Chidgey testified that he examined the Claimant on January 12, 2009 following the Claimant's alleged 2008 work-related accident. Dr. Chidgey testified that there were some concerns that the Claimant's implant had possibly loosened as well as a biceps tendon rupture. (Deposition of Dr. Chidgey, pp. 17-18). The Claimant was most recently examined by Dr. Chidgey on April 1, 2009. (Deposition of Dr. Chidgey, p. 18).

The deposition of Albert James Osbahr, M.D. was taken on March 15, 2010. Dr. Osbahr is an expert in occupational medicine. Dr. Osbahr testified that he provided the Claimant with a D.O.T. examination as a new hire for Watkins Shepard Trucking, Inc. on October 30, 2006. (Deposition of Dr. Osbahr, p. 6). Dr. Osbahr testified that he had no recollection of the Claimant informing him of the Claimant's 1987 work-related accident. (Deposition of Dr. Osbahr, p. 7). Dr. Osbahr also testified that the Claimant failed to inform him that the Claimant had undergone left elbow replacement surgery in 2000. (Deposition of Dr. Osbahr, p. 7). Although Dr. Osbahr identified some impairment with regards to the Claimant's left arm during the examination, Dr.

Osbahr testified that the Claimant failed to inform that Dr. Chidgey had assigned a 14% impairment rating to the Claimant's left arm. (Deposition of Dr. Osbahr, pp. 8-10). Dr. Osbahr further testified that the purpose of his examination of the Claimant was to determine if the Claimant's physical condition met the general standards as set forth by D.O.T. and not necessarily the specific requirements of the job for Watkins & Shepard Trucking, Inc. In fact, Dr. Osbahr confirmed that at the time of the examination he had no information with regards to the particular job that the Claimant was to perform for Watkins & Shepard Trucking, Inc. (Deposition of Dr. Osbahr, pp. 11-14).

The deposition of Matthew Grandy was taken on March 17, 2010. Mr. Grandy testified that he is the Director of Driver Recruiting and Training for Watkins & Shepard Trucking, Inc., and has worked for the Employer from 1989 to 1999 and then again starting in January 2008. Mr. Grandy testified that all hiring for Watkins & Shepard Trucking, Inc. is conducted from corporate headquarters in Missoula, Montana. Mr. Grandy testified that the company engages in a post job offer phase in order to identify an individual's ability to perform the job. (Deposition of Grandy, pp. 9-10). Mr. Grandy testified that a conditional offer of employment is contingent upon a drug test, a lift test, a D.O.T. physical, as well as the post-job offer questionnaire administered by the safety department. (Deposition of Grandy, pp. 10, 18). Mr. Grandy further testified that, had the Claimant provided Watkins Shepard Trucking, Inc. with accurate information regarding the permanent work restrictions, which were placed upon the Claimant by Dr. Chidgey, the Claimant would not have been subjected to a lift test. (Deposition of Grandy, p. 25). Rather, the Employer would have conducted further research, including obtaining a copy of the Claimant's work release for the treating physician. (Deposition of Grandy, pp. 25-26). Mr. Grandy further testified that the Employer would want any medical records regarding restrictions

in order to conduct a through investigation in order to determine if an applicant is physically capable of performing a job. (Deposition of Grandy, pp. 25-27).

The deposition of Rodney Stephens was taken on March 10, 2009. Mr. Stephens testified that he is a terminal manager for Watkins & Shepard Trucking, Inc. Mr. Stephens testified that the Claimant worked for the Employer as a delivery driver for nearly 2 years and was required to lift over 100lbs daily while delivering furniture. (Deposition of Stephens, pp. 7-8, p. 18). Mr. Stephens testified that he was the Claimant's direct supervisor while the Claimant was employed with Watkins & Shepard Trucking, Inc. (Deposition of Stephens, pp. 18-19). Mr. Stephens testified that the Claimant did not inform him of his 1987 work-related accident or that he had been provided permanent lifting restrictions by Dr. Chidgey. (Deposition of Stephens, pp. 19-20).

FINDINGS OF FACT

Based upon the testimony and exhibits submitted before the Single Commissioner, the undersigned Appellate Panel adopts the findings of fact as made by the Single Commissioner in their entirety. They are as follows:

1. The parties are subject to and bound by the South Carolina Workers' Compensation Act.
2. The Claimant's average weekly wage is One Thousand Sixty Eight and 84/100 Dollars (\$1,068.84.) with a corresponding compensation rate of Six Hundred Sixty One and 29/100 Dollars (\$661.29).
3. The Claimant alleges that he injured his left upper extremity (elbow and biceps) in a work-related accident on November 1, 2008, a claim we find, based on the substantial

evidence, including the medical evidence and testimony, is not supported by the greater weight of the evidence.

4. The Claimant is 45 years of age and resides in and resides in Pelion, South Carolina with his wife and children. (Deposition of Claimant, pp. 5-9).

5. The Claimant has 9 children between the ages of 3 and 24, eight of whom reside with Claimant and seven of whom are under the age of 18. (Deposition of Claimant, p. 7).

6. The Claimant's wife is unemployed. (Deposition of Claimant, p. 21, ll. 1-2).

7. The Claimant last completed the 11th grade, and has not obtained his GED or high school equivalent. (Hr'g Tr. p. 25, ll. 1-4).

8. Prior to the alleged accident in issue, the Claimant underwent left total elbow replacement surgery (after other multiple elbow surgeries) for a 1987 workers' compensation injury for which the Claimant received a settlement of approximately \$86,000.00. Based on the substantial evidence, including the medical records of the Claimant and the testimony of the Claimant, after the prior total elbow replacement surgery, the Claimant was assigned permanent lifting restrictions of 10 to 15 lbs. for his left arm. The Claimant admitted at the hearing that he knew he was subject to the 10-15 lb. lifting restriction when he began work for Employer in 2006, that the treating physician who assigned the restriction did not subsequently lift it, and that he (Claimant) was subject to the restriction on the date of the alleged accident in issue. ((Hr'g Tr. pp. 55-57, pp. 64-65); Defendants' APA #19 and #20; Deposition of Claimant, pp. 9, 11, 15, and 44-45; Deposition of Dr. Chidgey, p. 22; Claimant's APA #14, pp. 50-53).

9. The Claimant underwent the elbow replacement surgery in September 2000, and then ulnar nerve neurolysis surgery in November 2001. Based on the substantial evidence,

including the medical records of the Claimant, after the elbow replacement surgery, the Claimant's treating physician records state that the physician "again stressed the importance of limited use of the Claimant's left arm to increase the longevity of this prosthesis," the that Claimant "will always have a 15 lb. weight limit restriction [later changed to 10-15] for the left upper extremity," and that the Claimant "should also avoid situations where he might fall or excessively stress his left arm. We stressed this multiple times today, and the patient stated he understands." Based on the substantial evidence, including the medical records of the Claimant and the testimony of the Claimant, the Claimant was released from care in March 2002 (after an FCE), and assigned a 20% impairment rating. (Defendants' APA #19, pp. 83, 86, and 88a-c; Claimant's APA #14, p. 50-53; Deposition of Dr. Chidgey, pp. 6-12 and 22).

10. Notwithstanding his hearing testimony, the Claimant gave inconsistent sworn deposition testimony that he did "not recall" whether or not he had any restrictions after the 1987 workers' compensation injury and related elbow surgeries. (Deposition of Claimant, p. 17).

11. In addition to the previous left elbow surgeries, the Claimant also underwent 3 previous surgeries to his left shoulder and 1 to the right elbow. The condition of the Claimant's left shoulder was referred to as "complex" in 1998 and 1999. (Defendants' APA #19, pp. 70-72, dated 1998 and June 1999, referring to "two previous" left shoulder surgeries; Defendants' APA #2Q, pp. 94-95, containing the operative notes of the third left shoulder surgery; Claimant's APA #12, p. 42; testimony of Claimant; Claimant's APA #14, p. 47, containing a reference to the right elbow surgery).

12. Based on the substantial evidence, medical records from 1998 state that the Claimant has been disabled since 1987 because of his left arm. Based on the substantial evidence, including the medical records of the Claimant, medical evidence from 2000 states that

the Claimant's pain is "disabling and barely tolerable," and that he is unable to use the arm for any significant activity. (Defendants' APA #19; pp. 72, 73, and 79; Deposition of Claimant, page 15, in which the Claimant testified that he received workers' compensation benefits for 7 years prior to receiving a settlement for the 1987 injury).

13. Although the Claimant testified at the hearing that he injured his left shoulder playing sports, this Panel finds that he inconsistently testified in his deposition that he injured his left shoulder in the 1987 injury. Although the Claimant would admit to 1 left shoulder surgery, there actually were actually three prior surgeries. (Hr'g Tr. pp. 25-26, pp. 49-55; Deposition of Claimant, pp. 9-10, in which Claimant testified that he injured "both shoulders" in the work injury of 1987).

14. After releasing the Claimant in 2002—with a "permanent" lifting restriction of 10-15 lbs.—Dr. Chidgey did not see the Claimant again until 2009 (2 months after the alleged accident in issue). There is no notation in Dr. Chidgey's 2002 record that the restriction imposed was only in place "unless things changed." The word "permanent," repeatedly used by Dr. Chidgey in his treatment notes prior to and after the date of the Claimant's 2002 FCE, speaks for itself and (with no qualifying language at the time the notes were written) is unequivocal. (Defendants' APA #19, pp. 88 (a) – (c)). We also note that, in 2002, Dr. Chidgey warned the Claimant of the danger of excessively stressing the implant (to prolong its longevity) because of the Claimant's young age. (Defendants' APA #19). Dr. Chidgey admits that the Claimant understood that he was to avoid heavier lifting. (Deposition of Dr. Chidgey, pp. 7, 22). Therefore, we find Dr. Chidgey's 2010 attempt to retreat from the permanent restrictions he imposed in 2002 appears more than a little-result oriented. However, at the end of his deposition,

Dr. Chidgey did reiterate the left arm lifting restriction as he imposed it in 2002. (Deposition of Dr. Chidgey, particularly pp. 8-14, 20-22, 26, and 28).

15. In 2006, the Claimant applied with Employer for work involving truck driving and delivering furniture. The Claimant admitted at the hearing that prior to accepting employment he knew the job required him to lift 100-150 lbs. (Hr'g Tr. pp. 64-65; Defendants' APA #17, p. 59; Defendants' APA #26, p. 114, and particularly pp. 117 and 121-123; Deposition of Stephens, page 7; Deposition of Grandy, pp. 23 and 26-28).

16. Based on the substantial evidence, including the medical records and testimony, the Claimant's alleged accident was unwitnessed. (Hr'g Tr. pp. 43-44; Deposition of Claimant, pp. 30-31).

17. According to the Claimant, the recliner that hit the Claimant's left arm (after he pulled on it to get it down) weighed 100-150 lbs. The Claimant's job required him to use both arms. (Deposition of Claimant, pp. 30-32).

18. Based on the substantial evidence, including the medical records of the Claimant and the testimony of the Claimant, we find it odd and unusual that at a visit to his family doctor, Dr. Fisher, in November 13, 2008. (12 days after the date of the alleged accident), the Claimant would not (and did not) mention a work accident or work injury to his elbow. Based on the substantial evidence, including the medical records of the Claimant, the record shows that the Claimant was in fact examined (contrary to his hearing testimony), as his abdomen is noted as "soft" with "no obvious swelling or masses." (Claimant's APA #10, page 40; Hr'g Tr. p. 66).

19. Based on the substantial evidence, including the medical records of the Claimant and the testimony of the Claimant, after the date of the alleged accident in issue, the Claimant's

implant was noted to be loosened. The Claimant had to undergo another total elbow arthroplasty in 2009. (Deposition of Dr. Chidgey, pp. 16, 18 and 31; Claimants APA #8, pp. 28-29).

20. Based on the substantial evidence, including the medical records of the Claimant and the testimony of the Claimant, we find that Capers defeats this claim. Based on the substantial evidence, including the medical records of the Claimant and the testimony of the Claimant, we find that it is irrelevant that the Claimant: (a) may have "felt" or thought he could perform the work (notwithstanding the ongoing restrictions); (b) may have been taught "good lifting techniques" in physical therapy; (c) was able to pass Employer's lift test; or (d) was able to work without incident for Employer for 2 years before the injury in issue occurred. Based on the substantial evidence, including the medical records of the Claimant and the testimony of the Claimant, we find that if the legislature intended for a Capers defense to "expire" after a certain length of time a claimant is able to work outside his restrictions without injury, it could have enacted such a measure. Based on the substantial evidence, including the medical records of the Claimant and the testimony of the Claimant, we decline to create an "expiration" exception to Capers.

21. Based on the substantial evidence, including the medical records of the Claimant and the testimony of the Claimant, we find that the reality, in this case, is that the Claimant's "luck" (i.e., his ability to work outside his restrictions) eventually ran out.

22. Based on the substantial evidence, including the medical records of the Claimant and the testimony of the Dr. Chidgey, we find Dr. Chidgey's most telling comments—and which certainly apply to this textbook Capers case—is Dr. Chidgey's testimony that "if you want to try and gain life out of the arthroplasty, you keep your weight [lifting] to a lower level. *If you increase that, you may get away with it.*" I find that it would be patently unfair to require

Defendants to bear the burden for a risk that the Claimant knowingly and willfully chose to take, notwithstanding the Claimant's need to support his unemployed wife and large family, and to pay his mortgage. (Deposition of Dr. Chidgey, pp. 23 and 27-28; Claimant's Deposition, p. 6).

23. Even Dr. Chidgey testified that as to whether the Claimant had any problems with his left elbow between 2002 and 2009, "I can only guess" (Deposition of Dr. Chidgey, page 33).

24. As to the Claimant's claim of a biceps tendon rupture, Dr. Chidgey testified that he is not certain whether the Claimant's biceps tendon is ruptured. (Deposition of Dr. Chidgey, pages 32-34).

25. The general rule is that certain factors must be present for a false statement to bar benefits in a workers' compensation case.

26. First, the Employee must have knowingly and willfully made a false representation as to his physical condition.

27. Second, the Employer must have relied upon the false representation and this reliance must have been a substantial factor in the hiring.

28. Third, that there must have been a causal connection between the false representation and the injury.

29. Based on the substantial evidence, including the medical records of the Claimant and the testimony of the Claimant, as to Defendants' McDevitt defense, we find it applies. The Claimant contends that the case is inapplicable because the Claimant's post-hire physical examination revealed some impairment (but that Employer hired the Claimant anyway, ratifying any non-disclosure on the Claimant's part), and that the Claimant "misunderstood the form" and did not intend to mislead the Employer when he denied having any pre-existing impairment or injury. The Claimant's hearing testimony—that he knew he had a prior impairment/injury but

that he misinterpreted the CDL forms—seemed to the undersigned Panel to be "canned" and rehearsed. Further, the Employer never had the opportunity to explore the full extent of the Claimant's condition because it was concealed. Based on the substantial evidence, including the medical records of the Claimant and the testimony of Dr. Osbahr, we find that, although Dr. Osbahr on his own discovered some impairment during the examination, he never knew the full extent. The Claimant's hearing testimony—that he is "certain" he showed Dr. Osbahr his surgical scars—is refuted by the testimony of Dr. Osbahr (Hr'g Tr. pp. 36-38; Deposition of Dr. Osbahr, pp. 7-13 and 18, and particularly pp. 20-22; Defendants' APA #17, p. 62; Defendants' APA #22, p. 109; Claimant's APA #4, pp. 13-14; Claimant's APA #1, p. 1). This supports the contention that the Claimant knowingly and willfully made a false representation as to his physical condition.

30. Based on the substantial evidence, including the medical records of the Claimant and the testimony of the Claimant, we do not believe the Claimant's testimony that he does not remember the telephone conversation with Employer's agent during which the agent completed the post job offer questionnaire. Based on the substantial evidence, including the medical records of the Claimant and the testimony of the Claimant, we fail to see why (and do not believe) that the Employer's own agent would falsify or otherwise fail to document the Claimant's impairment and his previous workers' compensation claim. We base this finding on the fact that the Claimant has also been less than forthcoming about other information to various providers and in sworn testimony. Based on the substantial evidence, including, but not limited to, the medical records of the Claimant and the testimony of the Claimant, we find that the telephonically completed document is substantiated by Grandy's testimony that the post job offer questionnaire is generally conducted by telephone ("our standard practice") when an applicant does not live in Montana.

The Employer relied on the telephone document. Nonetheless, we do note that the Claimant never subsequently signed this particular form after it was completed. (Deposition of Grandy, pp. 8-15, 17-18, 30, 34-36, and 46-47; Defendants' APA #21, p. 108, dated October 30, 2006; Deposition of Stephens, pp. 17-18). This satisfies the second requirement that the Employer relied upon the false representation made by the Claimant and this reliance was a substantial factor in the hiring

31. Based on the substantial evidence, including the medical records of the Claimant and the testimony of the Claimant, because of the Claimant's failure to disclose his prior injury/impairment, the Employer had no opportunity to obtain from the Claimant's treating doctor a certification that the Claimant would have no problems doing the job. Grandy also states that the Claimant would not have undergone the lift test if Employer had known about the Claimant's prior injury/limitations for the reason that the Claimant could have injured himself during the lift test. (Deposition of Grandy, pages 12-13, 15-16, and 28-29). This satisfies the third requirement that there was a causal connection between the Claimant's misrepresentation and the resulting injury.

32. Based on the substantial evidence, including the medical records of the Claimant and the testimony, we find that the Claimant knowingly and willfully made a false representation as to his physical condition to the Defendants.

33. Based on the substantial evidence, including the medical records of the Claimant and the testimony, we find that the Defendants relied upon the false representation and this reliance was a substantial factor in the hiring of the Claimant by the Defendants.

34. Based on the substantial evidence, including the medical records of the Claimant and the testimony, we find that there was a causal connection between the false representation, knowingly and willfully made by the Claimant, and the Claimant's injury.

35. Based on the substantial evidence, including the medical records of the Claimant and the testimony of the Claimant, we find that, even if McDevitt does not serve to defeat this claim, Capers clearly does.

36. Based on the substantial evidence, we find that Dr. Chidgey's checklist/questionnaire (particularly the "pursuant to my recommendations" portion in #2) is refuted by his own medical records. Therefore, this checklist/questionnaire is given de minimis weight. (Claimant's APA #2, pages 2-3; Defendants' APA #19, pages 69-88c).

37. Based on the substantial evidence, including the medical records of the Claimant and the testimony of the Claimant, the Claimant's request for benefits under the Act is denied.

38. Based on the substantial evidence, including the medical records of the Claimant and the testimony of the Claimant, the Claimant did not satisfy his burden of proving a compensable injury within the course and scope of his employment with the Defendants.

39. The Claimant's average weekly wage is \$1,068.84, yielding a compensation rate of \$661.29.

CONCLUSIONS OF LAW

It is concluded under the South Carolina Worker's Compensation Act in Section 42-1-10 S.C. Code of Laws, et. seq., that:

1. The scope of review of the Full Commission is not limited. The Commission can, like the Single Commissioner, consider all of the evidence and reach its own findings of fact and conclusions of law. Lowe v. Am-Can Transport Services, Inc., 283 S.C. 534, 324 S.E.2d 87

(S.C. Ct. App. 1984).

2. The Full Commission is not necessarily bound by the Single Commissioner's findings of fact, and is empowered to make its own findings of fact and to reach its own conclusions of law consistent or inconsistent with those of the Single Commission. Green v. Raybestos-Manhattan, Inc., 250 S.C. 58, 64, 156 S.E.2d 318, 321 (S.C. 1967). See also Muir v. C.R. Bard, Inc.

3. The general rule is that certain factors must be present for a false statement to bar benefits in a workers' compensation case.

4. First, the Employee must have knowingly and willfully made a false representation as to his physical condition.

5. Second, the Employer must have relied upon the false representation and this reliance must have been a substantial factor in the hiring.

6. Third, that there must have been a causal connection between the false representation and the injury. Cooper v. McDevitt Street & Company, 260 S.C.463; 196 S.E.2d. 833 (SC 1973).

7. We find that based on the substantial evidence, including the medical records of the Claimant and the testimony of the Claimant, as to Defendants' McDevitt defense, we find it applies. The Claimant contends that the case is inapplicable because the Claimant's post-hire physical examination revealed some impairment (but that Employer hired the Claimant anyway, ratifying any non-disclosure on the Claimant's part), and that the Claimant "misunderstood the form" and did not intend to mislead the Employer when he denied having any pre-existing impairment or injury. The Claimant's hearing testimony—that he knew he had a prior impairment/injury but that he misinterpreted the CDL forms—seemed to the undersigned to be

"canned" and rehearsed. Further, the Employer never had the opportunity to explore the full extent of the Claimant's condition because it was concealed. Based on the substantial evidence, including the medical records of the Claimant and the testimony of Dr. Osbahr, we find that, although Dr. Osbahr on his own discovered some impairment during the examination, he never knew the full extent. The Claimant's hearing testimony—that he is "certain" he showed Dr. Osbahr his surgical scars—is refuted by the testimony of Dr. Osbahr (Hr'g Tr. pp. 36-38; Deposition of Dr. Osbahr, pp. 7-13 and 18, and particularly pp. 20-22; Defendants' APA #17, p. 62; Defendants' APA #22, p. 109; Claimant's APA #4, pp. 13-14; Claimant's APA #1, p. 1). We find that this supports the contention that the Claimant knowingly and willfully made a false representation as to his physical condition.

8. We find that based on the substantial evidence, including the medical records of the Claimant and the testimony of the Claimant, we do not believe the Claimant's testimony that he does not remember the telephone conversation with Employer's agent during which the agent completed the post job offer questionnaire. Based on the substantial evidence, including the medical records of the Claimant and the testimony of the Claimant, we fail to see why (and do not believe) that the Employer's own agent would falsify or otherwise fail to document the Claimant's impairment and his previous workers' compensation claim. We base this finding on the fact that the Claimant has also been less than forthcoming about other information to various providers and in sworn testimony. Based on the substantial evidence, including, but not limited to, the medical records of the Claimant and the testimony of the Claimant, we find that the telephonically completed document is substantiated by Grandy's testimony that the post job offer questionnaire is generally conducted by telephone ("our standard practice") when an applicant does not live in Montana. The Employer relied on the telephone document.

Nonetheless, we do note that the Claimant never subsequently signed this particular form after it was completed. (Deposition of Grandy, pp. 8-15, 17-18, 30, 34-36, and 46-47; Defendants' APA #21, p. 108, dated October 30, 2006; Deposition of Stephens, pp. 17-18). We find that this satisfies the second requirement that the Employer relied upon the false representation made by the Claimant and this reliance was a substantial factor in the hiring.

9. We find that based on the substantial evidence, including the medical records of the Claimant and the testimony of the Claimant, because of the Claimant's failure to disclose his prior injury/impairment, the Employer had no opportunity to obtain from the Claimant's treating doctor a certification that the Claimant would have no problems doing the job. Grandy also states that the Claimant would not have undergone the lift test if Employer had known about the Claimant's prior injury/limitations for the reason that the Claimant could have injured himself during the lift test. (Deposition of Grandy, pages 12-13, 15-16, and 28-29). We find that this satisfies the third requirement that there was a causal connection between the Claimant's misrepresentation and the resulting injury.

10. Based on the substantial evidence, including the medical records of the Claimant and the testimony of the Claimant, we find that Capers defeats this claim. Based on the substantial evidence, including the medical records of the Claimant and the testimony of the Claimant, we find that it is irrelevant that the Claimant: (a) may have "felt" or thought he could perform the work (notwithstanding the ongoing restrictions); (b) may have been taught "good lifting techniques" in physical therapy; (c) was able to pass Employer's lift test; or (d) was able to work without incident for Employer for 2 years before the injury in issue occurred. Based on the substantial evidence, including the medical records of the Claimant and the testimony of the Claimant, we find that if the legislature intended for a Capers defense to "expire" after a certain

length of time a claimant is able to work outside his restrictions without injury, it could have enacted such a measure. Based on the substantial evidence, including the medical records of the Claimant and the testimony of the Claimant, we decline to create an "expiration" exception to Capers.

11. Based on the substantial evidence, including the medical records of the Claimant and the testimony of the Claimant, we find that, even if McDevitt does not serve to defeat this claim, Capers clearly does.

12. Based on a review of the substantial medical evidence and testimony presented before the Single Commissioner, we conclude that the Conclusions of Law are adopted in their entirety. They are as follows:

13. Section 42-1-160 governs injuries by accident arising out of and in the course of employment.

14. The Claimant alleges that he sustained a compensable left upper extremity (elbow and biceps) by accident arising out of and occurring in the course and scope of his employment with the Defendants on November 1, 2008.

15. The Claimant knew he was subject to a 10-15 lb. lifting restriction when he knowingly accepted employment requiring him to lift 100-150lbs. (See Capers finding that the claimant, who worked as a dishwasher, did not sustain an injury by accident arising out of and in the course of his employment, when the claimant knew, based on prior experiences, that detergents and water would cause him to develop contact dermatitis. The substantial evidence supported the Court's conclusion that the claimant's contact dermatitis was not accidental within the meaning of Section 42-1-160).

16. The Claimant has not carried the burden of proof, required under the South Carolina Workers' Compensation Act, to establish that his alleged left upper extremity injury arose out of and in the course and scope of his employment with the Defendants. See Clade v. Champion Laboratories, 330 S.C. 8, 496 S.E.2d 856 (1998) (the workers' compensation claimant has the burden of proving facts that show that the injury arose out of the employment, and an award of benefits must not be based on surmise, conjecture or speculation); Mims v. Nehi Bottling Co., 218 S.C. 513, 63 S.E.2d 305 (1951) (the burden is upon the claimant to prove the facts which render the injury compensable);
17. The Claimant is not entitled to any benefits or compensation under the South Carolina Workers' Compensation Act. See Cooper v. McDevitt & Street Co., 260 S.C. 463, 196 S.E.2d 833 (SC 1973), A false statement in an employment application will bar workmen's compensation benefits when: 1) the employee knowingly and willfully makes a false representation as to his physical condition; 2) the employer relies upon the false representation and this the reliance is a substantial factor in the hiring; and 3) there is a causal connection between the false representation and the injury.
18. Section 42-1-140 governs average weekly wage.
19. The Claimant's average weekly wage is One Thousand Sixty Eight and 84/100 Dollars (\$1068.84.) with a corresponding compensation rate of Six Hundred Sixty One and 29/100 Dollars (\$661.29).

ORDER

IT IS HEREBY ORDERED, that the substantial evidence supports a finding that the Decision and Order of the Single Commissioner is **AFFIRMED** in its entirety.

IT IS FURTHER ORDERED, that the substantial evidence supports a finding that this that the greater weight of the evidence supports a finding that this claim is denied because the Claimant failed to satisfy his burden of proof that he suffered a compensable injury by accident to the left upper extremity arising out of and in the course of his employment with the Defendants on November 1, 2008.

IT IS FURTHER ORDERED, that the greater weight of the evidence supports a finding that the Defendants are not responsible for providing the Claimant with any benefits or compensation under the South Carolina Workers' Compensation Act.

IT IS HEREBY ORDERED.

AFFIRMED.

S.C. WORKERS' COMPENSATION COMMISSION

CERTIFICATE OF SERVICE

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

This 26 day of July, 2011
By Valerie D. Peter

Administrative Assistant to the Commissioner

Avery B. Wilkerson, Commissioner

Andrea P. Roche, Commissioner

Paula Anick
Kevin Smith
David Pearlman
Jason W. Lockhart

David W. Huffstetter, Commissioner

received
10/15/10
31

SOUTH CAROLINA WORKERS' COMPENSATION COMMISSION

W.C.C. FILE NO: 0818219

JOE A. OSMANSKI,

Employee,

Claimant,

vs.

WATKINS & SHEPARD TRUCKING, INC,

Employer,

AND

ZURICH NORTH AMERICA,

Carrier,

Defendants.

DECISION AND ORDER

DATE OF HEARING:

Hearing held in Columbia, South Carolina on April 29 2010.

APPEARANCES:

Claimant represented by David T. Pearlman, Esquire of The Steinberg Law Firm, L.L.P. of Charleston, South Carolina.

Defendants represented by Jason W. Lockhart, Esquire of McAngus Goudelock & Courie, L.L.C. of Columbia, South Carolina.

PURPOSE OF THE HEARING: To determine all issues as set forth in Forms 50 and 51.

COMMISSIONER: Commissioner Susan S. Barden

FILED: November 10, 2010

APA SUBMISSIONS

Pursuant to the South Carolina Administrative Procedures Act and Regulations of the South Carolina Workers' Compensation Commission, the following records were submitted into evidence.

The Claimant submitted the following exhibits:

1. Al Osbahr, M.D., Statement, dated 11/05/09, consisting of 1 page. (Claimant's APA #1).
2. Larry K. Chidgey, M.D., Questionnaire, dated 04/03/09, consisting of 2 pages. (Claimant's APA #2).
3. Larry K. Chidgey, M.D., Medical Records, dated 01/12/09 – 05/14/09, consisting of 9 pages. (Claimant's APA #3).
4. Al Osbahr, M.D., Medical Examination Medical Examiner's Certificate, dated 10/30/06, consisting of 3 pages. (Claimant's APA #4).
5. Watkins Shepard Trucking, Employee History, dated 01/31/07 – 11/01/08, consisting of 1 page. (Claimant's APA #5).
6. Watkins Shepard Trucking, Correspondence, dated 01/30/07 – 11/24/08, consisting of 4 pages. (Claimant's APA #6).
7. Gerald J. Shealy, M.D., Medical Records, dated 05/21/09 – 08/25/09, consisting to 7 pages. (Claimant's APA #7).
8. Gerald J. Shealy, M.D., Operative Notes, dated 07/08/09, consisting to 2 pages. (Claimant's APA #8).
9. Various Providers, Diagnostics, dated 11/02/08 – 01/12/09, consisting of 10 pages. (Claimant's APA #9).

10. John Fisher, M.D., Medical Notes, dated 10/22/08 – 11/13/08, consisting of 1 page. (Claimant's APA #10).
11. John Fisher, M.D., Medical Examiner's Certificate, dated 10/22/08, consisting of 1 page. (Claimant's APA #11).
12. James F. Bethea, Medical Records, dated 12/23/08, consisting of 2 pages. (Claimant's APA #12).
13. Lexington Orthopaedics, Medical Records, dated 11/2/08 – 11/06/08, consisting of 3 pages. (Claimant's APA #13).
14. Larry K. Chidgey, M.D., Medical Records, dated 08/5/88 – 11/01/01, consisting of 7 pages. (Claimant's APA #14).

The Defendants submitted the following exhibits:

1. James C. McIntosh, M.D., dated 11/06/08 – 11/20/08, consisting of 2 pages. (Defendants' APA #15).
2. Lexington Medical Center – Lexington, dated 11/02/08 – 11/04/08, consisting of 3 pages. (Defendants' APA #16).
3. John H. Fisher, Jr., M.D., Lexington Family Practice, dated 10/22/08 – 11/13/08, consisting of 6 pages. (Defendants' APA #17).
4. Gerald J. Shealy, M.D., Charleston Hand Group, LLC, dated 11/10/09 – 02/22/10, consisting of 4 pages. (Defendants' APA #18).
5. Larry K. Chidgey, M.D., dated 02/19/92 – 03/22/02, consisting of 20 pages. (Defendants' APA #19).
6. Shands Hospital at the University of Florida, dated 08/23/88 – 11/02/01, consisting of 19 pages. (Defendants' APA #20).

10. John Fisher, M.D., Medical Notes, dated 10/22/08 – 11/13/08, consisting of 1 page. (Claimant's APA #10).
11. John Fisher, M.D., Medical Examiner's Certificate, dated 10/22/08, consisting of 1 page. (Claimant's APA #11).
12. James F. Bethea, Medical Records, dated 12/23/08, consisting of 2 pages. (Claimant's APA #12).
13. Lexington Orthopaedics, Medical Records, dated 11/2/08 – 11/06/08, consisting of 3 pages. (Claimant's APA #13).
14. Larry K. Chidgey, M.D., Medical Records, dated 08/5/88 – 11/01/01, consisting of 7 pages. (Claimant's APA #14).

The Defendants submitted the following exhibits:

1. James C. McIntosh, M.D., dated 11/06/08 – 11/20/08, consisting of 2 pages. (Defendants' APA #15).
2. Lexington Medical Center – Lexington, dated 11/02/08 – 11/04/08, consisting of 3 pages. (Defendants' APA #16).
3. John H. Fisher, Jr., M.D., Lexington Family Practice, dated 10/22/08 – 11/13/08, consisting of 6 pages. (Defendants' APA #17).
4. Gerald J. Shealy, M.D., Charleston Hand Group, LLC, dated 11/10/09 – 02/22/10, consisting of 4 pages. (Defendants' APA #18).
5. Larry K. Chidgey, M.D., dated 02/19/92 – 03/22/02, consisting of 20 pages. (Defendants' APA #19).
6. Shands Hospital at the University of Florida, dated 08/23/88 – 11/02/01, consisting of 19 pages. (Defendants' APA #20).

STATEMENT OF THE CASE

The hearing was scheduled pursuant to the Form 50 filed by the Claimant on January 20, 2010. The Claimant maintained that he sustained a compensable injury to the left upper extremity while in the course and scope of his employment with the Defendants on November 1, 2008. The Claimant maintained that he was entitled to authorized medical treatment with Dr. Shealy and temporary total disability benefits from November 1, 2008 to the present and continuing.

In response, the Defendants maintained that the Claimant would be unable to satisfy his burden of proving a compensable injury to the left upper extremity while in the course and scope of his employment with the employer. In addition, the Defendants took the position that the Claimant was not entitled to benefits on the basis that the Claimant engaged in fraud in the application, when he obtained employment with the employer in November 2006, where the Claimant misrepresented his physical condition to the employer in November 2006.

EVIDENCE OF THE CASE

The Claimant was the only witness to testify on his behalf. The Claimant testified that he is currently 45 years of age, and resides in Pelion, South Carolina with his wife and nine children. (Hr'g Tr. p. 24, Deposition of Claimant pp. 5-6). The Claimant stated that he last completed the 11th grade, but has not obtained his GED or high school equivalent. (Hr'g Tr. pp. 24-25). The Claimant indicated that he sustained injuries to the left elbow, right elbow, left shoulder, right shoulder, left wrist, and right wrist as a result of a work-related injury that occurred in December 1987. (Hr'g Tr. pp. 25-26; Deposition of Claimant pp. 9-10). The Claimant testified that he sought and received medical treatment with Dr. Chidgey as a result of the injuries sustained in his 1987 work-related accident. (Hr'g Tr. pp. 25-28; Deposition of

Claimant pp. 12-14). Dr. Chidgey determined that the Claimant reached maximum medical improvement on March 20, 2002 and assigned a 20% impairment rating to the left upper extremity. (Defendants' APA #19, p. 88 (c)). The Claimant stated that he received weekly workers' compensation benefits, as a result of his 1987 work-related accident, for approximately 7 years, and eventually received a settlement in the amount of approximately \$86,000.00. (Deposition of Claimant, p. 15).

The Claimant testified that he contacted Watkins & Shepard Trucking, Inc. (the "Employer") in 2006 regarding possible employment as a truck driver. (Deposition of Claimant, p. 21). The Claimant stated that he was extended an offer of employment by Rodney Stephens, who instructed the Claimant to travel to Hickory, North Carolina for purposes of completing activities prior to the Claimant's beginning employment with Watkins & Shepard Trucking, Inc. as a truck driver. (Deposition of Claimant, pp. 21-22). The Claimant indicated that, while in Hickory, North Carolina, he underwent a D.O.T. physical, which was conducted by Dr. Osbahr. (Hr'g Tr. p. 35, Deposition of Claimant, p. 22). Most notably, the Claimant testified that he informed Dr. Osbahr of his previous work-related left upper extremity injury, and informed Dr. Osbahr that he had undergone multiple surgeries on the left upper extremity, including a left elbow replacement. (Hr'g Tr. pp. 36-39). The Claimant stated that he also underwent a lift test, pursuant to the request of the Employer, and successfully completed the lift test. (Hr'g Tr. p. 39, ll. 3-22). The Claimant testified that he did not re all anyone at Watkins & Shepard Trucking, Inc. asking him about prior injuries. (Hr'g Tr. pp. 40-41; Deposition of Claimant, p. 22, ll. 19-25, p. 23, ll. 23-25, p. 24, ll. 1-17). The Claimant testified that he was of the opinion that he was able to perform his job duties as a truck driver with Watkins & Shepard Trucking, Inc. (Hr'g Tr. pp. 39-40).

The Claimant testified that he began working with Watkins & Shepard Trucking, Inc. in October 2006 as a truck driver, and that his job duties and responsibilities required the Claimant to engage in physical activities such as lifting, pulling and pushing. (Hr'g Tr. p. 40, ll. 8-21, p. 42, ll. 15-19). Most notably, the Claimant stated that he did not experience any problems with his left upper extremity, while working with Watkins Shepard Trucking, Inc., prior to his November 2008 work-related accident. The Claimant indicated that he injured his left upper extremity while in the course and scope of his employment with the Employer on November 1, 2008. (Hr'g Tr. pp. 43-44). More specifically, the Claimant testified that he hyperextended his left elbow while attempting to break down freight weighing 100-150 lbs while in the course and scope of his employment with the Employer. (Hr'g Tr. pp. 43-44; Deposition of Claimant, pp. 30-31).

The Claimant testified that he has sought and received medical treatment from multiple physicians, for the injuries he sustained in his alleged November 2008 work-related accident, including Dr. Bethea, Dr. Chidgey, Dr. McIntosh, and Dr. Shealy. (Hr'g Tr. p. 44). The Claimant stated that he has sought and received medical treatment from Dr. Shealy, who is an orthopaedic physician in Charleston, South Carolina, in the form of 3 surgeries, including the replacement and repair of the Claimant's left elbow prosthesis. (Hr'g Tr. pp. 44-45; Claimant's APA ## 7-8). The Claimant indicated that he has not been released from the care of Dr. Shealy, and is currently being placed out of work by Dr. Shealy due to his work-related left upper extremity injury. (Hr'g Tr. pp. 45-46).

On cross-examination, the Claimant testified that he was released from the care of Dr. Chidgey in March 2002. (Hr'g Tr. pp. 55-57; Deposition of Claimant, p. 14, ll. 10-24). Most notably, the Claimant stated that, when he was released from the care of Dr. Chidgey in March

2002, he was aware that he had been provided with a permanent restriction by Dr. Chidgey of no lifting in excess of 10-15 pounds with the left upper extremity. (Hr'g Tr. pp. 55-57; Defendants' APA #19, pp. 88(a)-(c)). The Claimant indicated that his job duties and responsibilities with Watkins & Shepard Trucking, Inc. were outside of the permanent work restrictions, which he had been provided by Dr. Chidgey. (Hr'g Tr. pp. 55-57, pp. 64-65). The Claimant testified that he was of the opinion that he was physically capable of performing his job duties and responsibilities with Watkins & Shepard Trucking, Inc., despite the permanent work restriction that had been placed upon the Claimant by Dr. Chidgey, and that he would have informed the Employer of the above-referenced permanent work restriction had the Employer questioned the Claimant as to whether he possessed any permanent work restrictions. (Hr'g Tr. pp. 57-59). Most interestingly, the Claimant stated that, while he was not questioned by Watkins & Shepard Trucking, Inc. regarding any permanent work restrictions prior to his beginning employment with the Employer, he did not voluntarily inform Watkins & Shepard Trucking, Inc. that he possessed a permanent lifting restriction, with regards to the left upper extremity, prior to this beginning employment with Watkins & Shepard Trucking, Inc. in November 2006. (Id.).

The Claimant testified that he possessed limited range of motion of the left elbow and some occasional numbness of the left upper extremity prior to his November 2008 work-related accident. (Hr'g Tr. p. 61). Despite the deposition testimony of Dr. Osbahr, the Claimant stated that he informed Dr. Osbahr of his 1987 work-related accident as well as the multiple surgeries, which the Claimant underwent as a result of his 1987 work-related accident. (Hr'g Tr. pp. 46-49, 62-63). The Claimant indicated that he did not misrepresent any impairment, which he possessed with regard to the left upper extremity, when completing forms associated with his D.O.T. physical as he was under the impression that he did not possess any impairment to the left upper

extremity as a result of his 1987 work-related accident. (Hr'g Tr. pp. 60-62; Deposition of Claimant, p. 47). The Claimant indicated that he was of the opinion that his prior work-related left upper extremity injury did not prevent the Claimant from performing his job duties and responsibilities with Watkins & Shepard Trucking, Inc. as a truck driver. (Hr'g Tr. p. 59).

The deposition of Larry Chidgey, M.D., was taken on March 15, 2010. Dr. Chidgey is an expert in the orthopedic medicine. Dr. Chidgey testified that he began treating the Claimant in 2000 for treatment of a severe left elbow injury. (Deposition of Dr. Chidgey, pp. 4-5). Dr. Chidgey testified that he provided the Claimant with treatment in the form of two surgeries, including placement of an artificial elbow joint in September of 2000 and a procedure on the ulnar nerve of the Claimant's left elbow. (Deposition of Dr. Chidgey, p. 5). Dr. Chidgey testified that on February 11, 2002 he recommended a 10lb lifting restriction indefinitely for the Claimant's left upper extremity due to the Claimant's total elbow arthroplasty. (Deposition of Dr. Chidgey, p. 8). Thereafter, on March 22, 2002, Dr. Chidgey recommended a lifting restriction of 10-15 lbs after the Claimant underwent a functional capacity evaluation. (Deposition of Dr. Chidgey, p. 9). Dr. Chidgey testified that the Claimant was informed of these restrictions and understood the restrictions that had been recommended by Dr. Chidgey. (Deposition of Dr. Chidgey, p. 7, 10, 21). Dr. Chidgey testified that he released the Claimant on March 22, 2002 and assigned a 14% impairment rating to the upper extremity. (Deposition of Dr. Chidgey, p. 10; Defendants' APA #19, p. 88 (c)). Although Dr. Chidgey testified that the Claimant's work restrictions were permanent unless things changed, Dr. Chidgey also testified that there was no medical evidence to suggest that the Claimant's condition had changed between March 2002 and the date of the Claimant's alleged November 2008 work-related accident. (Deposition of Dr. Chidgey, p. 12).

Dr. Chidgey testified that he examined the Claimant on January 12, 2009 following the Claimant's alleged 2008 work-related accident. Dr. Chidgey testified that there were some concerns that the Claimant's implant had possibly loosened as well as a biceps tendon rupture. (Deposition of Dr. Chidgey, pp. 17-18). The Claimant was most recently examined by Dr. Chidgey on April 1, 2009. (Deposition of Dr. Chidgey, p. 18).

The deposition of Albert James Osbahr, M.D. was taken on March 15, 2010. Dr. Osbahr is an expert in occupational medicine. Dr. Osbahr testified that he provided the Claimant with a D.O.T. examination as a new hire for Watkins Shepard Trucking, Inc. on October 30, 2006. (Deposition of Dr. Osbahr, p. 6). Dr. Osbahr testified that he had no recollection of the Claimant informing him of the Claimant's 1987 work-related accident. (Deposition of Dr. Osbahr, p. 7). Dr. Osbahr also testified that the Claimant failed to inform him that the Claimant had undergone left elbow replacement surgery in 2000. (Deposition of Dr. Osbahr, p. 7). Although Dr. Osbahr identified some impairment with regards to the Claimant's left arm during the examination, Dr. Osbahr testified that the Claimant failed to inform that Dr. Chidgey had assigned a 14% impairment rating to the Claimant's left arm. (Deposition of Dr. Osbahr, pp. 8-10). Dr. Osbahr further testified that the purpose of his examination of the Claimant was to determine if the Claimant's physical condition met the general standards as set forth by D.O.T. and not necessarily the specific requirements of the job for Watkins & Shepard Trucking, Inc. In fact, Dr. Osbahr confirmed that at the time of the examination he had no information with regards to the particular job that the Claimant was to perform for Watkins & Shepard Trucking, Inc. (Deposition of Dr. Osbahr, pp. 11-14).

The deposition of Matthew Grandy was taken on March 17, 2010. Mr. Grandy testified that he is the Director of Driver Recruiting and Training for Watkins & Shepard Trucking, Inc.,

and has worked for the Employer from 1989 to 1999 and then again starting in January 2008. Mr. Grandy testified that all hiring for Watkins & Shepard Trucking, Inc. is conducted from corporate headquarters in Missoula, Montana. Mr. Grandy testified that the company engages in a post job offer phase in order to identify an individual's ability to perform the job. (Deposition of Grandy, pp. 9-10). Mr. Grandy testified that a conditional offer of employment is contingent upon a drug test, a lift test, a D.O.T. physical, as well as the post-job offer questionnaire administered by the safety department. (Deposition of Grandy, pp. 10, 18). Mr. Grandy further testified that, had the Claimant provided Watkins Shepard Trucking, Inc. with accurate information regarding the permanent work restrictions, which were placed upon the Claimant by Dr. Chidgey, the Claimant would not have been subjected to a lift test. (Deposition of Grandy, p. 25). Rather, the Employer would have conducted further research, including obtaining a copy of the Claimant's work release for the treating physician. (Deposition of Grandy, pp. 25-26). Mr. Grandy further testified that the Employer would want any medical records regarding restrictions in order to conduct a through investigation in order to determine if an applicant is physically capable of performing a job. (Deposition of Grandy, pp. 25-27).

The deposition of Rodney Stephens was taken on March 10, 2009. Mr. Stephens testified that he is a terminal manager for Watkins & Shepard Trucking, Inc. Mr. Stephens testified that the Claimant worked for the Employer as a delivery driver for nearly 2 years and was required to lift over 100lbs daily while delivering furniture. (Deposition of Stephens, pp. 7-8, p. 18). Mr. Stephens testified that he was the Claimant's direct supervisor while the Claimant was employed with Watkins & Shepard Trucking, Inc. (Deposition of Stephens, pp. 18-19). Mr. Stephens testified that the Claimant did not inform him of his 1987 work-related accident or that he had

been provided permanent lifting restrictions by Dr. Chidgey. (Deposition of Stephens, pp. 19-20).

FINDINGS OF FACT

Based upon the testimony and exhibits submitted, the undersigned Commissioner makes the following findings of fact:

1. The parties hereto are subject to and bound by the South Carolina Workers' Compensation Act.
2. The Claimant's average weekly wage is One Thousand Sixty Eight and 84/100 Dollars (\$1068.84.) with a corresponding compensation rate of Six Hundred Sixty One and 29/100 Dollars (\$661.29).
3. The Claimant alleges that he injured his left upper extremity (elbow and biceps) in a work-related accident on November 1, 2008, a claim I find is not supported by the greater weight of the evidence.
4. The Claimant is 45 years of age and resides in and resides in Pelion, South Carolina with his wife and children. (Deposition of Claimant, pp. 5-9).
5. The Claimant has 9 children between the ages of 3 and 24, eight of whom reside with Claimant and seven of whom are under the age of 18. (Deposition of Claimant, p. 7).
6. The Claimant's wife is unemployed. (Deposition of Claimant, p. 21, ll. 1-2).
7. The Claimant last completed the 11th grade, and has not obtained his GED or high school equivalent. (Hr'g Tr. p. 25, ll. 1-4).
8. Prior to the alleged accident in issue, the Claimant underwent left total elbow replacement surgery (after other multiple elbow surgeries) for a 1987 workers' compensation injury for which the Claimant received a settlement of approximately

\$86,000. After the prior total elbow replacement surgery, the Claimant was assigned permanent lifting restrictions of 10 to 15 lbs. for his left arm. The Claimant admitted at the hearing that he knew he was subject to the 10-15 lb. lifting restriction when he began work for Employer in 2006, that the treating physician who assigned the restriction did not subsequently lift it, and that he (Claimant) was subject to the restriction on the date of the alleged accident in issue. ((Hr'g Tr. pp. 55-57, pp. 64-65); Defendants' APA #19 and #20; Deposition of Claimant, pp. 9, 11, 15, and 44-45; Deposition of Dr. Chidgey, p. 22; Claimant's APA #14, pp. 50-53).

9. The Claimant underwent the elbow replacement surgery in September 2000, and then ulnar nerve neurolysis surgery in November 2001. After the elbow replacement surgery, the Claimant's treating physician records state that the physician "again stressed the importance of limited use of the Claimant's left arm to increase the longevity of this prosthesis," the that Claimant "will always have a 15 lb. weight limit restriction [later changed to 10-15] for the left upper extremity," and that the Claimant "should also avoid situations where he might fall or excessively stress his left arm. We stressed this multiple times today, and the patient stated he understands."

The Claimant was released from care in March 2002 (after an FCE), and assigned a 20% impairment rating. (Defendants' APA #19, pp. 83, 86, and 88a-c; Claimant's APA #14, p. 50-53; Deposition of Dr. Chidgey, pp. 6-12 and 22).

10. Notwithstanding his hearing testimony, the Claimant gave inconsistent sworn deposition testimony that he did "not recall" whether or not he had any restrictions

after the 1987 workers' compensation injury and related elbow surgeries. (Deposition of Claimant, p. 17).

11. In addition to the previous left elbow surgeries, the Claimant also underwent 3 previous surgeries to his left shoulder and 1 to the right elbow. The condition of the Claimant's left shoulder was referred to as "complex" in 1998 and 1999. (Defendants' APA #19, pp. 70-72, dated 1998 and June 1999, referring to "two previous" left shoulder surgeries; Defendants' APA #2Q, pp. 94-95, containing the operative notes of the third left shoulder surgery; Claimant's APA #12, p. 42; testimony of Claimant; Claimant's APA #14, p. 47, containing a reference to the right elbow surgery).
12. Medical records from 1998 state that the Claimant has been disabled since 1987 because of his left arm. Medical evidence from 2000 states that the Claimant's pain is "disabling and barely tolerable," and that he is unable to use the arm for any significant activity. (Defendants' APA #19; pp. 72, 73, and 79; Deposition of Claimant, page 15, in which the Claimant testified that he received workers' compensation benefits for 7 years prior to receiving a settlement for the 1987 injury).
13. Although the Claimant testified at the hearing that he injured his left shoulder playing sports, he inconsistently testified in his deposition that he injured his left shoulder in the 1987 injury. Although the Claimant would admit to 1 left shoulder surgery, there actually were actually three prior surgeries. (Hr'g Tr. pp. 25-26, pp. 49-55; Deposition of Claimant, pp. 9-10, in which Claimant testified that he injured "both shoulders" in the work injury of 1987).
14. After releasing the Claimant in 2002--with a "permanent" lifting restriction of 10-15 lbs.—Dr. Chidgey did not see the Claimant again until 2009 (2 months after the

alleged accident in issue). There is no notation in Dr. Chidgey's 2002 record that the restriction imposed was only in place "unless things changed." The word "permanent," repeatedly used by Dr. Chidgey in his treatment notes prior to and after the date of the Claimant's 2002 FCE, speaks for itself and (with no qualifying language at the time the notes were written) is unequivocal. (Defendants' APA #19, pp. 88 (a) – (c)). I also note that in 2002, Dr. Chidgey warned the Claimant of the danger of excessively stressing the implant (to prolong its longevity) because of the Claimant's young age. (Defendants' APA #19). Dr. Chidgey admits that the Claimant understood that he was to avoid heavier lifting. (Deposition of Dr. Chidgey, pp. 7, 22). Therefore, I find Dr. Chidgey's 2010 attempt to retreat from the permanent restrictions he imposed in 2002 appears more than a little result-oriented. However, at the end of his deposition, Dr. Chidgey does reiterate the left arm lifting restriction as he imposed it in 2002. (Deposition of Dr. Chidgey, particularly pp. 8-14, 20-22, 26, and 28).

15. In 2006, the Claimant applied with Employer for work involving truck driving and delivering furniture. **The Claimant admitted at the hearing that prior to accepting employment he knew the job required him to lift 100-150 lbs.** (Hr'g Tr. pp. 64-65; Defendants' APA #17, p. 59; Defendants' APA #26, p. 114, and particularly pp. 117 and 121-123; Deposition of Stephens, page 7; Deposition of Grandy, pp. 23 and 26-28).
16. The Claimant's alleged accident was unwitnessed. (Hr'g Tr. pp. 43-44; Deposition of Claimant, pp. 30-31).

17. According to the Claimant, the recliner that hit the Claimant's left arm (after he pulled on it to get it down) weighed 100-150 lbs. The Claimant's job required him to use both arms. (Deposition of Claimant, pp. 30-32).
18. I find it odd and unusual that at a visit to his family doctor, Dr. Fisher, in November 13, 2008 (12 days after the date of the alleged accident), the Claimant would not (and did not) mention a work accident or work injury to his elbow. The record shows that the Claimant was in fact examined (contrary to his hearing testimony), as his abdomen is noted as "soft" with "no obvious swelling or masses." (Claimant's APA #10, page 40; Hr'g Tr. p. 66).
19. After the date of the alleged accident in issue, the Claimant's implant was noted to be loosened. The Claimant had to undergo another total elbow arthroplasty in 2009. (Deposition of Dr. Chidgey, pp. 16-18 and 31; Claimants APA #8, pp. 28-29).
20. I find that Capers defeats this claim. It is irrelevant that the Claimant: (a) may have "felt" or thought he could perform the work (notwithstanding the ongoing restrictions); (b) may have been taught "good lifting techniques" in physical therapy; (c) was able to pass Employer's lift test; or (d) was able to work without incident for Employer for 2 years before the injury in issue occurred. If the legislature intended for a Capers defense to "expire" after a certain length of time a claimant is able to work outside his restrictions without injury, it could have enacted such a measure. I decline to create an "expiration" exception to Capers.
21. The reality in this case is that the Claimant's "luck" (i.e., his ability to work outside his restrictions) eventually ran out.

22. Dr. Chidgey's most telling comments--and which certainly apply to this textbook Capers case--is Dr. Chidgey's testimony that "if you want to try and gain life out of the arthroplasty, you keep your weight [lifting] to a lower level. *If you increase that, you may get away with it.* " I find that it would be patently unfair to require Defendants to bear the burden for a risk that the Claimant knowingly and willfully chose to take, notwithstanding the Claimant's need to support his unemployed wife and large family, and to pay his mortgage. (Deposition of Dr. Chidgey, pp. 23 and 27-28; Claimant's Deposition, p. 6).
23. Even Dr. Chidgey testified that as to whether the Claimant had any problems with his left elbow between 2002 and 2009, "I can only guess" (Deposition of Dr. Chidgey, page 33).
24. As to the Claimant's claim of a biceps tendon rupture, Dr. Chidgey testified that he is not certain whether the Claimant's biceps tendon is ruptured. (Deposition of Dr. Chidgey, pages 32-34).
25. As to Defendants' McDevitt defense, I find it applies. The Claimant contends that the case is inapplicable because the Claimant's post-hire physical examination revealed some impairment (but that Employer hired the Claimant anyway, ratifying any non-disclosure on the Claimant's part), and that the Claimant "misunderstood the form" and did not intend to mislead the Employer when he denied having any pre-existing impairment or injury. The Claimant's hearing testimony—that he knew he had a prior impairment/injury but that he misinterpreted the CDL forms—seemed to the undersigned to be "canned" and rehearsed. Further, the Employer never had the opportunity to explore the full extent of the Claimant's condition because it was

concealed. Although Dr. Osbahr on his own discovered some impairment during the examination, he never knew the full extent. The Claimant's hearing testimony—that he is "certain" he showed Dr. Osbahr his surgical scars—is refuted by the testimony of Dr. Osbahr (Hr'g Tr. pp. 36-38; Deposition of Dr. Osbahr, pp. 7-13 and 18, and particularly pp. 20-22; Defendants' APA #17, p. 62; Defendants' APA #22, p. 109; Claimant's APA #4, pp. 13-14; Claimant's APA #1, p. 1).

26. I do not believe the Claimant's testimony that he does not remember the telephone conversation with Employer's agent during which the agent completed the post job offer questionnaire. I fail to see why (and do not believe) that the Employer's own agent would falsify or otherwise fail to document the Claimant's impairment and his previous workers' compensation claim. I base this finding on the fact that the Claimant has also been ~~less than forthcoming~~ about other information to various providers and in sworn testimony, I find that the telephonically completed document is substantiated by Grandy's testimony that the post job offer questionnaire is generally conducted by telephone ("our standard practice") when an applicant does not live in Montana. The Employer relied on the telephone document. Nonetheless, I do note that the Claimant never subsequently signed this particular form after it was completed. (Deposition of Grandy, pp. 8-15, 17-18, 30, 34-36, and 46-47; Defendants' APA #21, p. 108, dated October 30, 2006; Deposition of Stephens, pp. 17-18).

27. Because of the Claimant's failure to disclose his prior injury/impairment, the Employer had no opportunity to obtain from the Claimant's treating doctor a certification that the Claimant would have no problems doing the job. Grandy also

states that the Claimant would not have undergone the lift test if Employer had known about the Claimant's prior injury/limitations for the reason that the Claimant could have injured himself during the lift test. (Deposition of Grandy, pages 12-13, 15-16, and 28-29).

28. However, even if McDevitt does not serve to defeat this claim, Capers clearly does.
29. Dr. Chidgey's checklist/questionnaire (particularly the "pursuant to my recommendations" portion in #2) is refuted by his own medical records. Therefore, this checklist/questionnaire is given de minimis weight. (Claimant's APA #2, pages 2-3; Defendants' APA #19, pages 69-88c).
30. The Claimant's request for benefits under the Act is denied.

CONCLUSIONS OF LAW

It is concluded under the South Carolina Workers' Compensation Act, § 42-1-10, S.C. Code of Laws, et. seq., that:

1. Section 42-1-160 governs injuries by accident arising out of and in the course of employment.
2. The Claimant alleges that he sustained a compensable left upper extremity (elbow and biceps) by accident arising out of and occurring in the course and scope of his employment with the Defendants on November 1, 2008.
3. The Claimant knew he was subject to a 10-15 lb. lifting restriction when he knowingly accepted employment requiring him to lift 100-150lbs. (See Capers finding that the claimant, who worked as a dishwasher, did not sustain an injury by accident arising out of and in the course of his employment, when the claimant

knew, based on prior experiences, that detergents and water would cause him to develop contact dermatitis. The substantial evidence supported the Court's conclusion that the claimant's contact dermatitis was not accidental within the meaning of Section 42-1-160.

4. The Claimant has not carried the burden of proof, required under the South Carolina Workers' Compensation Act, to establish that his alleged left upper extremity injury arose out of and in the course and scope of his employment with the Defendants. See Clade v. Champion Laboratories, 330 S.C. 8, 496 S.E.2d 856 (1998) (the workers' compensation claimant has the burden of proving facts that show that the injury arose out of the employment, and an award of benefits must not be based on surmise, conjecture or speculation); Mims v. Nehi Bottling Co., 218 S.C. 513, 63 S.E.2d 305 (1951) (the burden is upon the claimant to prove the facts which render the injury compensable);
5. The Claimant is not entitled to any benefits or compensation under the South Carolina Workers' Compensation Act. See Cooper v. McDevitt & Street Co., 260 S.C. 463, 196 S.E.2d 833 (1973), A false statement in an employment application will bar workmen's compensation benefits when: 1) the employee knowingly and willfully makes a false representation as to his physical condition; 2) the employer relies upon the false representation and this the reliance is a substantial factor in the hiring; and 3) there is a causal connection between the false representation and the injury.
6. Section 42-1-140 governs average weekly wage.
7. The Claimant's average weekly wage is One Thousand Sixty Eight and 84/100

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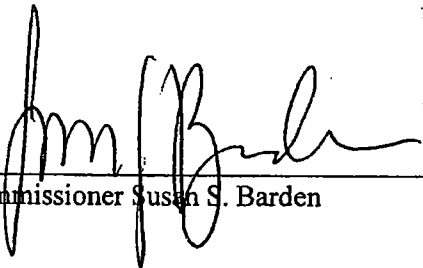
Dollars (\$1068.84.) with a corresponding compensation rate of Six Hundred Sixty One and 29/100 Dollars (\$661.29).

ORDER

IT IS HEREBY ORDERED, that the greater weight of the evidence supports a finding that this claim is denied because the Claimant failed to satisfy his burden of proof that he suffered a compensable injury by accident to the left upper extremity arising out of and in the course of his employment with the Defendants on November 1, 2008.

IT IS FURTHER ORDERED, that the greater weight of the evidence supports a finding that the Defendants are not responsible for providing the Claimant with any benefits or compensation under the South Carolina Workers' Compensation Act.

AND IT IS SO ORDERED.



Commissioner Susan S. Barden

CERTIFICATE OF SERVICE

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

DP
JL
This 10th day of NOVEMBER, 2010.

By KRISTI LOVE
Administrative Assistant to the Commissioner

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM THE SOUTH CAROLINA
WORKERS' COMPENSATION COMMISSION

Avery B. Wilkerson, Appellate Panel Chairman, Commissioner

WCC File No.: 0818219

JOE OSMANSKI, EMPLOYEE,

~~APPELLANT,~~

V.

WATKINS & SHEPARD TRUCKING, INC.,
EMPLOYER, AND ZURICH NORTH AMERICAN
INSURANCE COMPANY, CARRIER,

DEFENDANTS,

OF WHOM, ZURICH NORTH AMERICAN
INSURANCE COMPANY, CARRIER, IS THE

RESPONDENT.

PETITION FOR REHEARING

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SC Court of Appeals

The Appellant requests a rehearing. The basis for the Rehearing is that the Court failed to address the Appellant's request to rule the standard should be clear is convincing evidence and misapprehended the Appellant's remaining arguments and applicable law.

I. Clear and Convincing Evidence:

The Appellant contends this Court should rule the correct standard for proving fraud in the application should be by clear and convincing evidence. In every other area of the law, fraud is never presumed and must be proven by clear and convincing evidence. Byars v. Cherokee County, 237 SC 548. Due to the harsh consequences of a finding of fraud for either a plaintiff or a defendant, the burden of proof goes beyond a preponderance of the evidence. A fundamental principle for alleging fraud is that it must be proven by clear and convincing evidence. Byars v. Cherokee County, 237 SC 548.

While the Court points to the case of Brayboy v. Workforce, 383 S.C. 463, 681 S.E.2d 567 (2009) as support for the position that the standard is preponderance of the evidence, it is respectfully submitted that the standard of proof was not a point raised on appeal of that case. In other words, no one contested or asked the Court to rule upon that issue. Therefore, when the Brayboy Court listed the standard, it was only copying and pasting the general idea that the standard of proof in a Workers' Compensation case is the preponderance of the evidence. The Appellant is asking the Court to change the standard.

The Worker's Compensation Act is remedial legislation enacted to protect the worker. Therefore, the statute is given a broad construction in order to accomplish that end. Booth v. Midland Trane Heating & Air Conditioning, 298 S.C. 251, 254, 379 S.E.2d 730, 731 (Ct.App.1989). If the Court is going to deny someone benefits for an otherwise compensable case, shouldn't there be clear and convincing evidence that the injured

worker actually made the statements as opposed to simply tipping the scales ever so slightly?

II. Reliance

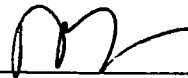
In its decision, the Court failed to address the Appellant's claim that the Respondent could not have relied on a statement their own doctor told them wasn't true. Our courts have long held that in cases alleging fraudulent statements, the aggrieved party cannot rely upon a misstatement of facts if the truth is easily within its reach. O'Shields v. Fountain Mobile Homes, Inc., 262 S.C. 276, 282, 204 S.E.2d 50, 52 (1974). The truth was not only clearly within the Respondents' reach, it was actually brought to them by the doctor they hired to evaluate the Appellant. Dr. Osbahar specifically told the Respondent the Appellant had one-half of the normal range of motion in his arm and that he had impairment to his arm. (R. pp. 331, 345). The Respondent could not have legally relied on the Appellant's statements because their own doctor told them his statements were not true. This point was not addressed by the Court in its decision.

III. Capers/Havird

Dr. Chidgey, the Appellant's treating doctor for his prior injury, testified that as the Claimant gained more strength in his right/dominant arm, he would not be limited to those restrictions as long as he shifted most of the weight to his stronger arm. He went further and stated, "I have a 10 to 15 pound weight restriction on the left arm. I have no weight restriction on the right arm." (R. pp. 304-305). Dr. Chidgey went on to state, but for the "unusual event of the heavy weight falling unexpectedly on his left arm, damaging the joint replacement itself, Mr. Osmanski would have undoubtedly been able to continue his work activities for the employer, as he did so for the two years prior to

this work-related injury on or about November 1, 2008.” (R. p. 332). Under our established case law, the word “accident” is defined under the Act as an “unlooked for and untoward event which is not expected or designed by the person who suffered the injury.” Radcliffe v. Southern Aviation School, 209 SC 411, Capers v. Flautt, 305 SC 254. Judging if the injury was unexpected is determined from considering the injured worker’s point of view. Pee v. AVM, 352 SC 167. The Appellant contends the Court is expanding the law beyond what is permitted for a *Capers* defense to prevail.

Respectfully Submitted,



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4 day of April, 2013

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM THE SOUTH CAROLINA
WORKERS' COMPENSATION COMMISSION
Avery B. Wilkerson, Appellate Panel Chairman, Commissioner

WCC File No.: 0818219

Joe Osmanski, Employee, ...Appellant,

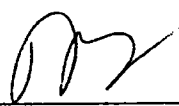
v.

WATKINS & SHEPARD TRUCKING, INC.,
EMPLOYER, AND ZURICH NORTH
AMERICAN INSURANCE COMPANY,
CARRIER, ...DEFENDANTS,

OF WHOM, ZURICH NORTH AMERICAN
INSURANCE COMPANY, CARRIER, IS THE RESPONDENT.

CERTIFICATE OF COUNSEL

Counsel hereby certifies that this Brief complies with the requirements of Rules 221, 240,
and 267 of the South Carolina Appellate Court Rules.


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April 4, 2013

RECEIVED

APR 08 2013

SC Court of Appeals

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM CHARLESTON COUNTY COURT OF
COMMON PLEAS FOR THE NINTH JUDICIAL CIRCUIT
Markley Dennis, Jr., Circuit Court Judge

Circuit Court Case No.: 07-CP-10-2354
Appellate Case No.: 2011196106

JOE OSMANSKI, EMPLOYEE,

APPELLANT,

V.

WATKINS & SHEPARD TRUCKING, INC., EMPLOYER, AND
ZURICH NORTH AMERICAN INSURANCE COMPANY,
CARRIER,

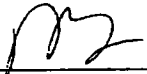
DEFENDANTS,

OF WHOM, ZURICH NORTH AMERICAN INSURANCE
COMPANY, CARRIER, IS THE

RESPONDENT.

PROOF OF SERVICE

I certify that I have served the Petition for Rehearing and Certificate of Counsel in the above matter by depositing a copy of these documents in the United States Mail, postage prepaid, on April 4, 2013, to the attorney of record, Jason Lockhart, Esquire, McAngus, Goudelock & Courie, LLC, P.O. Box 12519, Columbia, SC 29211-2519.


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SC Court of Appeals

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM THE SOUTH CAROLINA
WORKERS' COMPENSATION COMMISSION

Avery B. Wilkerson, Appellate Panel Chairman, Commissioner

WCC File No.: 0818219

JOE OSMANSKI, EMPLOYEE,

APPELLANT,

V.

WATKINS & SHEPARD TRUCKING, INC.,
EMPLOYER, AND ZURICH NORTH AMERICAN
INSURANCE COMPANY, CARRIER,

DEFENDANTS,

OF WHOM, ZURICH NORTH AMERICAN
INSURANCE COMPANY, CARRIER, IS THE

RESPONDENT.

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STATEMENT OF ISSUES ON APPEAL

- I. DID THE COMMISSION DECIDE THIS CLAIM USING
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STATEMENT OF THE CASE

The Appellant filed a WCC Form No. 50 on March 4, 2009, alleging he sustained a compensable injury during the course and scope of his employment on November 1, 2008. The Respondents filed a WCC Form No. 51 on January 28, 2010, denying the claim was compensable.

A hearing was held before Commissioner Susan S. Barden on April 29, 2010. Commissioner Barden denied the claim for several reasons. On November 29, 2010, the Appellant filed a WCC Form 30 appealing her decision to the Appellate Panel. A review hearing was held on April 18, 2011. By Order dated July 26, 2011, the Appellate Panel affirmed the decision of Commissioner Barden. This appeal follows.

FACTS

The Claimant is forty-five (45) years old and married to his wife of twenty-five (25) years. Together they have nine (9) children. He has worked in heavy manual labor his entire life and supported his family. In 1987, he injured his arms (elbow/left worse than right) while working construction. He had several surgeries that ended with a left elbow replacement. He has very large surgical scars on both of his arms which are clearly visible.

In physical therapy, he was taught proper lifting techniques in dealing with any functional deficits with his left arm. Dr. Larry Chidgey, the Appellant's treating physician, assigned lifting restrictions of ten (10) to fifteen (15) pounds. When deposed, Dr. Chidgey testified that as he gained more strength in his right/dominant arm, he would not be limited to those restrictions as long as he shifted most of the weight to his stronger right arm. Dr. Chidgey went further and stated, "I have a 10 to 15 pound weight restriction on the left arm. I have no weight restriction on the right arm." (R. pp. 304-305). The Appellant was last seen by Dr. Chidgey in 2002. He did not see any doctors for any problems with either of his arms until the accident in this claim in 2008.

In 2006, the Appellant applied for a position as a driver with the Respondent Employer, Watkins Trucking. He traveled to Hickory, North Carolina. He was there for two (2) full days. The Appellant filled out various forms, was physically examined by a company physician (Dr. Albert Osbahr), and given an extensive lifting test, much like a functional capacity evaluation or FCE. The Appellant passed the drug screen and lift test. Dr. Osbahr found that the Appellant had impairment and problems with the use of his left arm, but certified that he could still perform the job. He reported these findings directly

to the Employer. (R. pp. 317-318, Osbahr Depo pp. 16-22). The Appellant was hired and worked for over two (2) years without incident.

The Appellant's job involves mostly pushing and pulling. All of the freight he was hauling was loaded onto the truck before he arrived. The boxes were arranged in the order of his deliveries, so all he had to do was push them towards the back of the trailer. Workers from the delivery sites would be in charge of taking the boxes off the truck and into the store. (R. p. 130).

On November 1, 2008, the Appellant was in Aiken, SC and had just finished making a delivery. He noticed the boxes were stacked in such a way that they might fall over. When he attempted to reposition one of the boxes, it became dislodged and unexpectedly started to fall. He tried to catch it, but the weight came down on his left arm causing his injury. (R. pp. 133-134). The Respondents initially accepted the claim. They paid temporary compensation and provided medical treatment. It was only after surgery was recommended did they produce an unsigned statement they claim to have come from the Appellant. Using this highly questionable form, the Appellants denied the claim on the basis that the Appellant failed to disclose his prior injury.

The source of the alleged false statement comes from a document titled "Post Job Offer Questionnaire" dated October 30, 2006. It asks whether or not the employee who has been offered a job has been injured previously while on the job or otherwise that would prevent him from being able to perform the job. On the form submitted by the Respondents, the answer to this question is "No." Interestingly, this form was not filled out by the Appellant. It has a signature of his name, but it was not the Appellant that

signed it. The Respondent Employer claims that while all of the other paperwork was available at the Hickory, NC facility, they chose to do this one (1) form over the phone.

The Respondent Employer had the Appellant at their office in Hickory, NC for two (2) days. He filled out the application along with numerous other forms, took the drug test, took the lift test and submitted to their physical examination, but for some reason they claim this one document was completed over the telephone from Missoula where an interviewer asked the questions and noted the Appellant's responses. The Appellant testified he does not recall answering these questions for anyone over the phone. (R. pp. 130-131). Although the Employer's witness, Matthew Grandy, stated this was the normal procedure, the form itself indicates otherwise. When looking at the bottom of the form, it contains the statement, "Please fax this immediately to Debi Hould and Janice Peterson in the Missoula Safety Department." (R. p. 384). Instead, the Respondent Employer claims someone in Missoula called the Appellant and completed the form over the phone.

The Appellant challenged the relevance and weight afforded to this document because it was apparent that the Respondents did not plan on presenting the person who completed the form as a witness. The Respondents already knew the Appellant would testify that he did not recall answering these questions for anyone. (R. p. 208, lines 10-22).

ARGUMENT

I. THE COMMISSION DECIDED THIS CLAIM USING THE WRONG LEGAL STANDARD.

GENERAL DEFINITIONS

A. **Fraud in the Application:** "The general rule is that the following factors must be present before a false statement in an employment application will bar benefits:

1. The employee must have knowingly and willfully made a false representation as to his physical condition. 2. The employer must have relied upon the false representation and this reliance must have been a substantial factor in the hiring. 3. There must have been a causal connection between the false representation and the injury. Cooper v. McDevitt & Street, 260 SC 463.

B. **Any action or defense for Fraud requires:** 1. A representation. 2. Its falsity. 3. Its materiality. 4. The speaker's knowledge of its falsity. 5. His intent that it should be acted upon by the person. 6. The hearer's ignorance of its falsity. 7. His reliance on its truth. 8. His right to rely thereon. 9. His consequent and proximate injury. Outlaw v. Calhoun Life, 236 SC 272. The standards for providing fraud are the same whether raised as a cause of action or as a defense. Hansen v. DHL Laboratories, 3316 SC 505. Fraud is never presumed and must be proven by clear and convincing evidence. Byars v. Cherokee County, 237 SC 548.

Due to the harsh consequences of a finding of fraud or either a plaintiff or a defendant, the burden of proof goes beyond a preponderance of the evidence. A fundamental principle for alleging fraud is that it must be proven by clear and convincing evidence. Byars v. Cherokee County, 237 SC 548. The Order in this case contains an error of law in failing to satisfy, acknowledge or even mention the requirement for clear

and convincing evidence. This issue was raised to the Appellate Commission, but they refused to rule on or address this standard. (R. pp. 78-79). The Respondents argued before the Appellate Panel that the reason the Hearing Commissioner did not address the clear and convincing standard was because the Appellant never told her that was the correct legal standard. With all due respect, it is not an injured worker's job to tell a Hearing Commissioner which legal standard applies. The Respondents' argument is much like saying a workers' compensation decision based upon proof beyond a reasonable doubt is not appealable if the injured worker never told the Hearing Commissioner the standard should be preponderance of the evidence. Either way, the error was raised to the Appellate Panel, but it was completely ignored and never addressed in its Order. The Appellant contends the Commission committed an error of law in using the wrong legal standard.

II. THE RESPONDENTS CANNOT CLAIM RELIANCE ON A FACT THEY KNEW NOT TO BE TRUE.

In order to prevail on a *McDevitt Street* defense, the employer must have relied upon the false representation and this reliance must have been a substantial factor in the hiring. Cooper v. McDevitt & Street, 260 SC 463. Fundamental to any claim or defense involving an allegation of fraud is the hearer's ignorance of the statement's falsity. Outlaw v. Calhoun Life, 236 SC 272. In other words, you can't claim reliance on a fact you know not to be true. The Respondents claim the Appellant failed to disclose information regarding his physical condition. If the evidence in the records contained only the Appellant's responses to their questions, we certainly see the logic in their position. However, the Respondent Employer's own doctor reported to them that the Appellant had both impairment and a loss of function in his left arm. Matthew Grandy,

the Respondent Employer's witness, testified that Dr. Osbahr's findings of impairment and decreased supination would be serious enough that someone should have followed up with the doctor or the Appellant. (R. p. 276, Grandy Dep, p. 35, lines 14-23). He testified that nothing was preventing the Respondent Employer from following up on this information. (R. p. 276, Grandy Dep, p. 35, lines 8-13). Dr. Osbahr testified that the Respondent Employer never called him to follow up on his notation and finding that the Appellant had impairment and problems moving his left arm. He further testified, that had the Respondent Employer called him to ask about it, he would have spoken with them and done his best to answer their questions. (R. p. 317, Osbahr Dep, pp. 16-17).

The Respondents cannot claim ignorance and reliance on a fact that they knew to be false. The hearer's ignorance of the statement's falsity is an essential element of reliance. In fact, the Commission's Order states, "[The Respondent Employer] never had the opportunity to explore the full extent of the [Respondent's] condition because it was concealed." (R. p. 20). This is in direct contradiction to the Respondent Employer's own witness who admitted that upon reading Dr. Osbahr's findings, they should have followed up with either Dr. Osbahr or the Appellant. (R. p. 276, Grandy Dep, p. 35, lines 8-13). That is to say, they had enough information about the Appellant's physical condition to know they needed to know more. All they had to do was ask either Dr. Osbahr or the Appellant. Had they done what they admitted they should have done, they could have asked for specific restrictions, the nature of any surgeries, or anything else they needed to know. Instead, they chose not to follow up or ask anyone for any additional information. Therefore, the Respondents did not meet their burden of proving reliance because their own witness admitted they knew the Appellants' responses were incorrect.

III. THE APPELLANTS ACCIDENT WAS UNEXPECTED.

The claim was further denied on the basis that this occurrence was not an accident. Under our established case law, the word "accident" is defined under the Act as an "unlooked for and untoward event which is not expected or designed by the person who suffered the injury." Radcliffe v. Southern Aviation School, 209 SC 411, Capers v. Flautt, 305 SC 254. Judging if the injury was unexpected is determined from considering the injured worker's point of view. Pee v. AVM, 352 SC 167.

The Appellant's usual job was described as mostly pushing and pulling. He did not have to load any of the freight he was hauling. He only pushed the boxes to the end of the trailer so they could be off loaded by the customers' workers. Since the boxes were arranged in the order of his deliveries, all he had to do was push them towards the back of the trailer. (R. p. 130). The accident happened when a box he was shifting became dislodged and fell onto his weaker arm.

Dr Chidgey, the Appellant's treating doctor for his prior injury, testified that as the Claimant gained more strength in his right/dominant arm, he would not be limited to those restrictions as long as he shifted most of the weight to his stronger right arm. He went further and stated, "I have a 10 to 15 pound weight restriction on the left arm. I have no weight restriction on the right arm." (R. pp. 304-305).

The Commission failed to consider the fact that prior to accepting employment, he was certified by the Employer's doctor as able to perform the job. He had passed the Employer's extensive testing designed to mirror the actual requirements of the job and was again certified as being physically able to perform all of the essential functions of the job. His treating doctor testified that as long as he used his right/dominant arm for most

of the lifting and used his left arm as a guide, he would not have violated his restrictions. (R. p. 305).

The Appellant's treating physician opined that but for the "unusual event of the heavy weight falling unexpectedly on his left arm, damaging the joint replacement itself, Mr. Osmanski would have undoubtedly been able to continue his work activities for the employer, as he did so for the two years prior to this work-related injury on or about November 1, 2008." (R. p. 332). In light of the foregoing, the Appellant contends the Commission erred as a matter of law in misapplying the standard for an accident and failing to base the ruling on evidence from the Appellant's point of view.

IV. THE COMMISSION'S ANALYSIS VIOLATES THE SOUTH CAROLINA WORKERS' COMPENSATION ACT.

S.C. Code Ann Section 42-9-35(D), Evidence of Preexisting Injury or Condition, provides, "[t]he provisions of this section apply whether or not the employer knows of the preexisting permanent disability". The language of this provision is unambiguous and makes it clear that aggravation of pre-existing injuries are compensable under the Act "whether or not the employer knows of the preexisting permanent disability." "Where a statute is clear and unambiguous, [the Supreme Court] has held that it will be literally applied." Citizens for Lee County v. Lee County, 308 S.C. 23, 416 S.E.2d 641 (1992); see also Bagwell v. Ernest Burwell, Inc., 227 S.C. 168, 87 S.E.2d 583, 585 (1955). The Act makes clear that aggravated pre-existing injuries are within the class of injuries to be protected thereby.

The Commission relied on caselaw for the general premise that *McDevitt* applications/contracts are not enforceable, which is inapplicable here. Under the rules of statutory construction, a specific statute controls over a more general one. ION, LLC, v.

Town of Mt. Pleasant, 338 S.C. 406, 526 S.E.2d 716, 719 (2000); State Farm Fire and Casualty Co. v. Barrett, 340 S.C. 1, 530 S.E.2d 132, 1135 (Ct. App. 2000). Further, legislation enacted for a specific purpose, like the South Carolina Workers' Compensation Act, supplants the general law that would otherwise apply. Cf. Abba Equipment, Inc. v. Thomason, 335 S.C. 477, 517 S.E.2d 235, 241 (Ct. App. 1999).

Accordingly, the South Carolina legislature specifically provided employees with aggravation of preexisting conditions/disabilities are entitled to workers' compensation benefits regardless of "whether or not the employer knows of the preexisting permanent disability." S.C. Code Ann. Section 42-9-35. In construing this statute, the Court must presume that the Legislature did not intend to perform a futile thing and avoid a construction that would read a provision out of statute. Steinke v. South Carolina Dept. of Labor, Licensing, and Regulation, 336 S.C. 373, 520 S.E.2d 142, 153 (1999).

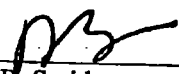
Additionally, our state's "policy is to resolve jurisdictional doubts in favor of the inclusion of employers and employees under the Workers' Compensation Act." Spivey v. D.G. construction Company, 321 S.C. 19, 467 S.E.2d 117, 119 (Ct. App. 1996). In order to give effect to this specific statute, this Court should enforce the specific language of S.C. Code Ann. Section 42-9-35 over general contract law/caselaw and find that an employee with an undisclosed preexisting injury/condition/impairment is covered under the South Carolina Workers' Compensation Act.

CONCLUSION

The Appellant requests an Order declaring the correct legal standard to be by clear and convincing evidence. The Appellant contend the claim need not be remanded to the Commission to decide the case under the correct legal standard because

as a matter of law, the Respondents failed to prove reliance, which is essential to that defense. Additionally, the Appellant requests a ruling that the Appellants' accident was just that, an accident under our legal definition thereof. Lastly, the Appellant requests a ruling declaring the fraud in the application defense illegal as it violates S.C. Code Ann. Section 42-9-35.

Respectfully Submitted



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73

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

**APPEAL FROM THE SOUTH CAROLINA
WORKERS' COMPENSATION COMMISSION**

Avery B. Wilkerson, Appellate Panel Chairman, Commissioner

WCC File No.: 0818219

JOE OSMANSKI, EMPLOYEE,

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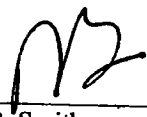
DEFENDANTS,

OF WHOM, ZURICH NORTH AMERICAN
INSURANCE COMPANY, CARRIER, IS THE

RESPONDENT.

CERTIFICATE OF COMPLIANCE

The undersigned certifies that the Final Brief of the Appellant complies with Rule 211(b) SCACR. The undersigned further certifies that the Final Brief of the Appellant complies with the South Carolina Supreme Court's August 13, 2007 Order regarding Interim Guidance Regarding Personal Data Identifiers and Other Sensitive Information in Appellate Court Findings.



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July 6, 2012

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM THE SOUTH CAROLINA
WORKERS' COMPENSATION COMMISSION

Avery B. Wilkerson, Appellate Panel Chairman, Commissioner

WCC File No.: 0818219

JOE OSMANSKI, EMPLOYEE,

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WATKINS & SHEPARD TRUCKING, INC.,
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INSURANCE COMPANY, CARRIER,

DEFENDANTS,

OF WHOM, ZURICH NORTH AMERICAN
INSURANCE COMPANY, CARRIER, IS THE

RESPONDENT.

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ARGUMENT

I. ONE CANNOT RELY UPON A MISSTATEMENT OF FACTS IF THE TRUTH IS EASILY WITHIN ITS REACH.

Our courts have long held that in cases alleging fraudulent statements, the aggrieved party cannot rely upon a misstatement of facts if the truth is easily within its reach. O'Shields v. Fountain Mobile Homes, Inc., 262 S.C. 276, 282, 204 S.E.2d 50, 52 (1974). In our Initial Brief, the Appellant raised this issue and demonstrated the truth was clearly within the Respondents' reach.

The thrust of the Appellant's argument concerning reliance is essentially this: The alleged misstatements come from a highly suspect form which the Appellant did not sign or complete. The Respondent claims they called him while he was already at their office and asked him these questions. Although the Appellant has always questioned the validity of this form, the Respondents chose not to present the person who supposedly asked the questions and completed the form. However, even if such a highly suspect form (produced only after surgery was recommended) can be taken to say the Appellant misrepresented his condition, the Respondents had enough information to know this was false.

The Appellant had long, raised, clearly visible scars on both elbows when he was examined by the Respondents' doctor, Albert Osbahr. Dr. Osbahr made notes on his forms that the Appellants had impairment and decreased supination in his left arm.¹ Matthew Grandy, the Respondents' witness, testified that he was aware supination refers

¹ Although the Respondents claim they are not sure if they received Dr. Osbahr's note, the testimony of Matthew Grandy reveals otherwise. Mr. Grandy was asked: "All right. And this form that Osbahr completes, this was contained in Mr. Osmanski's personnel file?" Mr. Grandy responded, "Yes." (r. P. 274, Grandy Dep, p. 29, lines 19-22). Moreover, Dr. Osbahr specifically stated, "This information was sent to Watkins Shepard Trucking, LLC." (R. p. 331).

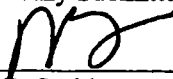
to the movement of the arm in one direction or another. (R. p. 275, Grandy Dep, p. 31, lines 15-23). He further testified that the findings of the company doctor of impairment and loss of motion in the Appellant's arm would be serious enough that someone should have followed up with the doctor. (R. p. 276, Grandy Dep, p. 35, lines 14-23). No one followed up with Dr. Osbahr. No one followed up with the Appellant. He worked for nearly two (2) years without issue.

The Respondents take issue with the qualifying statement in Mr. Grandy's deposition where he stated someone should have followed up on Dr. Osbahr's note. The question asked Mr. Grandy to assume 180 degrees is normal supination. Dr. Osbahr reported to them that the Appellant had "decreased supination, only 90 degrees" in his left arm. (R. p. 345). Under the case law contained above, the question remains, was the truth easily within the Respondents' reach? Mr. Grandy clearly admits that had he known what normal supination was, someone should have followed up with either the Appellant or the company doctor, or both. (R. pp. 275-276, Grandy Dep. p. 31, lines 15-23, p. 35, lines 14-23).

First of all, Mr. Grandy did not need to know what normal supination was in order to know the Appellant had problems using his left arm. The fact that Dr. Osbahr indicated his supination was *decreased* was enough to know it was less than normal. And, if Mr. Grandy exercised any diligence after being informed the Appellant had a less than normal range of motion, all he really had to do was do a Google search for "what is normal arm supination?" This would have revealed the Appellant had only half of the normal range of motion in his left arm. Dr. Osbahr testified he was willing to speak with the Respondent if they had any questions. (R. p. 317, Osbahr Dep, pp. 16-17). Mr.

Grandy could have asked Dr. Osbahr to explain normal supination. The question is, was the fact that the Appellant had problems moving his arm within the Respondents' reach? Was the fact the he had only half the normal range of motion also within their reach given that all they had to do was either ask their own company doctor or simply look it up?

Respectfully Submitted



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6 day of July, 2012

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM THE SOUTH CAROLINA
WORKERS' COMPENSATION COMMISSION

Avery B. Wilkerson, Appellate Panel Chairman, Commissioner

WCC File No.: 0818219

JOE OSMANSKI, EMPLOYEE,

APPELLANT,

V.

WATKINS & SHEPARD TRUCKING, INC.,
EMPLOYER, AND ZURICH NORTH AMERICAN
INSURANCE COMPANY, CARRIER,

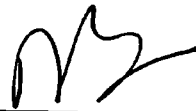
DEFENDANTS,

OF WHOM, ZURICH NORTH AMERICAN
INSURANCE COMPANY, CARRIER, IS THE

RESPONDENT.

CERTIFICATE OF COMPLIANCE

The undersigned certifies that the Appellant's Final Reply Brief complies with Rule 211(b) SCACR. The undersigned further certifies that the Appellant's Final Reply Brief complies with the South Carolina Supreme Court's August 13, 2007 Order regarding Interim Guidance Regarding Personal Data Identifiers and Other Sensitive Information in Appellate Court Findings.



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AVERY B. WILKERSON, APPELLATE PANEL CHAIRMAN, COMMISSIONER

WCC File No. 0818219

Joc A. Osmanski, Employee, ...Appellant,

v.

Watkins & Shepard Trucking, Inc., Employer,
and Zurich North American Insurance
Company, Carrier Respondents.

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STATEMENT OF ISSUES ON APPEAL

- I. WHETHER THE COMMISSION APPLIED THE CORRECT LEGAL STANDARD FOR FRAUD IN THE APPLICATION?
- II. WHETHER THE COMMISSION CORRECTLY DETERMINED THAT CLAIMANT'S CLAIM IS BARRED DUE TO FRAUD IN THE APPLICATION?
- III. WHETHER CLAIMANT IS BARRED FROM ARGUING ON APPEAL THAT S.C. CODE ANN § 42-9-35(D) SHOULD APPLY TO THIS CLAIM?
- IV. WHETHER THE COMMISSION CORRECTLY DETERMINED THAT CLAIMANT'S CLAIM WAS BARRED BECAUSE IT WAS NOT UNEXPECTED FROM CLAIMANT'S POINT OF VIEW?

STATEMENT OF THE CASE

Appellant Joseph A. Osmanski ("Claimant") alleges he incurred a work-related injury on November 1, 2008, when a box containing a recliner fell, causing his left arm to be pulled straight down and thereby injuring it. (R. p. 162, line 14 – p. 163, line 15).

Prior to the November 1, 2008 claim, Claimant suffered a 1987 work-related accident. Although he injured multiple body parts in the 1987 accident, his left arm was the most significantly injured. (R. p. 115, line 18 – p. 116, line 10). As a result of the 1987 accident, Claimant was treated by several physicians, including Dr. Larry Chidgey at the University of Florida, who was his primary treating physician. (R. p. 196, line 1 – p. 197, line 21) (R. p. 139, lines 18-21) (R. pp. 443-465) (R. pp. 466-484). Claimant underwent multiple surgeries, including a left total elbow replacement. (R. p. 116, lines 11-22) (R. p. 281, line 17 – p. 282, line 18).

Following his recovery from the above-referenced surgery, the Claimant was assigned an impairment rating of 14 percent for his left arm and 6 percent for his right shoulder for a combined rating of 20 percent. (R. p. 465). Claimant was given permanent lifting restrictions of 10 to 15 pounds for the left arm, (R. p. 283, line 16 – p. 284, line 20) (R. p. 285, line 2 – p. 287, line 6) (R. p. 288, line 24 – p. 289, line 23), which Claimant admitted he was aware of. (R. p. 145, line 14 – p. 146, line 16). Claimant was specifically and repeatedly warned by Dr. Chidgey that he was not to stress the left arm and should permanently restrict his activities. (R. pp. 457, 463-465). After Claimant's elbow surgery, Dr. Chidgey "again stressed the importance of limited use of [Claimant's] left arm to increase the longevity of this prosthesis," that Claimant "will **always** have a 15 pound weight limit restriction for the left upper extremity," and Claimant "should also

avoid situations where he might fall or excessively stress his left arm. We stressed this multiple times today, and the **patient stated he understands.**" (R. p. 463) (emphasis added). Although Dr. Chidgey testified that the Claimant's work restrictions were permanent unless things changed, Dr. Chidgey also testified that there was no medical evidence to suggest that the Claimant's condition had changed between March 2002 and the date of the Claimant's alleged November 2008 work-related accident. (R. p. 289, lines 13-23). Claimant received benefits for the 1987 injury, and ultimately settled his workers' compensation claim with his employer for approximately \$86,000. (R. p. 200, lines 2-25).

In 2006, Claimant applied for work with Respondent Watkins & Shepard Trucking, Inc. ("Employer") as a truck driver and furniture deliveryman. (R. p. 120, lines 10-19). Claimant completed multiple forms during his application process where he denied having any prior injuries or impairment. (R. p. 384) (R. p. 485) (R. p. 486). Claimant admitted at the hearing that, prior to accepting employment, he knew the job required him to lift 100-150 pounds, which was outside of the permanent lifting restrictions Dr. Chidgey had placed on him. (R. p. 154, lines 3-16). Claimant admitted that his job required him to use both arms. (R. p. 217, lines 5-8). Claimant testified that he knew he was subject to the lifting restrictions imposed by Dr. Chidgey when he applied for work with Employer, and that the restrictions had not been lifted by a medical provider. (R. p. 146, lines 5-25) (R. p. 147, lines 7-17). Claimant confirmed that, although he was aware of these restrictions, (R. p. 147, lines 1-17), he knew Employer was not. (R. p. 155, lines 4-20). Although Claimant agreed that, "it would have been a good idea" to have told Employer about his prior injury to and lifting restrictions on his

left arm, (R. p. 150, line 22 – p. 151, line 2), he openly admitted that he did not “bother telling them” because he did not think it was specifically asked of him and because he thought he could perform the job. (R. p. 150, line 12 – p. 151, line 4) (R. p. 147, line 13 – p. 149, line 17). Although he marked “no” on forms provided to Employer that asked whether he had any impairment, (R. p. 384) (R. p. 485) (R. p. 486), he admitted at the hearing that his left arm was, in fact, impaired. (R. p. 152, lines 1-11). Although Claimant testified that he could not recall giving the phone interview that was the source of the Post Job Offer Questionnaire, (R. p. 384), he never denied that the interview took place. He simply said that he could not recall. (R. p. 130, line 25 – p. 131, line 1) (R. p. 150, lines 7-15). With respect to the portion of the D.O.T. physical form that he filled out in October 2006, Claimant explained that he checked “no” to the question asking whether he had any impairment because he said he understood the form to be asking only for the prior five years. (R. p. 152, line 12 – p. 153, line 20). However, Claimant admitted he had been treated by Dr. Chidgey within the five years prior to filling out this form. (R. pp. 460-462, 464-465). With respect to an affirmative action form on which Claimant marked that he did not have any impairment, (R. p. 486), Claimant testified that he “answered no that I’m not disabled. That’s what I answered to,” despite the fact that he acknowledged he had an impairment. (R. p. 168, line 4 – p. 169, line 23).

As part of the hiring process, Dr. Albert James Osbahr examined Claimant on October 30, 2006. (R. p. 315, Osbahr Depo. p. 6, lines 6-8). Although Dr. Osbahr noticed an impairment to Claimant’s left arm, (R. pp. 315-316, Osbahr Dep. p. 9, lines 23 – p. 10, line 1), he had no information regarding whether Claimant had suffered a previous accident or had undergone surgery on his left elbow, and did not know that

Claimant had been assigned an impairment rating or any lifting restrictions. (R. p. 315, Osbahr Dep. p. 7, line 15 – p. 8, line 24; *see also* R. p. 316, Osbahr Dep. p. 11, lines 20-25). Claimant admitted that he did not inform Dr. Osbahr that he had been placed under lifting restrictions. (R. p. 138, lines 22-24) (R. p. 316, Osbahr Dep. p. 10, lines 11-17). Dr. Osbahr did not note any scarring on Claimant's left arm. (R. p. 318, Osbahr Dep. p. 20, lines 8-21). Specifically, Dr. Osbahr concluded after examining Claimant that, "even though he had the impairment, it appeared he could use his arm for the purposes of driving a truck." (R. p. 318, Osbahr Dep. p. 21, lines 7-8). Dr. Osbahr was not provided with Claimant's job description and was only examining him "overall for truck driving." (R. p. 316, Osbahr Dep. p. 11, lines 13-16). Dr. Osbahr had no connection to and was not provided any information regarding a lift test, but only certified that Claimant was able to perform the duties of a commercial motor vehicle driver. (R. pp. 318-319, Osbahr Dep. p. 21, line 17 – p. 22, line 13). Dr. Osbahr was unaware of and did not evaluate Claimant for any pushing, pulling or lifting requirements of his job. (R. pp. 319-320, Osbahr Dep. p. 25, line 23 – p. 26, line 12). Dr. Osbahr testified that he was not certain whether he sent the "long" form, which would have had the notation regarding Claimant's arm impairment, or the "short" form to Employer. (R. p. 318, Osbahr Dep. p. 18, line 16 – p. 19, line 17) (R. pp. 319-320, Osbahr Dep. p. 25, line 6 – p. 26, line 3 (Dr. Osbahr testifying that he cannot confirm whether Employer received the long or the short form)).

Matthew Grandy, the Director of Driver Recruiting and Training, testified that all hiring for Employer is conducted from corporate headquarters in Missoula, Montana. Mr. Grandy testified that, once an application has been received and evaluated, a conditional job offer is extended, after which the company engages in a post job offer

evaluation in order to identify an individual's ability to perform the job. (R. p. 269, Grandy Dep. p. 9, line 5 – p. 10, line 24). Mr. Grandy testified that a conditional offer of employment is contingent upon completion of a drug test, a lift test, a D.O.T. physical, as well as the post-job offer questionnaire administered by the safety department. (R. p. 270, Grandy Dep. p. 10, lines 2-15) (R. p. 272, Grandy Dep. p. 18, line 14 – p. 19, line 1). Mr. Grandy further testified that, had Claimant provided Employer with accurate information regarding the permanent work restrictions that were placed upon Claimant by Dr. Chidgey, Claimant would not have been subjected to a lift test. (R. p. 273, Grandy Dep. p. 25, lines 16-22). Instead, Employer would have conducted further research, including obtaining a copy of Claimant's work release from Dr. Chidgey. (R. p. 273, Grandy Dep. p. 25, line 22 – p. 26, line 7). Mr. Grandy confirmed that Employer would want any medical records documenting Claimant's restrictions in order to conduct a thorough investigation to determine if he was physically capable of performing the job. (R. pp. 273-274, Grandy Dep. p. 25, line 16 – p. 27, line 4).

At the hearing, Claimant denied that his left arm and elbow had been bothering him since the 2002 total elbow replacement. (R. p. 142, lines 15-19). However, just days prior to his alleged November 1, 2008 accident, Claimant told his family doctor that he still had range of motion problems. Claimant later admitted that he had been experiencing limited range of motion and occasional numbness. (R. p. 161, line 17 – p. 162, line 13). In November 2008, Claimant told Dr. McIntosh "it has always been painful, but this is a little more." (R. p. 441) (R. p. 442).

Claimant alleges that, on November 1, 2008, a box containing a recliner weighing 100-150 pounds shifted when he tried to move it. The box came down and straightened

his left arm out, injuring it. (R. p. 132, line 20 – p. 134, line 2) (R. p. 162, line 14 – p. 163, line 15). There were no witnesses to this accident. (R. p. 160, lines 14-16). Interestingly, Claimant did not report this accident when he visited his family doctor 12 days later. (R. p. 156, line 8 – p. 158, line 11) (R. p. 442).

Claimant began seeing Dr. Chidgey in January 2009 for his alleged work-related accident. (R. p. 160, lines 17-20). Dr. Chidgey testified that there were some concerns that Claimant's implant had possibly loosened, as well as the possibility of a biceps tendon rupture. (R. p. 294, line 9 – p. 295, line 8). Dr. Chidgey could not confirm whether there actually was any injury to the biceps. (R. p. 309, line 8 – p. 310, line 8). Claimant testified that the treatment he had undergone dealt primarily with his elbow replacement, or prosthesis. (R. p. 166, lines 5-19).

In July 2009, Claimant filed a Form 50 seeking medical treatment and workers' compensation benefits from Employer and its workers' compensation insurer, Zurich North American Insurance Company (jointly "Respondents"). Respondents filed a Form 51 denying that Claimant suffered a work-related accidental injury as defined by the South Carolina Workers' Compensation Act ("Act") and that his claim was barred because Claimant had engaged in fraud in the application.

A Hearing took place on April 29, 2010 before the Single Commissioner Susan S. Barden. Commissioner Barden determined Claimant did not satisfy his burden to prove a compensable injury to the left upper extremity. (Decision and Order of Single Commissioner Barden, November 10, 2010, R. p. 36). Commissioner Barden further found that Claimant failed to prove that he had sustained an accidental injury pursuant to Capers v. Flautt, 305 S.C. 254, 407 S.E.2d 660 (Ct. App. 1991), and that Claimant had

engaged in fraud in the application which barred his claim under Cooper v. McDevitt & Street Co., 260 S.C. 463, 196 S.E.2d 833 (1973). (R. pp. 40-41). Commissioner Barden also expressed doubts about Claimant's credibility. (R. pp. 37-38, 40-42).

Within the proscribed time period, the Claimant submitted a Form 30 Request for Commission Review. The Full Commission heard oral argument on April 18, 2011 and adopted the findings of fact of the Single Commissioner in their entirety, (Decision and Order of the Full Commission, July 26, 2011, R. p. 9) ("Commission Decision"), including that Claimant failed to prove he suffered a work-related injury, that Claimant's alleged injury was not accidental pursuant to Capers, and that Claimant's claim was barred by Cooper v. McDevitt. (R. pp. 10-11, 14-18). The Commission also found Claimant's hearing testimony to not be credible. (R. pp. 10-12, 13-16).

Claimant timely appealed to this Court.

STANDARD OF REVIEW

Judicial review of a Commission decision is directed by the substantial evidence rule of the Administrative Procedures Act, S.C. Code Ann. § 1-23-380(A)(5) (Supp. 2010). Lark v. Bi-Lo, Inc., 276 S.C. 130, 276 S.E.2d 304 (1981). A reviewing court should affirm the decision of the Full Commission unless it is clearly erroneous in view of the substantial evidence of the whole record. Lark, 276 S.C. at 136, 276 S.E.2d at 307. A reviewing court may not substitute its own judgment for that of the Full Commission as to the weight of the evidence on a question of fact, but may reverse if the decision is affected by errors of law. S.C. Code Ann. §1-23-380(A)(5). The Administrative Procedures Act "mandates that the commission take the evidence, judge the credibility and weight of that evidence, and from that judgment determine the facts of the case."

Rogers v. Kunja Knitting Mills, Inc., 312 S.C. 377, 381, 440 S.E.2d 401, 403 (Ct. App. 1994).

Substantial evidence is not a mere scintilla of evidence, nor the evidence viewed blindly from one side of the case, but is evidence which, considering the record as a whole, would allow reasonable minds to reach the same conclusion the administrative agency reached in order to justify its action. Etheredge v. Monsanto Co., 349 S.C. 451, 456, 562 S.E.2d 679, 681-82 (Ct. App. 2002). The findings of the Full Commission are presumed correct and can be set aside only if unsupported by substantial evidence or based on an error of law. McGuffin v. Schlumberger-Sangamo, 307 S.C. 184, 186, 414 S.E.2d 162, 163 (1992).

The Full Commission is the ultimate fact finder in workers' compensation cases. Ross v. American Red Cross, 298 S.C. 490, 492, 381 S.E.2d 728, 730 (1989). It is not within the appellate courts' purview to reverse findings of the Full Commission which are supported by substantial evidence. Broughton v. South of the Border, 336 S.C. 488, 496, 520 S.E.2d 634, 637 (Ct. App. 1999). Where there is a conflict in the evidence, either by different witnesses or the testimony of the same witnesses, the factual findings of the Commission are conclusive. Anderson v. Baptist Med. Ctr., 343 S.C. 487, 492-93, 541 S.E.2d 526, 528 (2001). Furthermore, the Commission is free to believe or disbelieve some or all of the testimony of witnesses. *See*, Holcomb v. Dan River Mills/Woodside Div., 286 S.C. 223, 225, 333 S.E.2d 338, 340 (Ct. App. 1985) (because the Commission is the trier of fact in workers' compensation cases, it "may believe part or all of a witness's testimony").

ARGUMENTS

I. The Commission applied the correct legal standard for fraud in the application.

Claimant argues that the Commission erred by applying the wrong legal standard to this case, and then urges this Court to supplant the test for fraud in the application as set forth in Cooper v. McDevitt with the general common law test for fraud. However, none of the common law fraud cases cited by Claimant – Outlaw v. Calhoun Life Ins. Co., 236 S.C. 272, 113 S.E.2d 817 (1960) (alleging fraudulent inducement to execute a final release and discharge on a life insurance policy); Hansen v. DHL Laboratories, 316 S.C. 505; 450 S.E.2d 624 (Cl. App. 1994) (alleging fraudulent inducement to sign promissory notes); and Byars v. Cherokee County, 237 S.C. 548; 118 S.E.2d 324 (1961) (alleging fraudulent sale and reconveyance of property) – involved a workers' compensation claim. Fraud in the application is a defense peculiar to workers' compensation and is distinct from claims or defenses alleging common law fraud. The test for fraud in the application is set forth clearly in Cooper v. McDevitt and requires that an employer prove the following: “(1) The employee must have knowingly and willfully made a false representation as to his physical condition. (2) The employer must have relied upon the false representation and this reliance must have been a substantial factor in the hiring. (3) There must have been a causal connection between the false representation and the inquiry.” 260 S.C. at 468, 196 S.E.2d at 835. This rule has been applied consistently in workers' compensation claims in South Carolina. *See, e.g.*, Brayboy v. WorkForce, 383 S.C. 463, 681 S.E.2d 567 (2009) (finding the claimant's arguments that he was entitled to make material misrepresentations on his employment application “because he believed he was fit for construction work . . . a specious

position”); Jones v. Georgia-Pacific Corp., 355 S.C. 413, 586 S.E.2d 111 (2003) (finding claimant lied on an application form where she failed to disclose prior back and leg problems, that her employer regularly relied on the information supplied by applicants in making its hiring decisions, and that there was a causal connection between her failure to disclose her back problems and her alleged back injury); Frederick v. Wellman, Inc., 385 S.C. 8, 682 S.E.2d 516 (Ct. App. 2009) (claim for back injury denied because claimant falsely indicated on her job application that she had had no prior back injuries).

As the South Carolina Supreme Court pointed out in Brayboy, once an employer establishes the three prongs set forth in Cooper v. McDevitt, the “employment relationship may be vitiated.” Brayboy, 383 S.C. at 467, 681 S.E.2d at 569. In other words, once an employer has proven fraud in the application, the employer/employee relationship is deemed to not have existed for workers’ compensation purposes. Id., 681 S.E.2d at 569; Frederick, 385 S.C. at 16, 682 S.E.2d at 519-20. If there is no employer-employee relationship at the time of the accident, the Act does not apply and the inquiry is complete. Brayboy, 383 S.C. at 466-67, 681 S.E.2d at 568-69

Claimant cites no workers’ compensation cases to support his position that the burden of proof in this case should be clear and convincing evidence. Contrary to Claimant’s position, the South Carolina Supreme Court has applied a preponderance of the evidence standard, Brayboy, 383 S.C. at 568, 681 S.E.2d at 466 (stating that the “existence of an employment relationship is a jurisdictional issue for purposes of workers’ compensation benefits reviewable under the preponderance of the evidence standard”), and, with respect to the underlying factual issues, the substantial evidence standard. *See*, Jones, 355 S.C. 413, 586 S.E.2d (applying the substantial evidence

standard to the factual determination that employer met the three-prong test set forth in Cooper v. McDevitt); *see also* Cooper v. McDevitt 260 S.C. at 469, 196 S.E.2d at 835 (finding “ample evidence” supported the finding below that false statements in an employment application barred benefits). In any event, as explained in more detail below, the Commission Decision in this case meets all three evidentiary standards – clear and convincing evidence, preponderance of the evidence and substantial evidence. Therefore, the Commission did not err with respect to the evidentiary standard applied in this case and this Court should affirm.

II. The Commission correctly determined that Claimant’s claim is barred due to fraud in the application.

Despite Claimant’s arguments to the contrary, the Commission correctly and properly determined that Claimant’s workers’ compensation claim is barred because he made false representations on his job application. As noted above, the Cooper v. McDevitt defense requires proof that Claimant knowingly and willfully made a false representation as to his physical condition, that Employer relied on the false representation and such reliance was a substantial factor in the hiring, and that a causal connection exists between the false representation and the injury. The Commission’s findings on all three of these prongs are supported by substantial evidence – even by clear and convincing evidence – in the record and, therefore, should be upheld by this Court.

Claimant does not argue in his opening Brief either: 1) that he did not make a knowingly false misrepresentation on his job application,¹ or 2) that there was a causal connection between Claimant’s misrepresentation and the subsequent injury. He has thus

¹ In addition, Claimant’s statement agreeing with “the logic” in Respondents’ position regarding the false representations he made in response to Employer’s questions, (App. Br. p. 10), is a further concession of this point.

conceded these issues. See McClurg v. Deaton, 716 S.E.2d 887, 888 n.2, 2011 S.C. LEXIS 288, ** 5-6, n.2 (2011) (observing that, “[i]t is axiomatic that an issue cannot be raised for the first time in a reply brief”). Because the Commission’s findings of fact are amply supported by the record below, (Commission Decision, R. pp. 10-17), and because Claimant has not challenged them on appeal, this Court should affirm the Commission’s findings of fact on the first and third prongs of the test for fraud in the application.

Claimant does challenge the Commission’s finding that Employer relied on his material representations, arguing that Employer knew Claimant’s statements to be false. Claimant’s argument is built on a number of factual inaccuracies that are not supported by the evidence and, therefore, ultimately fails. Claimant states that Dr. Osbahr, “found that the Appellant had impairment and problems with the use of his left arm, but certified that he could still perform the job.” (App. Br. pp. 6, 12). What the record reveals, however, is that Dr. Osbahr only certified that Claimant had passed his D.O.T. physical and could drive a truck. (R. p. 318, Osbahr Dep. p. 21, lines 7-8). Dr. Osbahr was not provided with Claimant’s job description, any information regarding the lift test, and did not evaluate him for any pushing, pulling or lifting requirements of his job. (R. p. 316, Osbahr Dep. p.11, lines 13-16) (R. pp. 318-319, Osbahr Dep. p. 21, line 17 – p. 22, line 13) (R. p. 319-320, Osbahr Dep. p. 25, line 23 – p. 26, line 12).

Claimant also argues that the Commission’s conclusion of law that Employer “never had the opportunity to explore the full extent of the Claimant’s condition because it was concealed” is in error because it is contradicted by other evidence in the record. (App Br. p. 11). First, to the extent there is conflicting evidence in the record, the Commission’s findings will be upheld so long as they are supported by substantial

evidence in the record. Anderson, 343 S.C. at 492-93, 541 S.E.2d at 528. Here, substantial evidence supports the Commission's finding. In addition to the forms Claimant filled out denying any impairment and his statements that he had no intention of informing Employer about his left arm impairment and lifting restrictions unless directly asked, there is also testimony by Employer's manager that they knew nothing about Claimant's impairment the entire time he worked for Employer. (R. p. 256, line 18 – p. 258, line 1).

Second, the sentence in the Commission Decision following the one quoted by Claimant reveals that, “[b]ased on the substantial evidence including the medical records of the Claimant and the testimony of Dr. Osbahr, we find that, although Dr. Osbahr on his own discovered some impairment during the examination, **he never knew the full extent.**” (Commission Decision, R. p. 20) (emphasis added). All of the credible evidence in the record supports this conclusion. Although Dr. Osbahr noticed an impairment to Claimant's left arm, (R. pp. 315-316, Osbahr Dep. p. 9, lines 23 – p. 10, line 1), Claimant did not reveal to him that he had suffered a previous accident, that he had undergone surgery on his left elbow, or that he had been assigned an impairment rating or was under any lifting restrictions. (R. p. 315, Osbahr Dep. p. 7, line 15 – p. 8, line 24) (R. p. 316, Osbahr Dep. p. 10, lines 11-17) (R. p. 316, Osbahr Dep. p. 11, lines 20-25) (R. p. 138, lines 22-24). Furthermore, although Dr. Osbahr examined Claimant's arm, he did not note any surgical scars. (R. p. 318, Osbahr Dep. p. 20, lines 5-21).² Thus, neither Dr. Osbahr nor Employer knew the full extent of Claimant's impairment

² Although Claimant testified that he showed Dr. Osbahr his scars, there is no note on the D.O.T. form indicating scarring and Dr. Osbahr testified specifically that he did not notice any scarring. The Commission, which is authorized to determine witness credibility, Rogers, 312 S.C. at 380-81, 440 S.E.2d at 403, determined that Claimant was not a credible witness. (Commission Decision, R. pp. 10-12, 13-16).

but, instead, relied on the representations Claimant made on the forms he filled out during the application process.

Claimant also incorrectly states that Dr. Osbahr reported his impairment findings “directly to the Employer.” (App. Br. pp. 6-7). There is no evidence in the record to support this assertion. Instead, Dr. Osbahr testified that he was not certain whether he sent the “long” form, which would have had the information regarding Claimant’s arm impairment, or the “short” form to Employer. (R. p. 318, Osbahr Dep. p. 18, line 16 – p. 19, line 17) (R. pp. 319-320, Osbahr Dep. p. 25, line 6 – p. 26, line 3) (Dr. Osbahr testifying that he cannot confirm whether Employer received the long or the short form).

Next, Claimant argues that Mr. Grandy, “testified that Dr. Osbahr’s findings of impairment and decreased supination would be serious enough that someone should have followed up with the doctor or the Appellant.” (App. Br. pp. 10-11). This assertion again is not supported by evidence in the record. First, the D.O.T. physical form filled out by Dr. Osbahr does not state what normal supination for an elbow is. (R. pp. 343-345). In addition, Mr. Grandy testified that he did not know what normal supination for an arm was. (R. p. 275, Grandy Dep. p. 31, lines 9-23) (R. p. 275, Grandy Depo p. 32, lines 11-17). The testimony cited by Claimant asked Mr. Grandy to *assume* that normal supination was 180 degrees and then, *if* he was made aware of that fact, and was told that an applicant only had half that supination “is that something you would want to follow upon,” to which Mr. Grandy replied yes. (R. p. 276, Grandy Dep. p. 35, lines 14-23). Thus, the statement Claimant relies on requires both Mr. Grandy and this Court to assume facts that Employer was not aware of and/or that are not in evidence.

Mr. Grandy did not testify that Employer was aware of Claimant’s impairment –

instead, he confirmed that Employer relied on the forms Claimant filled out as well as the post-acceptance interview in order to determine whether he was capable of performing all the functions of his job. (R. p. 269, Grandy Dep. p. 9, line 2 – p. 11, line 12) (R. p. 272, Grandy Dep. p. 18, line 14 – p. 19, line 1). Furthermore, as Mr. Grandy stated, Employer would not have proceeded with the lift test had it known Claimant was under restrictions from his doctor. (R. pp. 273-274, Grandy Dep. p. 25, line 16 – p. 26, line 7).

Finally, Mr. Grandy testified that, “[a]s far as the hiring process, the DOT physical is basically almost a pass/fail thing.” (R. p. 275, Grandy Dep. p. 30, lines 8-9). Because Dr. Osbahr was only evaluating Claimant for his ability to drive a truck, and not for the other requirements of his job, and because Claimant himself marked on the D.O.T. form that he did not have any impairments, (R. pp. 343-345), as well as the facts that Claimant denied having any impairment on Employer’s Post Job Offer Questionnaire and on an Affirmative Action Program Information form, (R. p. 384) (R. p. 486), the Commission was correct in concluding that Employer relied on Claimant’s false representations and that Employer’s reliance was a substantial factor in the hiring. The Commission properly concluded that Claimant’s claim is barred because of fraud in the application and this Court should uphold the Commission on this basis.

III. Claimant is barred from arguing on appeal that S.C. Code Ann § 42-9-35(D) should apply to this claim.

Although Claimant argues that S.C. Code Ann § 42-9-35(D), Evidence of Preexisting Injury of Condition, should apply to this claim, (App. Br. pp. 13 -14), he did not make this argument to the Commission and, therefore, this issue is not properly before this Court. Robbins v. Walgreens, 375 S.C. 259, 266, 652 S.E.2d 90, 94 (Ct. App. 2007) (where a specific argument is not raised to the Commission, it is not preserved for

appeal and the appellate court cannot review it); Solomon v. W.B. Easton, Inc., 307 S.C. 518, 521, 415 S.E.2d 841, 843-44 (Ct. App. 1992) (issues not raised to and ruled on by the lower tribunal are not preserved for review); *see also* City of Columbia v. Ervin, 330 S.C. 516, 519-20, 500 S.E.2d 483, 485 (1998) (appellate courts may not address issues raised for the first time on appeal). Therefore, this Court should disregard entirely Claimant's arguments regarding any potential application of S.C. Code Ann § 42-9-35(D) to this claim.

However, even if this Court decides to consider this issue, application of S.C. Code Ann § 42-9-35 to this claim does not dictate a different result. First, the provisions of section 42-9-35(D), or any of the other benefits provisions of the Act, do not even come into consideration if there is no employment relationship at the time of the alleged accident. It is axiomatic that no award can be authorized under the Act unless an employer-employee relationship existed at the time of the alleged injury. *See, e.g., Shuler v. Tri-County Elec. Co-op, Inc.*, 385 S.C. 470, 472, 684 S.E.2d 765, 767 (2009) (observing that the "existence of an employment relationship is a factual question that determines the jurisdiction of the Workers' Compensation Commission"); Alewine v. Tobin Quarries, Inc., 206 S.C. 103, 109, 33 S.E.2d 81, 83 (1945) (stating that, "[n]o award under the Act is authorized unless the employer-employee relationship existed at the time of the alleged injury for which the claim is made. This relation is contractual in character . . ."). As noted above, the result of proving fraud in the application is that the employment relationship is voidable. Cooper v. McDevitt, 260 S.C. at 469, 196 S.E.2d at 836; *see also* Brayboy, 383 S.C. at 467-68, 681 S.E.2d at 569 (holding that the claimant's misrepresentations on his employment application "vitiated his employment relationship

and barred his recovery of workers' compensation benefits"). It was Employer's policy at the time Claimant was hired that, "falsifying . . . any Company record or report, such as an application for employment . . ." constituted grounds for terminating employment. (R. pp. 487-488). Thus, because the employment contract between Claimant and Employer was not enforceable at the time of his alleged accident, no benefits may be awarded in this case.³ Accordingly, the statutory construction arguments set forth in Claimant's brief simply do not apply and should be disregarded by this Court.⁴ There is nothing "illegal" about the fraud in the application defense, as that defense is part of the determination of whether an employer-employee relationship existed at the time of the accident.

Numerous other states have judicially adopted the affirmative defense of fraud or misrepresentation in the application. *See, e.g., Ex parte Southern Energy Homes, Inc.*, 603 So.2d 1036, 1992 Ala. LEXIS 639 (Ala. 1992); *Shippers Transp. of Georgia v. Stepp*, 265 Ark. 365, 578 S.W.2d 232 (Ark. 1979); *City of Homestead v. Watkins*, 285 So.2d 394, 1973 Fla. LEXIS 4223 (Fla. 1973); *Georgia Elec. Co. v. Rycroft*, 259 Ga. 155, 378 S.E.2d 111 (Ga. 1989); *Air Mod Corp. v. Newton*, 59 Del. 148, 215 A.2d 434 (Del. 1965); *Honaker v. Duro Bag Manuf. Co.*, 851 S.W.2d 481, 1993 Ky. LEXIS 70

³ The weakness of Claimant's argument is further exposed in his closing sentence, where he asks this Court to apply S.C. Code Ann § 42-9-35(D) over "general contract law/caselaw and find that an **employee** with an undisclosed preexisting injury/condition/impairment is covered under the South Carolina Workers' Compensation Act." (App. Br. p. 14) (emphasis added). For this Court to so find would require that an employer-employee relationship existed at the time of the injury, a finding that has been resolved against Claimant in light of *Cooper v. McDevitt* and the facts of this case.

⁴ There clearly are instances where an employee, who has a pre-existing condition that is not disclosed to his or her employer, is entitled to workers compensation benefits when that pre-existing condition is aggravated by a work-related accident or conditions. However, the cases in which benefits are payable under S.C. Code Ann § 42-9-35(D) would not involve fraud in the application. A number of job applications or processes do not ask for information relating to a person's health or physical condition, in which case, no issue of fraud in the application would arise. In addition, a pre-existing condition may be entirely unrelated to the performance of one's job but still be aggravated by a job-related injury. Thus, the inclusion of S.C. Code Ann § 42-9-35(D) was not a "futile" act by the Legislature; it simply does not apply in this case.

(Ky. 1993); Shaw's Supermarkets, Inc. v. Delgiacco, 410 Mass. 840, 575 N.E.2d 1115 (Mass. 1991); Jewison v Frerichs Const., 434 N.W.2d 259, 1989 Minn. LEXIS 2 (Minn. 1989); Jaynes v. Wal-Mart Store No. 824, 107 N.M. 648, 763 P.2d 82 (N.M App. 1988); Oesterreich v. Canton-Inwood Hosp., 511 N.W.2d 824, 1994 S.D. LEXIS 12 (S.D. 1994); Allred v. Berkline, LLC, 2010 Tenn. LEXIS 626 (Tenn. 2010); Progressive Driver Servs., Inc. v. Talley, 2003 Va. App. LEXIS 286 (Va. App. 2003). The Alabama Supreme Court held that, "[i]t is not a usurpation of the legislative function for this Court to conclude that misrepresentation on an employment application as to prior physical injuries is a bar to recovery of worker's compensation benefits." Southern Energy Homes, 603 So.2d at 1039. The Arkansas Supreme Court explained that, although the Arkansas workers' compensation statute was "silent on the effect of a false representation, except as to 'occupational disease,' . . . public policy requires an obligation on the part of an employee, upon inquiry, to be truthful to an employer about preemployment health conditions." Shippers Transp., 265 Ark. at 368, 578 S.W.2d at 233; *see also* Georgia Elec., 259 Ga. at 158, 378 S.E.2d at 113. Other states hold that evidence that an employee lied about his or her physical condition on a job application amounts to "serious and willful misconduct causing injury," which bars them from recovering workers compensation benefits. *See, e.g.*, Shaw's Supermarkets, 410 Mass. at 844, 575 N.E.2d at 118. As the Alabama Supreme Court observed, "while an employer takes the employee as he finds him, an employer is not required to assume the risk of aggravating a pre-existing injury unless either some notice of the condition is given by the applicant to enable the employer to make an informed hiring decision, or employer does not rely upon the employee's representation." Southern Energy Homes, 603 So.2d

at 1040.⁵

Second, Section 42-9-35(B) provides that “the commission *may* award compensation benefits to an employee who has a permanent physical impairment or preexisting condition and who incurs a subsequent disability” from a work-related accident. S.C. Code Ann § 42-9-35(B) (emphasis added). This provision is permissive, not mandatory, leaving the Commission discretion to award or not award benefits for a subsequent disability in appropriate cases.

Finally, although Claimant cites Spivey v. D.G. Constr. Co., 321 S.C. 19, 467 S.E.2d 117 (Ct. App. 1996), for the proposition that jurisdictional doubts should be resolved in favor of inclusion of workers under the Act, what he fails to acknowledge is that it is equally true that, “a construction should not be adopted that does violence to the specific provisions of the Act.” Shuler, 385 S.C. at 473, 684 S.E.2d at 767. Furthermore, Spivey and similar cases involve a determination of whether a claimant meets the four-prong test set forth in South Carolina Workers’ Comp. Comm’n v. Ray Covington Realtors, Inc., 318 S.C. 546, 548, 459 S.E.2d 302, 303 (1995). That test is entirely irrelevant to the issues raised in this case. Thus, this Court should disregard any argument made that S.C. Code Ann § 42-9-35(D) applies and, instead, affirm the Commission’s determination that Claimant’s claim is barred because of fraud in the application.

⁵ Note that none of these cases applied a clear and convincing evidentiary standard to the three-pronged fraud in the application test. Southern Energy Homes, 603 So.2d at 1041 (requiring “material evidence . . . from which a factfinder could find that all three elements were established”); Shippers Transp., 265 Ark. at 368, 578 S.W.2d at 234 (finding employer “adduced ample testimony” to establish two of the three prongs); Air Mod., 59 Del. at 157, 215 A.2d at 440 (applying substantial evidence standard); Jewison v. Frerichs Const., 434 N.W.2d at 262 (applying the substantial evidence standard); Jaynes, 107 N.M. at 649, 763 P.2d at 83 (applying the substantial evidence standard); Allred, 2010 Tenn. LEXIS 626 (finding the defense proved by “persuasive evidence”).

IV. The Commission correctly determined that Claimant's claim was barred because it was not unexpected from Claimant's point of view.

As an alternative and independent reason for denying this claim, the Commission correctly held that the Capers defense barred the claim because Claimant's injury was not unexpected from his point of view. Although Claimant correctly cites general case law regarding the definition of an accident for workers' compensation purposes, he entirely fails to address the principle set out in Capers and properly relied on by the Commission. In Capers, the claimant had been treated for contact dermatitis while working for a prior employer, but did not reveal his condition on his application with Holiday Inn. While working for Holiday Inn as a dishwasher, he began suffering from contact dermatitis and sought workers' compensation benefits. This Court denied the claim because "the outbreak of dermatitis was not an unlooked for event which Capers did not expect," but instead was "an event which Capers could anticipate given his past experience." 305 S.C. at 256, 407 S.E.2d at 661-62. Similarly, in Havird v. Columbia YMCA, 308 S.C. 397, 418 S.E.2d 329 (Ct. App. 1992), this Court determined that the injury to claimant's vascular system was not an injury by accident as defined by our workers' compensation statute because the injury was not unexpected. Instead, the claimant knew standing would worsen his condition but continued to work in a job that required prolonged standing. 308 S.C. at 399-400, 418 S.E.2d at 330-31.

Pee v. AVM, Inc., relied on by Claimant, instructs that the focus should be, "on the unexpected nature of the **injury** rather than requiring that the **event** causing the injury be unexpected." 352 S.C. 167, 171, 573 S.E.2d 785, 787 (2002) (emphasis added). Substantial evidence supports the Commission's factual and legal conclusions that Claimant: 1) knew he was under permanent lifting restrictions; 2) had been warned by

Dr. Chidgey his treating physician “that he should avoid situations where he might fall or excessively stress his left arm;” 3) knew he was impaired and had settled his prior workers’ compensation claim for approximately \$68,000; and 4) knew prior to accepting the job with Employer that the requirements of his job exceeded his lifting restrictions, and support a finding that Claimant should have expected just such an injury to his elbow. (Commission Decision, R. pp. 10-14) (R. p. 145, line 14 – p. 147, line 17) (R. p. 154, line 3 – p. 155, line 20) (R. p. 442) (R. pp. 463-465) (R. p. 283, line 16 – p. 289, line 23) (R. p. 298, line 19 – p. 299, line 2) (R. p. 200, lines 2-25) (R. pp. 489-497).

There can be no legitimate question that Claimant’s job involved heavy lifting. Although Claimant’s counsel attempted to elicit testimony from Mr. Grandy that, “most of the physical requirements of [Claimant’s] job is the ability to push and pull,” Mr. Grandy explicitly did not agree. (R. p. 276, Grandy Dep. p. 36, lines 16-20) (emphasis added). Although Mr. Grandy did agree that Claimant would have done “more” pushing and pulling than lifting, (R. p. 276, Grandy Dep. p. 36, line 24 – p. 37, line 8), “more” can mean anything slightly over 50 percent and Mr. Grandy was clear that it did not mean “most.” The stated requirements of Claimant’s job flatly contradict any suggestion that his job did not involve heavy lifting. (R. pp. 489-497). Claimant acknowledged that his job required him to use both arms. (R. p. 217, lines 5-8).

Dr. Chidgey specifically noted that he and Claimant had discussed that, “if you want to try and gain life out of the arthroplasty, you keep your weight to a lower level. If you increase that, you may get away with it.” (R. p. 300, lines 8-18). Implicit in this statement is the recognition that you may *not* “get away with it” also. The fact is that Claimant took a calculated risk, got away with it for two years, but ultimately

experienced precisely the type of injury his treating physician specifically warned him about. As the Commission observed, “it would be patently unfair to require [Respondents] to bear the burden for a risk that the Claimant knowingly and willfully chose to take . . .” (Commission Decision, R. pp. 14-15).⁶

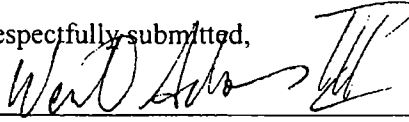
Although Claimant argues there was no testimony or evidence that Claimant expected a box to fall on his arm, it is not the precise manner in which an accident occurs that controls the analysis. Pee, 352 S.C. at 171, 573 S.E.2d at 787. Rather, the key determination in this case is that Claimant, examining the facts from his point of view, should have expected precisely the type of injury he incurred and his claim is therefore barred. Therefore, the Commission did not commit any error of law in determining that Claimant did not prove his injuries were unexpected and this Court should uphold the Commission on this point.

⁶ Claimant’s assertion that his treating physician opined that “but for” the accident that occurred on November 1, 2008, Claimant would have been able to continue to perform his job indefinitely, (App. Br. p. 13), is nothing more than pure speculation. It is axiomatic that workers’ compensation awards may not be based on surmise, conjecture or speculation. Tiller v. National Health Care Ctr., 334 S.C. 333, 339, 513 S.E.2d 843, 845 (1999).

CONCLUSION

For the foregoing reasons, Respondents respectfully request that this Court uphold the Full Commission Decision in its entirety.

Respectfully submitted,



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Attorneys for Respondents

June 28, 2012

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM THE SOUTH CAROLINA
WORKERS' COMPENSATION COMMISSION

AVERY B. WILKERSON, APPELLATE PANEL CHAIRMAN, COMMISSIONER

WCC File No. 0818219

Joe A. Osmanski, Employee, ...Appellant,

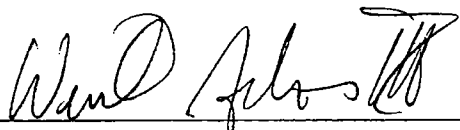
v.

Watkins & Shepard Trucking, Inc., Employer,
and Zurich North American Insurance
Company, Carrier Respondents.

PROOF OF COMPLIANCE

The undersigned certifies that the Final Brief of Respondents Watkins & Shepard Trucking, Inc. and Zurich North American Insurance Company complies with Rule 211(b), SCACR. The undersigned further certifies that the Final Brief Respondents Watkins & Shepard Trucking, Inc. and Zurich North American Insurance Company complies with the South Carolina Supreme Court's August 13, 2007 Order re: Interim Guidance Regarding Personal Data Identifiers and Other Sensitive Information in Appellate Court Filings.

June 28, 2012



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WCC File #: 0818219
Carrier File #: _____
Carrier Code #: _____
Employer FEIN #: _____

Claimant's Name: Joe Osmanski SSN: _____ Employer's Name: Watkins Shepard Trucking
Address: _____ Address: _____
City: Pelion State: SC Zip: 29123 City: Hickory State: NC Zip: 28601
Home Phone: (803) 894-7661 Work Phone: () Insurance Carrier: Zurich American Insurance
Preparer's Name: Paula Howker Amick Law Firm: George Sink, P.A. Preparer's Phone #: (803) 929 - 1920

Complete each information blank. To request a hearing, check Box 13b, indicate the kinds of benefits claimed by checking the box(es) at Lines 6, 7, 8, and 9, and file this form in duplicate.

A claim for workers' compensation benefits is made based on the following grounds Date of Injury or Illness: on or about 11/1/2008

☒ Injury ☐ Illness ☐ Repetitive Trauma

- 1a. The claimant sustained an injury to left shoulder/arm/elbow (Part(s) of Body Injured) on or about 11/1/2008 (Month/Day/Year) in Aiken county, state of SC.
1b. Body part(s) affected are: left shoulder/arm/elbow

Briefly describe how the accident occurred. Claimant was delivering furniture when heavy object caused hyperextension of left arm.

2. Both the claimant and the employer were subject to the South Carolina Workers' Compensation Act at the time of injury.
3. The relationship of employer and employee existed at the time of injury.
4. At the time of the injury the claimant was performing services arising out of and in the course of employment.
5. Notice of the accidental injury was given to the Employer on 11/2/2008 (Month/Day/Year) in the following manner:
Verbally to Randy Stevenson

☒ 6. Due to injury, the claimant is in need of (check one):

- ☐ (a) medical examination and treatment for: _____
☐ (b) additional medical examination and treatment for: above-referenced injuries

☒ 7. Due to injury, the claimant requests temporary total disability benefits because of lost compensable time from work and wages for the period of:
To Be Determined

☒ 8. Due to the injury, the Claimant has permanent disability of the following nature and extent (check one): (extent & nature of disability to be determined)

- ☐ (1) General Disability: ☐ Total ☐ (2) Specific Disability: ☐ Total
☐ (3) Wage Loss ☐ Partial ☐ Partial

☐ 9. Due to the injury, the Claimant has a serious bodily disfigurement consisting of:

10a. At the time of the injury, the Claimant was paid weekly wages of \$Max CR, and demands accounting of days worked and wages earned as provided by law.

10b. Give names and addresses of all employers for whom the Claimant has worked since the date of the accident:

11a. Further grounds or unusual aspects of claim: The Claimant asserts any and all other benefits available to the Claimant pursuant to the South Carolina Workers' Compensation Act. Claimant also reserves the right to amend.

11b. List names and addresses of all physicians or other medical specialists who have seen or treated the Claimant as a result of the accident:
LMC and LFP, West Columbia, SC; Doctor's Care, Lexington, SC; Lexington Ortho, Lexington, SC; University of FL Physicians, Gainesville, FL

11c. To the best of your knowledge, did you have any prior permanent disability? yes
If yes, describe: prior Surgeries to L arm/shoulder and other injuries from 1987 or 1988 work-related fall

12. Appropriate benefits as provided in the Act for the above grounds and other relief as the Workers' Compensation Commission may direct as just and proper.

☒ 13a. I am filing a claim. I am not requesting a hearing at this time.

☐ 13b. I am requesting a hearing. A \$25 fee is required.

14. Estimated time needed for hearing: 30 minutes

I verify the contents of this form are accurate and true to the best of my knowledge.

Preparer's Signature - Paula Howker Amick

Attorney for Claimant
Title _____

pamick@sinklaw.com
Email _____

RECEIVED
S.C. WORKERS' COMP. COMM.
FILING OFFICE
3/4/09
Date

Refer to R.67-204 through R.67-210 and R.67-601 through R.67-615. Questions about the use of this form may be directed to the Commission's Claims Department.

WCC Form # 50
Revised 9/07

50

Employee's Notice of Claim and/or
Request for Hearing

SOUTH CAROLINA WORKERS' COMPENSATION COMMISSION
WCC FILE NUMBER 0818219

Joseph A. Osmanski,

Claimant,

v.

Watkins Shepard Trucking,

Employer.

and

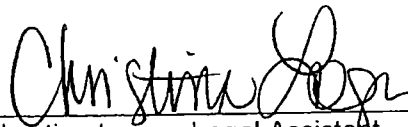
Zurich American Insurance Company,

Carrier,

CERTIFICATE OF SERVICE

I hereby certify that on this day, March 4, 2009, I mailed copies of the attached Pre-Hearing Brief, Form 50 and Notice of Witnesses/Evidence with APA Submissions by depositing same with the U.S. Postal Service, postage pre-paid, for first-class delivery to Defendant's attorney, addressed as follows:

Mr. Jason W. Lockhart
McAngus Goudelock & Courie, L.L.C.
70 Gervais Street, Suite 300
Post Office Box 12519
Columbia, SC 29211-2519



Christina Logan, Legal Assistant
George Sink, P.A.
Attorney for Employee/Claimant

Columbia, SC
March 4, 2009

Workers' Compensation Commission

33 Main Street, suite 500 • Post Office Box 1715
 Columbia, South Carolina 29202-1715
 (803)737-5723



WCC File #: 0818219

Carrier File #: 2800063420-001

Carrier Code #:

Employer FEIN #:

Joe A. Osmanski

Claimant's Name SSN

Pelion, South Carolina 29123

Address City State Zip

(803) 687-0866

Home Phone #

Work Phone #

Jason W. Lockhart

McAngus Goudelock & Courie

Preparer's Name

Law Firm

Watkins & Shepard Trucking, Inc

Employer's Name

Missoula, Montana 59808

Address City State Zip

Zurich North America

Insurance Carrier

(803) 227-2283

Phone Number

Date of Accident: 11/1/08

Complete each information blank. Specify clearly when contentions are admitted in part and denied in part.
 The employer-insurance carrier in answer to the claim, respectfully shows:

1. It is **denied** that the employee sustained an injury on or about the date set forth in the application. The reasons for denial are: The investigation of the Employer/Carrier does not reveal a compensable injury by accident within the course and scope of the Claimant's employment. In addition, the Employer/Carrier maintain that the Claimant's current problems with his left elbow, left shoulder, and/or left upper extremity are not causally connected to his alleged November 1, 2008 work-related accident.
2. It is **admitted** that both the employer and employee were subject to the Workers' Compensation Act at the time in question. The reasons for denial are: See Number 1 above.
3. It is **denied** that the relationship of employer and employee existed at the time in question. The reasons for denial are: See Number 1 above.
4. It is **denied** that at the time in question the employee was performing service growing out of and incidental to his employment. The reasons for denial are: See Number 1 above.
5. It is **admitted** that notice of injury was given to the employer. The reasons for denial are: See Number 1 above.
6. It is **denied** that the employee needs/is entitled to additional medical care as a result of the injury. The reasons for denial are: The Employer/Carrier maintains that there is no medical evidence to support the Claimant's entitlement to additional medical treatment.
7. It is **denied** that the employee is entitled to temporary total disability for the period(s) of: The Employer/Carrier maintain that there is no medical evidence to support the Claimant's entitlement to temporary total disability benefits.
8. It is **denied** that the employee is permanently disabled. The reasons for denial are: The Employer/Carrier maintain that there is no medical evidence to support the Claimant's entitlement to permanent disability benefits.
9. It is **denied** that the employee has a serious disfigurement.
10. It is contended that an average weekly wage of \$Form 20 to be submitted applies, according to attached accounting of employee's earnings as provided by law.
11. Further contentions or grounds of defense are: The Employer/Carrier maintain that the Claimant will be unable to satisfy his burden of proof pursuant to §42-1-160 and/or §42-9-35 of the Act. In addition, the Employer/Carrier maintain that the Claimant's claim for compensation would be barred on the basis that the Claimant engaged in fraud in the application of employment with the Employer.
12. Estimated time needed for hearing: 2 hours

I certify that I have served this document pursuant to R.67-211 by delivering a copy to:

David T. Pearlman, Esquire
 The Steinberg Law Firm, L.L.P.
 Post Office Box 9
 Charleston, South Carolina 29402-0009

on the 28th day of January, 2010 by ☒ first class mail; ☐ personal service; ☐ certified mail.
 I verify the contents of this form are accurate and true to the best of my knowledge.

Preparer's Signature

Attorney for Employer/Carrier
 Title

jlockhart@mgclaw.com
 Email

January 28, 2010
 Date

Refer to R.67-204 through R.67-210 and R.67-601 through R.67-615. Questions about the use of this form may be directed to the Commission's Judicial Department. Pursuant to R.67-606, a Form 20 must be filed with the Claims Department at least 30 days from the date of filing this form.

South Carolina Workers' Compensation Commission
1333 Main Street, Suite 500
Post Office Box 1715
Columbia, South Carolina 29202-1715
803-737-5723



WCC File #: 0818219
Carrier File #: _____
Carrier Code #: _____
Employer FEIN #: _____

Claimant's Name: Joe Osanski Employer's Name: Watkins Shepard Trucking
Address: _____ Address: _____
City: Pelion State: SC Zip: 29123 City: Hickory State: NC Zip: 28601
Home Phone: (803) 894-7661 Work Phone: _____ Insurance Carrier: Zurich American Insurance Co.
Preparer's Name: Kevin B. Smith, Esquire Law Firm: The Steinberg Law Firm Preparer's Phone #: (843) 720-2800

Request for Commission Review by ☒ claimant ☐ employer (check one) Date of injury: November 1, 2008

The undersigned makes application for review of the findings of the Commissioner in the above captioned case. The request for review is based on the following grounds: (State the grounds of your appeal in the form of questions presented. Each question presented must contain a concise statement of one proposition of law or fact. Refer to evidence by title and exhibit number. Use additional pages, if necessary).

Please see attached.

(Check one) Oral argument ☒ is ☐ is not requested. Appellant's request for oral argument is waived if not indicated on this form.

I certify that I have served this document pursuant to R.67-211 by delivering a copy to Jason Lockhart, Esquire, McAngus, Goudelock, and Courie, P.O. Box 12519, Columbia, SC 29211.

on the 29 day of November, 2009 by ☒ first class mail; ☐ personal service; ☒ certified mail.

Preparer's Signature: [Signature]

Attorney for the Claimant
Title

November 29, 2010
Date

Check this box if you are not represented by an attorney ☐

If the claimant appeals and is representing himself or herself, the Judicial Department will prepare the additional copies of this form and serve this form on the opposing party. R.67-701 B. Otherwise, file the original and 4 copies of this form with the Judicial Department. The appeal must be postmarked no later than 14 days from the date of service of the Hearing Commissioner's decision. R.67-701 and R.67-205. Attach the filing fee to this form. Attach a Form 32 if you are unable to pay the filing fee. Refer to R.67-701 through R.67-711 for additional information.

WCC FORM #30

REV. DATE 3/97

30

REQUEST FOR COMMISSION REVIEW

GROUND\$ FOR REVIEW

Claimant: Joe Osmanski
Employer/Carrier: Watkins Shepard Trucking
WCC No.: 0818219

- FIRST:** The Hearing Commissioner erred in failing to find as fact and conclude as a matter of law that the Claimant sustained a compensable injury by accident on November 1, 2008.
- SECOND:** The Hearing Commissioner erred as a matter of law in failing to find and conclude that the Defendants' defenses were inapplicable to the facts of this claim.
- THIRD:** The Hearing Commissioner erred in finding of fact No. 3; the error being the substantial evidence in the record does not support this finding and it also constitutes an error of law.
- FOURTH:** The Hearing Commissioner erred in finding of fact No. 8; the error being the substantial evidence in the record does not support this finding and it also constitutes an error of law.
- FIFTH:** The Hearing Commissioner erred in finding of fact No. 10; the error being the substantial evidence in the record does not support this finding and it also constitutes an error of law.
- SIXTH:** The Hearing Commissioner erred in finding of fact No. 13; the error being the substantial evidence in the record does not support this finding and it also constitutes an error of law.
- SEVENTH:** The Hearing Commissioner erred in finding of fact No. 14; the error being the substantial evidence in the record does not support this finding and it also constitutes an error of law.
- EIGHTH:** The Hearing Commissioner erred in finding of fact No. 15; the error being the substantial evidence in the record does not support this finding and it also constitutes an error of law.
- NINTH:** The Hearing Commissioner erred in finding of fact No. 17; the error being the substantial evidence in the record does not support this finding and it also constitutes an error of law.
- TENTH:** The Hearing Commissioner erred in finding of fact No. 18; the error being the substantial evidence in the record does not support this finding and it also constitutes an error of law.

- ELEVENTH: The Hearing Commissioner erred in finding of fact No. 20; the error being the substantial evidence in the record does not support this finding and it also constitutes an error of law.
- TWELFTH: The Hearing Commissioner erred in finding of fact No. 21; the error being the substantial evidence in the record does not support this finding.
- THIRTEENTH: The Hearing Commissioner erred in finding of fact No. 22; the error being the substantial evidence in the record does not support this finding.
- FOURTEENTH: The Hearing Commissioner erred in finding of fact No. 25; the error being the substantial evidence in the record does not support this finding and it also constitutes an error of law.
- FIFTEENTH: The Hearing Commissioner erred in finding of fact No. 26; the error being the substantial evidence in the record does not support this finding and it also constitutes an error of law.
- SIXTEENTH: The Hearing Commissioner erred in finding of fact No. 27; the error being the substantial evidence in the record does not support this finding and it also constitutes an error of law.
- SEVENTEENTH: The Hearing Commissioner erred in finding of fact No. 28; the error being the substantial evidence in the record does not support this finding and it also constitutes an error of law.
- EIGHTEENTH: The Hearing Commissioner erred in finding of fact No. 29; the error being the substantial evidence in the record does not support this finding and it also constitutes an error of law.
- NINETEENTH: The Hearing Commissioner erred in finding of fact No. 30; the error being the substantial evidence in the record does not support this finding and it also constitutes an error of law.
- TWENTIETH: The Hearing Commissioner erred as a matter of law in Conclusion of Law No. 3; the error being the substantial evidence in the record does not support this finding and it also constitutes an error of law.
- TWENTY-FIRST: The Hearing Commissioner erred as a matter of law in Conclusion of Law No. 4; the error being the substantial evidence in the record does not support this finding and it also constitutes an error of law.

TWENTY-SECOND: The Hearing Commissioner erred as a matter of law in Conclusion of Law No. 5; the error being the substantial evidence in the record does not support this finding and it also constitutes an error of law.

TWENTY-THIRD: The Hearing Commissioner erred as a matter of law in failing to address or even consider the Claimant's arguments concerning fraud and the cases of Outlaw v. Calhoun Life and Hansen v. DHL Laboratories.

TWENTY FOURTH: The Hearing Commissioner erred as a matter of law in failing to set forth reasons for disbelieving the Claimant and his doctors so as to enable meaningful appellate review.

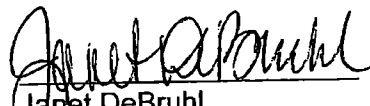
CERTIFICATE OF SERVICE

I hereby certify that on November 29, 2010, I served the Defendant in the foregoing matter with a copy of the attached WCC Form No. 30 (Request for Commission Review) by mailing a copy of same via certified mail and first class mail, postage pre-paid and addressed as follows:

S.C. Workers' Compensation Commission
P.O. Box 1715
Columbia, SC 29202

Jason Lockhart, Esquire
McAngus, Goudelock, and Courie
P.O. Box 12519
Columbia, SC 29211
Attorney For: Watkins Shepard Trucking

By:


Janet DeBruhl

Received
10/15/10
11:19

SOUTH CAROLINA WORKERS' COMPENSATION COMMISSION

W.C.C. FILE NO: 0818219

JOE A. OSMANSKI,

Employee,

Claimant,

vs.

WATKINS & SHEPARD TRUCKING, INC,

Employer,

AND

ZURICH NORTH AMERICA,

Carrier,

Defendants.

DECISION AND ORDER

DATE OF HEARING:

Hearing held in Columbia, South Carolina on April 29 2010.

APPEARANCES:

Claimant represented by David T. Pearlman, Esquire of The Steinberg Law Firm, L.L.P. of Charleston, South Carolina.

Defendants represented by Jason W. Lockhart, Esquire of McAngus Goudelock & Courie, L.L.C. of Columbia, South Carolina.

PURPOSE OF THE HEARING: To determine all issues as set forth in Forms 50 and 51.

COMMISSIONER:

Commissioner Susan S. Barden

FILED:

November 10, 2010

APA SUBMISSIONS

Pursuant to the South Carolina Administrative Procedures Act and Regulations of the South Carolina Workers' Compensation Commission, the following records were submitted into evidence.

The Claimant submitted the following exhibits:

1. Al Osbahr, M.D., Statement, dated 11/05/09, consisting of 1 page. (Claimant's APA #1).
2. Larry K. Chidgey, M.D., Questionnaire, dated 04/03/09, consisting of 2 pages. (Claimant's APA #2).
3. Larry K. Chidgey, M.D., Medical Records, dated 01/12/09 – 05/14/09, consisting of 9 pages. (Claimant's APA #3).
4. Al Osbahr, M.D., Medical Examination Medical Examiner's Certificate, dated 10/30/06, consisting of 3 pages. (Claimant's APA #4).
5. Watkins Shepard Trucking, Employee History, dated 01/31/07 – 11/01/08, consisting of 1 page. (Claimant's APA #5).
6. Watkins Shepard Trucking, Correspondence, dated 01/30/07 – 11/24/08, consisting of 4 pages. (Claimant's APA #6).
7. Gerald J. Shealy, M.D., Medical Records, dated 05/21/09 – 08/25/09, consisting to 7 pages. (Claimant's APA #7).
8. Gerald J. Shealy, M.D., Operative Notes, dated 07/08/09, consisting to 2 pages. (Claimant's APA #8).
9. Various Providers, Diagnostics, dated 11/02/08 – 01/12/09, consisting of 10 pages. (Claimant's APA #9).

10. John Fisher, M.D., Medical Notes, dated 10/22/08 – 11/13/08, consisting of 1 page. (Claimant's APA #10).
11. John Fisher, M.D., Medical Examiner's Certificate, dated 10/22/08, consisting of 1 page. (Claimant's APA #11).
12. James F. Bethea, Medical Records, dated 12/23/08, consisting of 2 pages. (Claimant's APA #12).
13. Lexington Orthopaedics, Medical Records, dated 11/2/08 – 11/06/08, consisting of 3 pages. (Claimant's APA #13).
14. Larry K. Chidgey, M.D., Medical Records, dated 08/5/88 – 11/01/01, consisting of 7 pages. (Claimant's APA #14).

The Defendants submitted the following exhibits:

1. James C. McIntosh, M.D., dated 11/06/08 – 11/20/08, consisting of 2 pages. (Defendants' APA #15).
2. Lexington Medical Center – Lexington, dated 11/02/08 – 11/04/08, consisting of 3 pages. (Defendants' APA #16).
3. John H. Fisher, Jr., M.D., Lexington Family Practice, dated 10/22/08 – 11/13/08, consisting of 6 pages. (Defendants' APA #17).
4. Gerald J. Shealy, M.D., Charleston Hand Group, LLC, dated 11/10/09 – 02/22/10, consisting of 4 pages. (Defendants' APA #18).
5. Larry K. Chidgey, M.D., dated 02/19/92 – 03/22/02, consisting of 20 pages. (Defendants' APA #19).
6. Shands Hospital at the University of Florida, dated 08/23/88 – 11/02/01, consisting of 19 pages. (Defendants' APA #20).

7. Watkins & Shepard Trucking, Inc. Post Job Offer Questionnaire, dated 10/30/06, consisting of 1 page. (Defendants' APA #21).
8. Medical Examination Report for Commercial Driver Fitness Determination, dated 10/30/06, consisting of 1 page. (Defendants' APA #22).
9. Watkins & Shepard Trucking, Inc. Driver Procedural Manual and Driver Policy Manual Receipt Acknowledgment, consisting of 1 page. (Defendants' APA #23).
10. Watkins & Shepard Trucking, Inc. Guidelines for Appropriate Conduct, consisting of 2 pages. (Defendants' APA #25).
11. Life Care Services Job Analysis, dated 06/07/06, consisting of 10 pages. (Defendants' APA #26).

STIPULATIONS

The parties stipulate to the following:

1. The Claimant's average weekly wage is One Thousand Sixty Eight and 84/100 Dollars (\$1068.84.) with a corresponding compensation rate of Six Hundred Sixty One and 29/100 Dollars (\$661.29).
2. Notice of the hearing was timely and properly served on all parties of interests.
3. The South Carolina Worker's Compensation Commission has jurisdiction over the claim.
4. Venue is proper in Lexington County, but, pursuant to the consent of both parties, the hearing was conducted in Richland County.

STATEMENT OF THE CASE

The hearing was scheduled pursuant to the Form 50 filed by the Claimant on January 20, 2010. The Claimant maintained that he sustained a compensable injury to the left upper extremity while in the course and scope of his employment with the Defendants on November 1, 2008. The Claimant maintained that he was entitled to authorized medical treatment with Dr. Shealy and temporary total disability benefits from November 1, 2008 to the present and continuing.

In response, the Defendants maintained that the Claimant would be unable to satisfy his burden of proving a compensable injury to the left upper extremity while in the course and scope of his employment with the employer. In addition, the Defendants took the position that the Claimant was not entitled to benefits on the basis that the Claimant engaged in fraud in the application, when he obtained employment with the employer in November 2006, where the Claimant misrepresented his physical condition to the employer in November 2006.

EVIDENCE OF THE CASE

The Claimant was the only witness to testify on his behalf. The Claimant testified that he is currently 45 years of age, and resides in Pelion, South Carolina with his wife and nine children. (Hr'g Tr. p. 24, Deposition of Claimant pp. 5-6). The Claimant stated that he last completed the 11th grade, but has not obtained his GED or high school equivalent. (Hr'g Tr. pp. 24-25). The Claimant indicated that he sustained injuries to the left elbow, right elbow, left shoulder, right shoulder, left wrist, and right wrist as a result of a work-related injury that occurred in December 1987. (Hr'g Tr. pp. 25-26; Deposition of Claimant pp. 9-10). The Claimant testified that he sought and received medical treatment with Dr. Chidgey as a result of the injuries sustained in his 1987 work-related accident. (Hr'g Tr. pp. 25-28; Deposition of

Claimant pp. 12-14). Dr. Chidgey determined that the Claimant reached maximum medical improvement on March 20, 2002 and assigned a 20% impairment rating to the left upper extremity. (Defendants' APA #19, p. 88 (c)). The Claimant stated that he received weekly workers' compensation benefits, as a result of his 1987 work-related accident, for approximately 7 years, and eventually received a settlement in the amount of approximately \$86,000.00. (Deposition of Claimant, p. 15).

The Claimant testified that he contacted Watkins & Shepard Trucking, Inc. (the "Employer") in 2006 regarding possible employment as a truck driver. (Deposition of Claimant, p. 21). The Claimant stated that he was extended an offer of employment by Rodney Stephens, who instructed the Claimant to travel to Hickory, North Carolina for purposes of completing activities prior to the Claimant's beginning employment with Watkins & Shepard Trucking, Inc. as a truck driver. (Deposition of Claimant, pp. 21-22). The Claimant indicated that, while in Hickory, North Carolina, he underwent a D.O.T. physical, which was conducted by Dr. Osbahr. (Hr'g Tr. p. 35, Deposition of Claimant, p. 22). Most notably, the Claimant testified that he informed Dr. Osbahr of his previous work-related left upper extremity injury, and informed Dr. Osbahr that he had undergone multiple surgeries on the left upper extremity, including a left elbow replacement. (Hr'g Tr. pp. 36-39). The Claimant stated that he also underwent a lift test, pursuant to the request of the Employer, and successfully completed the lift test. (Hr'g Tr. p. 39, ll. 3-22). The Claimant testified that he did not re all anyone at Watkins & Shepard Trucking, Inc. asking him about prior injuries. (Hr'g Tr. pp. 40-41; Deposition of Claimant, p. 22, ll. 19-25, p. 23, ll. 23-25, p. 24, ll. 1-17). The Claimant testified that he was of the opinion that he was able to perform his job duties as a truck driver with Watkins & Shepard Trucking, Inc. (Hr'g Tr. pp. 39-40).

The Claimant testified that he began working with Watkins & Shepard Trucking, Inc. in October 2006 as a truck driver, and that his job duties and responsibilities required the Claimant to engage in physical activities such as lifting, pulling and pushing. (Hr'g Tr. p. 40, ll. 8-21, p. 42, ll. 15-19). Most notably, the Claimant stated that he did not experience any problems with his left upper extremity, while working with Watkins Shepard Trucking, Inc., prior to his November 2008 work-related accident. The Claimant indicated that he injured his left upper extremity while in the course and scope of his employment with the Employer on November 1, 2008. (Hr'g Tr. pp. 43-44). More specifically, the Claimant testified that he hyperextended his left elbow while attempting to break down freight weighing 100-150 lbs while in the course and scope of his employment with the Employer. (Hr'g Tr. pp. 43-44; Deposition of Claimant, pp. 30-31).

The Claimant testified that he has sought and received medical treatment from multiple physicians, for the injuries he sustained in his alleged November 2008 work-related accident, including Dr. Bethea, Dr. Chidgey, Dr. McIntosh, and Dr. Shealy. (Hr'g Tr. p. 44). The Claimant stated that he has sought and received medical treatment from Dr. Shealy, who is an orthopaedic physician in Charleston, South Carolina, in the form of 3 surgeries, including the replacement and repair of the Claimant's left elbow prosthesis. (Hr'g Tr. pp. 44-45; Claimant's APA ## 7-8). The Claimant indicated that he has not been released from the care of Dr. Shealy, and is currently being placed out of work by Dr. Shealy due to his work-related left upper extremity injury. (Hr'g Tr. pp. 45-46).

On cross-examination, the Claimant testified that he was released from the care of Dr. Chidgey in March 2002. (Hr'g Tr. pp. 55-57; Deposition of Claimant, p. 14, ll. 10-24). Most notably, the Claimant stated that, when he was released from the care of Dr. Chidgey in March

2002, he was aware that he had been provided with a permanent restriction by Dr. Chidgey of no lifting in excess of 10-15 pounds with the left upper extremity. (Hr'g Tr. pp. 55-57; Defendants' APA #19, pp. 88(a)-(c)). The Claimant indicated that his job duties and responsibilities with Watkins & Shepard Trucking, Inc. were outside of the permanent work restrictions, which he had been provided by Dr. Chidgey. (Hr'g Tr. pp. 55-57, pp. 64-65). The Claimant testified that he was of the opinion that he was physically capable of performing his job duties and responsibilities with Watkins & Shepard Trucking, Inc., despite the permanent work restriction that had been placed upon the Claimant by Dr. Chidgey, and that he would have informed the Employer of the above-referenced permanent work restriction had the Employer questioned the Claimant as to whether he possessed any permanent work restrictions. (Hr'g Tr. pp. 57-59). Most interestingly, the Claimant stated that, while he was not questioned by Watkins & Shepard Trucking, Inc. regarding any permanent work restrictions prior to his beginning employment with the Employer, he did not voluntarily inform Watkins & Shepard Trucking, Inc. that he possessed a permanent lifting restriction, with regards to the left upper extremity, prior to this beginning employment with Watkins & Shepard Trucking, Inc. in November 2006. (Id.).

The Claimant testified that he possessed limited range of motion of the left elbow and some occasional numbness of the left upper extremity prior to his November 2008 work-related accident. (Hr'g Tr. p. 61). Despite the deposition testimony of Dr. Osbahr, the Claimant stated that he informed Dr. Osbahr of his 1987 work-related accident as well as the multiple surgeries, which the Claimant underwent as a result of his 1987 work-related accident. (Hr'g Tr. pp. 46-49, 62-63). The Claimant indicated that he did not misrepresent any impairment, which he possessed with regard to the left upper extremity, when completing forms associated with his D.O.T. physical as he was under the impression that he did not possess any impairment to the left upper

extremity as a result of his 1987 work-related accident. (Hr'g Tr. pp. 60-62; Deposition of Claimant, p. 47). The Claimant indicated that he was of the opinion that his prior work-related left upper extremity injury did not prevent the Claimant from performing his job duties and responsibilities with Watkins & Shepard Trucking, Inc. as a truck driver. (Hr'g Tr. p. 59).

The deposition of Larry Chidgey, M.D., was taken on March 15, 2010. Dr. Chidgey is an expert in the orthopedic medicine. Dr. Chidgey testified that he began treating the Claimant in 2000 for treatment of a severe left elbow injury. (Deposition of Dr. Chidgey, pp. 4-5). Dr. Chidgey testified that he provided the Claimant with treatment in the form of two surgeries, including placement of an artificial elbow joint in September of 2000 and a procedure on the ulnar nerve of the Claimant's left elbow. (Deposition of Dr. Chidgey, p. 5). Dr. Chidgey testified that on February 11, 2002 he recommended a 10lb lifting restriction indefinitely for the Claimant's left upper extremity due to the Claimant's total elbow arthroplasty. (Deposition of Dr. Chidgey, p. 8). Thereafter, on March 22, 2002, Dr. Chidgey recommended a lifting restriction of 10-15 lbs after the Claimant underwent a functional capacity evaluation. (Deposition of Dr. Chidgey, p. 9). Dr. Chidgey testified that the Claimant was informed of these restrictions and understood the restrictions that had been recommended by Dr. Chidgey. (Deposition of Dr. Chidgey, p. 7, 10, 21). Dr. Chidgey testified that he released the Claimant on March 22, 2002 and assigned a 14% impairment rating to the upper extremity. (Deposition of Dr. Chidgey, p. 10; Defendants' APA #19, p. 88 (c)). Although Dr. Chidgey testified that the Claimant's work restrictions were permanent unless things changed, Dr. Chidgey also testified that there was no medical evidence to suggest that the Claimant's condition had changed between March 2002 and the date of the Claimant's alleged November 2008 work-related accident. (Deposition of Dr. Chidgey, p. 12).

Dr. Chidgey testified that he examined the Claimant on January 12, 2009 following the Claimant's alleged 2008 work-related accident. Dr. Chidgey testified that there were some concerns that the Claimant's implant had possibly loosened as well as a biceps tendon rupture. (Deposition of Dr. Chidgey, pp. 17-18). The Claimant was most recently examined by Dr. Chidgey on April 1, 2009. (Deposition of Dr. Chidgey, p. 18).

The deposition of Albert James Osbahr, M.D. was taken on March 15, 2010. Dr. Osbahr is an expert in occupational medicine. Dr. Osbahr testified that he provided the Claimant with a D.O.T. examination as a new hire for Watkins Shepard Trucking, Inc. on October 30, 2006. (Deposition of Dr. Osbahr, p. 6). Dr. Osbahr testified that he had no recollection of the Claimant informing him of the Claimant's 1987 work-related accident. (Deposition of Dr. Osbahr, p. 7). Dr. Osbahr also testified that the Claimant failed to inform him that the Claimant had undergone left elbow replacement surgery in 2000. (Deposition of Dr. Osbahr, p. 7). Although Dr. Osbahr identified some impairment with regards to the Claimant's left arm during the examination, Dr. Osbahr testified that the Claimant failed to inform that Dr. Chidgey had assigned a 14% impairment rating to the Claimant's left arm. (Deposition of Dr. Osbahr, pp. 8-10). Dr. Osbahr further testified that the purpose of his examination of the Claimant was to determine if the Claimant's physical condition met the general standards as set forth by D.O.T. and not necessarily the specific requirements of the job for Watkins & Shepard Trucking, Inc. In fact, Dr. Osbahr confirmed that at the time of the examination he had no information with regards to the particular job that the Claimant was to perform for Watkins & Shepard Trucking, Inc. (Deposition of Dr. Osbahr, pp. 11-14).

The deposition of Matthew Grandy was taken on March 17, 2010. Mr. Grandy testified that he is the Director of Driver Recruiting and Training for Watkins & Shepard Trucking, Inc.,

and has worked for the Employer from 1989 to 1999 and then again starting in January 2008. Mr. Grandy testified that all hiring for Watkins & Shepard Trucking, Inc. is conducted from corporate headquarters in Missoula, Montana. Mr. Grandy testified that the company engages in a post job offer phase in order to identify an individual's ability to perform the job. (Deposition of Grandy, pp. 9-10). Mr. Grandy testified that a conditional offer of employment is contingent upon a drug test, a lift test, a D.O.T. physical, as well as the post-job offer questionnaire administered by the safety department. (Deposition of Grandy, pp. 10, 18). Mr. Grandy further testified that, had the Claimant provided Watkins Shepard Trucking, Inc. with accurate information regarding the permanent work restrictions, which were placed upon the Claimant by Dr. Chidgey, the Claimant would not have been subjected to a lift test. (Deposition of Grandy, p. 25). Rather, the Employer would have conducted further research, including obtaining a copy of the Claimant's work release for the treating physician. (Deposition of Grandy, pp. 25-26). Mr. Grandy further testified that the Employer would want any medical records regarding restrictions in order to conduct a thorough investigation in order to determine if an applicant is physically capable of performing a job. (Deposition of Grandy, pp. 25-27).

The deposition of Rodney Stephens was taken on March 10, 2009. Mr. Stephens testified that he is a terminal manager for Watkins & Shepard Trucking, Inc. Mr. Stephens testified that the Claimant worked for the Employer as a delivery driver for nearly 2 years and was required to lift over 100lbs daily while delivering furniture. (Deposition of Stephens, pp. 7-8, p. 18). Mr. Stephens testified that he was the Claimant's direct supervisor while the Claimant was employed with Watkins & Shepard Trucking, Inc. (Deposition of Stephens, pp. 18-19). Mr. Stephens testified that the Claimant did not inform him of his 1987 work-related accident or that he had

been provided permanent lifting restrictions by Dr. Chidgey. (Deposition of Stephens, pp. 19-20).

FINDINGS OF FACT

Based upon the testimony and exhibits submitted, the undersigned Commissioner makes the following findings of fact:

1. The parties hereto are subject to and bound by the South Carolina Workers' Compensation Act.
2. The Claimant's average weekly wage is One Thousand Sixty Eight and 84/100 Dollars (\$1068.84.) with a corresponding compensation rate of Six Hundred Sixty One and 29/100 Dollars (\$661.29).
3. The Claimant alleges that he injured his left upper extremity (elbow and biceps) in a work-related accident on November 1, 2008, a claim I find is not supported by the greater weight of the evidence.
4. The Claimant is 45 years of age and resides in and resides in Pelion, South Carolina with his wife and children. (Deposition of Claimant, pp. 5-9).
5. The Claimant has 9 children between the ages of 3 and 24, eight of whom reside with Claimant and seven of whom are under the age of 18. (Deposition of Claimant, p. 7).
6. The Claimant's wife is unemployed. (Deposition of Claimant, p. 21, ll. 1-2).
7. The Claimant last completed the 11th grade, and has not obtained his GED or high school equivalent. (Hr'g Tr. p. 25, ll. 1-4).
8. Prior to the alleged accident in issue, the Claimant underwent left total elbow replacement surgery (after other multiple elbow surgeries) for a 1987 workers' compensation injury for which the Claimant received a settlement of approximately

\$86,000. After the prior total elbow replacement surgery, the Claimant was assigned permanent lifting restrictions of 10 to 15 lbs. for his left arm. The Claimant admitted at the hearing that he knew he was subject to the 10-15 lb. lifting restriction when he began work for Employer in 2006, that the treating physician who assigned the restriction did not subsequently lift it, and that he (Claimant) was subject to the restriction on the date of the alleged accident in issue. ((Hr'g Tr. pp. 55-57, pp. 64-65); Defendants' APA #19 and #20; Deposition of Claimant, pp. 9, 11, 15, and 44-45; Deposition of Dr. Chidgey, p. 22; Claimant's APA #14, pp. 50-53).

9. The Claimant underwent the elbow replacement surgery in September 2000, and then ulnar nerve neurolysis surgery in November 2001. After the elbow replacement surgery, the Claimant's treating physician records state that the physician "again stressed the importance of limited use of the Claimant's left arm to increase the longevity of this prosthesis," the that Claimant "will always have a 15 lb. weight limit restriction [later changed to 10-15] for the left upper extremity," and that the Claimant "should also avoid situations where he might fall or excessively stress his left arm. We stressed this multiple times today, and the patient stated he understands." The Claimant was released from care in March 2002 (after an FCE), and assigned a 20% impairment rating. (Defendants' APA #19, pp. 83, 86, and 88a-c; Claimant's APA #14, p. 50-53; Deposition of Dr. Chidgey, pp. 6-12 and 22).
10. Notwithstanding his hearing testimony, the Claimant gave inconsistent sworn deposition testimony that he did "not recall" whether or not he had any restrictions

after the 1987 workers' compensation injury and related elbow surgeries. (Deposition of Claimant, p. 17).

11. In addition to the previous left elbow surgeries, the Claimant also underwent 3 previous surgeries to his left shoulder and 1 to the right elbow. The condition of the Claimant's left shoulder was referred to as "complex" in 1998 and 1999. (Defendants' APA #19, pp. 70-72, dated 1998 and June 1999, referring to "two previous" left shoulder surgeries; Defendants' APA #2Q, pp. 94-95, containing the operative notes of the third left shoulder surgery; Claimant's APA #12, p. 42; testimony of Claimant; Claimant's APA #14, p. 47, containing a reference to the right elbow surgery).
12. Medical records from 1998 state that the Claimant has been disabled since 1987 because of his left arm. Medical evidence from 2000 states that the Claimant's pain is "disabling and barely tolerable," and that he is unable to use the arm for any significant activity. (Defendants' APA #19; pp. 72, 73, and 79; Deposition of Claimant, page 15, in which the Claimant testified that he received workers' compensation benefits for 7 years prior to receiving a settlement for the 1987 injury).
13. Although the Claimant testified at the hearing that he injured his left shoulder playing sports, he inconsistently testified in his deposition that he injured his left shoulder in the 1987 injury. Although the Claimant would admit to 1 left shoulder surgery, there actually were actually three prior surgeries. (Hr'g Tr. pp. 25-26, pp. 49-55; Deposition of Claimant, pp. 9-10, in which Claimant testified that he injured "both shoulders" in the work injury of 1987).
14. After releasing the Claimant in 2002--with a "permanent" lifting restriction of 10-15 lbs.—Dr. Chidgey did not see the Claimant again until 2009 (2 months after the

alleged accident in issue). There is no notation in Dr. Chidgey's 2002 record that the restriction imposed was only in place "unless things changed." The word "permanent," repeatedly used by Dr. Chidgey in his treatment notes prior to and after the date of the Claimant's 2002 FCE, speaks for itself and (with no qualifying language at the time the notes were written) is unequivocal. (Defendants' APA #19, pp. 88 (a) – (c)). I also note that in 2002, Dr. Chidgey warned the Claimant of the danger of excessively stressing the implant (to prolong its longevity) because of the Claimant's young age. (Defendants' APA #19). Dr. Chidgey admits that the Claimant understood that he was to avoid heavier lifting. (Deposition of Dr. Chidgey, pp. 7, 22). Therefore, I find Dr. Chidgey's 2010 attempt to retreat from the permanent restrictions he imposed in 2002 appears more than a little result-oriented. However, at the end of his deposition, Dr. Chidgey does reiterate the left arm lifting restriction as he imposed it in 2002. (Deposition of Dr. Chidgey, particularly pp. 8-14, 20-22, 26, and 28).

15. In 2006, the Claimant applied with Employer for work involving truck driving and delivering furniture. **The Claimant admitted at the hearing that prior to accepting employment he knew the job required him to lift 100-150 lbs.** (Hr'g Tr. pp. 64-65; Defendants' APA #17, p. 59; Defendants' APA #26, p. 114, and particularly pp. 117 and 121-123; Deposition of Stephens, page 7; Deposition of Grandy, pp. 23 and 26-28).
16. The Claimant's alleged accident was unwitnessed. (Hr'g Tr. pp. 43-44; Deposition of Claimant, pp. 30-31).

17. According to the Claimant, the recliner that hit the Claimant's left arm (after he pulled on it to get it down) weighed 100-150 lbs. The Claimant's job required him to use both arms. (Deposition of Claimant, pp. 30-32).
18. I find it odd and unusual that at a visit to his family doctor, Dr. Fisher, in November 13, 2008 (12 days after the date of the alleged accident), the Claimant would not (and did not) mention a work accident or work injury to his elbow. The record shows that the Claimant was in fact examined (contrary to his hearing testimony), as his abdomen is noted as "soft" with "no obvious swelling or masses." (Claimant's APA #10, page 40; Hr'g Tr. p. 66).
19. After the date of the alleged accident in issue, the Claimant's implant was noted to be loosened. The Claimant had to undergo another total elbow arthroplasty in 2009. (Deposition of Dr. Chidgey, pp. 16-18 and 31; Claimants APA #8, pp. 28-29).
20. I find that Capers defeats this claim. It is irrelevant that the Claimant: (a) may have "felt" or thought he could perform the work (notwithstanding the ongoing restrictions); (b) may have been taught "good lifting techniques" in physical therapy; (c) was able to pass Employer's lift test; or (d) was able to work without incident for Employer for 2 years before the injury in issue occurred. If the legislature intended for a Capers defense to "expire" after a certain length of time a claimant is able to work outside his restrictions without injury, it could have enacted such a measure. I decline to create an "expiration" exception to Capers.
21. The reality in this case is that the Claimant's "luck" (i.e., his ability to work outside his restrictions) eventually ran out.

22. Dr. Chidgey's most telling comments--and which certainly apply to this textbook Capers case--is Dr. Chidgey's testimony that "if you want to try and gain life out of the arthroplasty, you keep your weight [lifting] to a lower level. *If you increase that, you may get away with it.* " I find that it would be patently unfair to require Defendants to bear the burden for a risk that the Claimant knowingly and willfully chose to take, notwithstanding the Claimant's need to support his unemployed wife and large family, and to pay his mortgage. (Deposition of Dr. Chidgey, pp. 23 and 27-28; Claimant's Deposition, p. 6).
23. Even Dr. Chidgey testified that as to whether the Claimant had any problems with his left elbow between 2002 and 2009, "I can only guess" (Deposition of Dr. Chidgey, page 33).
24. As to the Claimant's claim of a biceps tendon rupture, Dr. Chidgey testified that he is not certain whether the Claimant's biceps tendon is ruptured. (Deposition of Dr. Chidgey, pages 32-34).
25. As to Defendants' McDevitt defense, I find it applies. The Claimant contends that the case is inapplicable because the Claimant's post-hire physical examination revealed some impairment (but that Employer hired the Claimant anyway, ratifying any non-disclosure on the Claimant's part), and that the Claimant "misunderstood the form" and did not intend to mislead the Employer when he denied having any pre-existing impairment or injury. The Claimant's hearing testimony—that he knew he had a prior impairment/injury but that he misinterpreted the CDL forms—seemed to the undersigned to be "canned" and rehearsed. Further, the Employer never had the opportunity to explore the full extent of the Claimant's condition because it was

concealed. Although Dr. Osbahr on his own discovered some impairment during the examination, he never knew the full extent. The Claimant's hearing testimony—that he is "certain" he showed Dr. Osbahr his surgical scars—is refuted by the testimony of Dr. Osbahr (Hr'g Tr. pp. 36-38; Deposition of Dr. Osbahr, pp. 7-13 and 18, and particularly pp. 20-22; Defendants' APA #17, p. 62; Defendants' APA #22, p. 109; Claimant's APA #4, pp. 13-14; Claimant's APA #1, p. 1).

26. I do not believe the Claimant's testimony that he does not remember the telephone conversation with Employer's agent during which the agent completed the post job offer questionnaire. I fail to see why (and do not believe) that the Employer's own agent would falsify or otherwise fail to document the Claimant's impairment and his previous workers' compensation claim. I base this finding on the fact that the Claimant has also been less than forthcoming about other information to various providers and in sworn testimony, I find that the telephonically completed document is substantiated by Grandy's testimony that the post job offer questionnaire is generally conducted by telephone ("our standard practice") when an applicant does not live in Montana. The Employer relied on the telephone document. Nonetheless, I do note that the Claimant never subsequently signed this particular form after it was completed. (Deposition of Grandy, pp. 8-15, 17-18, 30, 34-36, and 46-47; Defendants' APA #21, p. 108, dated October 30, 2006; Deposition of Stephens, pp. 17-18).

27. Because of the Claimant's failure to disclose his prior injury/impairment, the Employer had no opportunity to obtain from the Claimant's treating doctor a certification that the Claimant would have no problems doing the job. Grandy also

states that the Claimant would not have undergone the lift test if Employer had known about the Claimant's prior injury/limitations for the reason that the Claimant could have injured himself during the lift test. (Deposition of Grandy, pages 12-13, 15-16, and 28-29).

28. However, even if McDevitt does not serve to defeat this claim, Capers clearly does.
29. Dr. Chidgey's checklist/questionnaire (particularly the "pursuant to my recommendations" portion in #2) is refuted by his own medical records. Therefore, this checklist/questionnaire is given de minimis weight. (Claimant's APA #2, pages 2-3; Defendants' APA #19, pages 69-88c).
30. The Claimant's request for benefits under the Act is denied.

CONCLUSIONS OF LAW

It is concluded under the South Carolina Workers' Compensation Act, § 42-1-10, S.C. Code of Laws, et. seq., that:

1. Section 42-1-160 governs injuries by accident arising out of and in the course of employment.
2. The Claimant alleges that he sustained a compensable left upper extremity (elbow and biceps) by accident arising out of and occurring in the course and scope of his employment with the Defendants on November 1, 2008.
3. The Claimant knew he was subject to a 10-15 lb. lifting restriction when he knowingly accepted employment requiring him to lift 100-150lbs. (See Capers finding that the claimant, who worked as a dishwasher, did not sustain an injury by accident arising out of and in the course of his employment, when the claimant

knew, based on prior experiences, that detergents and water would cause him to develop contact dermatitis. The substantial evidence supported the Court's conclusion that the claimant's contact dermatitis was not accidental within the meaning of Section 42-1-160.

4. The Claimant has not carried the burden of proof, required under the South Carolina Workers' Compensation Act, to establish that his alleged left upper extremity injury arose out of and in the course and scope of his employment with the Defendants. See Clade v. Champion Laboratories, 330 S.C. 8, 496 S.E.2d 856 (1998) (the workers' compensation claimant has the burden of proving facts that show that the injury arose out of the employment, and an award of benefits must not be based on surmise, conjecture or speculation); Mims v. Nehi Bottling Co., 218 S.C. 513, 63 S.E.2d 305 (1951) (the burden is upon the claimant to prove the facts which render the injury compensable);
5. The Claimant is not entitled to any benefits or compensation under the South Carolina Workers' Compensation Act. See Cooper v. McDevitt & Street Co., 260 S.C. 463, 196 S.E.2d 833 (1973), A false statement in an employment application will bar workmen's compensation benefits when: 1) the employee knowingly and willfully makes a false representation as to his physical condition; 2) the employer relies upon the false representation and this the reliance is a substantial factor in the hiring; and 3) there is a causal connection between the false representation and the injury.
6. Section 42-1-140 governs average weekly wage.
7. The Claimant's average weekly wage is One Thousand Sixty Eight and 84/100

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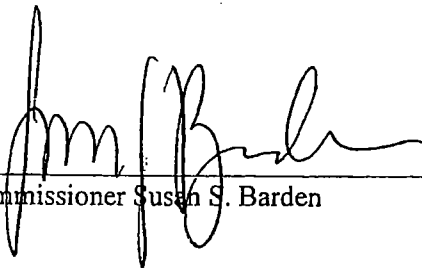
Dollars (\$1068.84.) with a corresponding compensation rate of Six Hundred Sixty
One and 29/100 Dollars (\$661.29).

ORDER

IT IS HEREBY ORDERED, that the greater weight of the evidence supports a finding that this claim is denied because the Claimant failed to satisfy his burden of proof that he suffered a compensable injury by accident to the left upper extremity arising out of and in the course of his employment with the Defendants on November 1, 2008.

IT IS FURTHER ORDERED, that the greater weight of the evidence supports a finding that the Defendants are not responsible for providing the Claimant with any benefits or compensation under the South Carolina Workers' Compensation Act.

AND IT IS SO ORDERED.



Commissioner Susan S. Barden

CERTIFICATE OF SERVICE

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

DP
JL

This 10th day of November, 2010.

By KRISTI LOVE
Administrative Assistant to the Commissioner

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Transcript of the Testimony of
WCC HEARING Osmanski Watkins & Shepard

Date: April 18, 2011

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BEFORE THE
SOUTH CAROLINA WORKERS' COMPENSATION COMMISSION

Joe Osmanski,)
 Claimant,) Claim No. 0818219
)
 -vs-)
)
Watkins & Shepard,)
 Employer,))
)
 and)
)
Zurich North America,)
 Carrier/))
 Defendants.))
- - - - -)

FULL COMMISSION PANEL HEARING

- - - - -
Monday, April 18th, 2011
4:00 p.m. - 4:22 p.m.
- - - - -

The Full Commission Panel Hearing was
held before the South Carolina Workers'
Compensation Commission at the South Carolina
Workers' Compensation Commission, 1333 Main
Street, 5th Floor, Columbia, South Carolina, on
the 18th day of April, 2011, before Jill H.
Vickers, Certified Court Reporter and Notary
Public in and for the State of South Carolina.

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Page 2		Page 4	
1	APPEARANCES:	1	taught in physical therapy to be able to
2	COMMISSION PANEL:	2	work. He employed those techniques and
3	Andrea Pope Roche, Chairman	3	he worked successfully until something
4	David W. Huffstetler	4	unexpected happened, until something
5	Avery B. Wilkerson	5	happened that did not come in the usual
6	Kevin B. Smith, Esquire.	6	course of what he did. So, I'll just submit
7	Steinberg Law Firm	7	to you, this is an unusual case from our
8	61 Broad Street	8	point of view and hopefully from yours, as
9	Charleston, South Carolina 29401	9	well, being that we've got such a hard
10	Attorney for the Claimant	10	working man motivated to take care of his
11	Jason Lockhart, Esquire.	11	family.
12	McAngus, Goudelock & Courie	12	The case was really denied on two
13	1320 Main Street, 10th Floor	13	theories. One was the Fraud on the
14	Columbia, South Carolina 29201	14	Application. The second was the Capers
15	Attorney for the Defendants	15	Defense. As you all know, Fraud on the
16		16	Application requires three things, and it
17	INDEX:	17	can't be proven unless all three things are
18	Page	18	present. There must be a knowingly and
19	STATEMENT BY MR. SMITH 3	19	willful false representation as to the
20	STATEMENT BY MR. LOCKHART 14	20	person's physical condition, and as to the
21	COMMISSIONER HUFFSTETLER 19	21	physical condition, it's very important,
22	STATEMENT BY MR. SMITH 24	22	because it ties into really the general
23	CERTIFICATE 29	23	characteristics of fraud in any case,
24		24	whether it's pled as a cause of action
25		25	defense or otherwise. You've got to show
Page 3		Page 5	
1	COURT REPORTER: Today is April	1	that the employer relied on the false
2	18th, 2011. This is South Carolina Workers'	2	representation and that must have been a
3	Compensation Case Number 0818219. This is	3	substantial factor in the hiring. Again,
4	the case of Joe Osmanski versus Watkins &	4	that goes back to the general elements of
5	Shepard and Zurich North America, Carrier.	5	fraud. You've got to have the right to rely
6	The Appellant is the Claimant	6	on it. It's got to cause some damage. And
7	represented by Jason B. Smith. The	7	finally, you've got to show a causal
8	Respondent is represented by Jason Lockhart.	8	connection between the representation and
9	MR. SMITH: May it please the	9	the injury. Like I said, any case of fraud
10	Commission. I'm here today on behalf of	10	requires these sorts of things. This is
11	Mr. Osmanski. This is a unique sort of	11	just how they tie into it.
12	case. It's a case involving Fraud on the	12	I'll say out front that any claim in
13	Application, Capers Defense, things like	13	fraud, whether it's a cause of action,
14	that. It's an unusual case in the sense	14	whether it's a defense, fraud must always
15	that, I guess, more times than not, we find	15	be proven by clear and convincing evidence.
16	ourselves arguing about a person who says	16	The case law is absolutely clear to this
17	he's more disabled than he really is. Often	17	point. And that, again, is true whether or
18	there are competing vocational reports,	18	not it's raised as a cause of action or
19	competing doctors and things that.	19	defense.
20	This case is the exact opposite from all	20	Actually, I raised that in my Brief, and
21	that. This is a fellow who contends just	21	when I got the response from Mr. Lockhart
22	the opposite of that. He wanted to work.	22	here, I guess the response to that was,
23	He paid attention to the things his doctor	23	well, no one ever told the Hearing
24	told him to do in order to be able to work.	24	Commissioner that that was the standard upon
25	He paid attention to the things he was	25	which this case was to be judged by. Either

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Page 6 1 way, we will submit that it's an 2 error of the law. 3 And the reason that you have to prove 4 these cases by clear and convincing evidence 5 is because the standard is so tough, because 6 it's such a harsh remedy, because you're 7 looking at things from the injured worker's 8 point of view. You're judging what was 9 in his mind when he made these things. That 10 shouldn't be a gut reaction. That shouldn't 11 be something that you come to on a whim. 12 You should have to prove that if you're 13 going to get inside someone's mind and show 14 a false representation. 15 The issues here: One, did Mr. Osmanski 16 make a false statement about his physical 17 condition; two, was there reliance; three, 18 was the accident unexpected; and four, are 19 there reasons why he was found not 20 credible, are they legally sufficient in 21 this case. 22 The false statement, the false statement 23 comes from a form that was suspect, and I 24 hope y'all will agree at the very least that 25 it was a suspect. This is a form that asks	Page 8 1 this. Somehow, the one form, the one really 2 important form, this is the only one they 3 don't get him to sign personally or fill 4 out, but either way, let's say this. 5 There's one question on that form that deals 6 with his physical condition. It's like, "Do 7 you have any impairment that would affect 8 your ability to do this job?" That's the 9 only question that goes to the physical 10 condition. 11 Let's assume that Mr. Osmanski did 12 answer these questions over the phone, and 13 his testimony was not that he didn't do this 14 form or he didn't answer these questions. 15 His testimony was simply that he was there 16 for two days, and he filled out all this 17 stuff, and he took all these tests. He 18 doesn't remember answering any questions on 19 the phone for anyone, but let's assume for a 20 minute that Mr. Osmanski did, in fact, 21 answer these questions. Is the statement 22 false? Is the answer to the questions 23 false? 24 The history in the case, Mr. Osmanski 25 had an injury back in 1997 to his arm, and
Page 7 1 various questions. The case after Mr. 2 Osmanski was initially injured, this form 3 and none of this ever surfaced. This form 4 only surfaced after surgery was being 5 recommended and the true nature of how 6 serious or how much this injury was going 7 to cost started to become known. No one 8 will contend that the Claimant filled out 9 this form where the response is the false 10 representation. No one will contend that. 11 This form was filled out by someone else, 12 and Mr. Osmanski's name was signed by 13 someone else. Mr. Lockhart will admit that. 14 The form itself says that this is supposed 15 to be completed by the person, and it is 16 supposed to be FAX'ed to this lady in 17 Massoula at the home office. That's 18 not what happened. The employer's rep 19 testified, "Oh, this is how we usually do 20 it". Well, that's not what the form says. 21 This was such an important document. 22 Mr. Osmanski was at Watkins & Shepard 23 Trucking Company for two days filling out 24 forms, taking tests and doing all of 25 this stuff. They've got him doing all of	Page 9 1 he had surgery. Afterwards, he was taught 2 proper lifting techniques by his physical 3 therapist. His treating doctor said he 4 could do what he wanted if he used his 5 stronger right dominant arm. This is an 6 injury to his left arm, but if he used his 7 right dominant arm, and this is in the 8 deposition of Dr. Chidgey, the treating 9 doctor from the 1987 injury, that if he used 10 his right dominant arm, if he shifted most 11 of the weight over to it, he could do what 12 he wanted. He didn't have any restrictions 13 at all on his right dominant arm. He had a 14 10 to 15 pound lifting restriction on his 15 left, but nothing on his right. He worked 16 for two years before this happened, six 17 years total after he last saw his treating 18 Doctor. He goes to Watkins & Shepard 19 Shipping, and he gets this job. Before he 20 gets the job, he's certified by the 21 employer's doctor as able to do the 22 job. 23 Two, he passed a very -- we've been 24 calling it a "Lift Test", and we refer 25 to it as a Lift Test in our Brief, but it's

Page 10	Page 12
1 much much more extensive than a Lift Test. 2 It's in our APA's. The employer's rep 3 testified that the physical testing they 4 had him to go through was designed to 5 specifically mirror all of the things that 6 he would be required to do on the job day in 7 and day out. He was certified as able to do 8 the job by their doctor. He passed the test 9 that certified him to do all of the job 10 functions by the employer themselves. When 11 he was asked the question, "Is there 12 anything that would prevent you from 13 performing this job, anything about your 14 physical condition that would prevent you 15 from performing this job", and that's the 16 end of the question, "that would prevent you 17 from performing the job". 18 Keep in mind, he knew he had done this 19 kind of thing before. He was using the 20 proper lifting techniques. He was doing 21 what his doctor told him to do using most 22 of the weight with his right arm, been 23 certified by the company doctor and passed 24 the test designed to mirror all the specific 25 requirements of this job. So, let's assume	1 follow up on this information, he certainly 2 would have talked to them. He was their 3 doctor. He was the company doctor. But no 4 one ever called him. No one ever followed 5 up on it. 6 Our position regarding the false 7 statement, if it was false and if it was 8 made is that the employer should have known 9 it was false. If they're claiming it's 10 false now, they would have known it was 11 False then, because Dr. Oshbar, their 12 company doctor, notified them that he had 13 impairment and limitations in the movement 14 and use of his arm. 15 The Capers Defense, was the accident 16 unexpected, the term "accident" is defined 17 as an unlooked for and an untoward event 18 which is not expected or designed by the 19 person who suffered the injury, and this is 20 always judged from the perspective of the 21 injured worker. 22 The claimant's job was hauling 23 furniture. He didn't have to load the 24 truck. He didn't have to unload the truck. 25 He drove the truck. He had to push the
Page 11	Page 13
1 he put "no". When he put "no", we would 2 contend that wasn't a false statement. 3 Now, we move on. Let's assume he did 4 fill out the form. Let's assume the answer 5 was false. Let's assume it's a matter of 6 interpretation and we assume the question 7 was false. 8 The second part of the requirements here 9 is that you've got to have reliance, and 10 where this comes in is, when Mr. Osmanski 11 was examined by the company doctor, the 12 company doctor, Dr. Oshbar, wrote on the 13 bottom of the form, "He's got impairment and 14 he's got limitations in movement in the use 15 of his arm". This was sent to the job. 16 Mr. Dandy or Grandy, I forget which one 17 it was, was the employer's rep who testified 18 at the hearing, and he testified 19 specifically that this kind of information 20 should have been followed up by someone. 21 Someone should have called Dr. Oshbar and 22 ask, "Well, what do you mean? How much 23 limitation? What's the problem here? How 24 much impairment?" Dr. Oshbar testified in 25 his deposition that had anyone called him to	1 boxes down to the end of the truck for the 2 workers at the furniture stores to get it 3 off, and this was his job. The truck was 4 preloaded in the morning. It was loaded in 5 order of his deliveries. So, his job was 6 mostly pushing and pulling, the job that he 7 did for two years before this happened, 8 pushing and pulling and driving. The box 9 that caused the injury here, he noticed that 10 it looked like it was going to fall over. 11 He goes to try and move it, and it shifts 12 and unexpectedly falls on his arm. 13 I'll just leave you with just this one 14 statement from the authorized treating 15 physician -- or not from the authorized 16 treating physician, but from the doctor who 17 had seen him in 1997, "But for the unusual 18 event of the heavy weight falling 19 unexpectedly on his arm damaging the joint 20 replacement itself, Mr. Osmanski undoubtedly 21 would have been able to continue his work 22 activities for the employer, as he did for 23 two years, 'til this work related injury on 24 or about November 1st, 2008". 25 There was no testimony whatsoever

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Page 14 1 from anyone saying that Mr. Osmanski 2 expected, designed or knew that this box was 3 going to unexpectedly shift and fall onto 4 his weaker arm. 5 COMMISSIONER ROCHE: Mr. Lockhart. 6 MR. LOCKHART: With the Panel's 7 permission, if I could remain at the table 8 here to be able to reference the file 9 materials and my notes. If I may, let me 10 address the Capers decision or the Capers 11 rationale first. We would argue that the 12 rationale as applied by Commissioner Barden 13 in this case is supported by the evidence 14 and the testimony, and that she correctly 15 applied Capers to deny the compensability of 16 this claim. 17 We look at the medical records and 18 deposition testimony of Dr. Chidgey, the 19 physician who treated Mr. Osmanski in 20 Gainesville, Florida. You'll see that at 21 APA Page 88, Dr. Chidgey released Mr. 22 Osmanski in March of 2002 with a permanent 23 lifting restriction of no lifting in excess 24 of 10 to 15 pounds with the left arm. He 25 testified in his deposition at Pages 9	Page 16 1 position that Mr. Osmanski was seeking. It 2 laid out the specific physical requirements, 3 the lifting requirements, many of which were 4 in excess of this 10 to 15 pound restriction 5 that had been placed upon Mr. Osmanski 6 by Dr. Chidgey. 7 Mr. Osmanski himself testified at Page 8 64 of the hearing transcript and at Page 65 9 that he knowingly performed the work that 10 was outside of the restrictions that had 11 been placed upon him by Dr. Chidgey. 12 And if you look at Commissioner Barden's 13 decision, and as you all know, like many of 14 you, she makes very detailed findings and 15 goes into a very thorough analysis of the 16 Claimant's deposition testimony. Finding 17 of Fact 15, she talks about the Claimant 18 knowingly performing work on behalf of 19 Watkins & Shepard that was in excess 20 of the restrictions that had been placed 21 upon Mr. Osmanski by Dr. Chidgey. 22 And I think her most poignant finding of 23 fact is at Page -- I'm sorry -- Page 17 of 24 the Order, Finding of Fact 22. She states 25 "I would find it would be patently unfair to
Page 15 1 through 10 and Page 12 that he again placed 2 this permanent work restriction in March of 3 2002, six years -- six-and-a-half years 4 prior to the date of this accident, and not 5 only did he place the restriction upon Mr. 6 Osmanski, but Mr. Chidgey testified that 7 Mr. Osmanski understood or at least Dr. 8 Chidgey believed through his conversations 9 with Mr. Osmanski that he understood what 10 his permanent work restriction was, that he 11 had no lifting in excess of 10 to 15 pounds 12 with the left arm, and that's documented at 13 Pages 10 and 22 of Dr. Chidgey's deposition 14 testimony. 15 Based on the Claimant's testimony, his 16 injury which occurred in November 2008 was 17 not unexpected, and it was not unexpected 18 because he was performing activities on 19 behalf of my client that he knew were 20 in excess of the restrictions that had been 21 placed upon him by his physician in Florida. 22 At Page 117 of the APA's, you'll see a 23 document that was provided or produced 24 by the employer that laid out the specific 25 job duties and responsibilities of the	Page 17 1 require the defendants to bear the burden 2 for a risk that the Claimant knowingly and 3 willfully chose to take. In this particular 4 case, Mr. Osmanski had an elbow problem. He 5 had an impairment. He had a restriction. 6 He performed activities that were outside of 7 those restrictions, and therefore, his 8 injury in this case was not unexpected. It 9 was not unlooked for, and as Commissioner 10 Barden indicated, it was a mere matter of 11 time before his luck ran out, as she termed 12 it, which in this case occurred on November 13 1st of 2008. 14 With regard to the McDevitt and Street 15 rationale and analysis, we would argue that 16 Commissioner Barden's decision is supported 17 by the medical evidence and the testimony of 18 the witnesses and other documentation 19 submitted by the parties. 20 Clearly, Mr. Osmanski had a prior left 21 elbow injury. He treated with an 22 orthopaedic physician from 1987 following 23 the work related accident until 2002 for a 24 variety of orthopaedic injuries, most 25 notably, the left elbow. The medical

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1 records document his impairment rating which 2 again is at Page 88, and his permanent 3 restrictions are outlined by Dr. Chidgey 4 both in his records and in his deposition 5 testimony. Mr. Smith would like you to 6 believe that there's only one document that 7 Mr. Osmanski completed in this particular 8 case that substantiates or supports his 9 willful misrepresentation of his physical 10 Condition, but there actually are several. 11 Page 108 of the APA's is the Post Job Offer 12 Questionnaire which Mr. Osmanski completed 13 during a telephonic interview with a 14 representative of the defendant. Page 110 15 of the APA's is another document where Mr. 16 Osmanski was given the opportunity to 17 inform the employer of his impairment, and 18 he indicated he had none. He admitted to 19 completing this document dishonestly at Page 20 79 of the hearing transcript, and he also 21 denied having any impairment of the arm when 22 he underwent a DOT physical prior to 23 beginning work with my client. 24 So, there are three documents where Mr. 25 Osmanski was given the opportunity to	1 relationship between those two? 2 MR. LOCKHART: Your Honor, that 3 evidence can be found at Pages 16 through 20 4 of Dr. Chidgey's deposition testimony in 5 which he indicates that the Claimant's 6 problems for which he saw the Claimant in 7 2009 were very similar, if not identical to 8 the problems that he treated the Claimant 9 for back in 2002. 10 I'll also point out to, Your Honor, if 11 you review the Appellant's Brief in this 12 case, they make no arguments or present no 13 evidence to contend that that element of the 14 McDevitt & Street defense was not satisfied. 15 And our contention would be that since that 16 argument was not raised in the Brief and not 17 addressed by the Appellant's in their Brief, 18 that they've abandoned that argument at this 19 hearing today. 20 Your Honor, I would also go to point out 21 --- 22 COMMISSIONER HUFFSTETLER: You 23 understand the point of my question is, a 24 person with two healthy arms -- and I don't 25 know how big this box was. If you have two
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1 disclose his impairment, to disclose his 2 restrictions to the employer, and he 3 willfully chose not to do that. 4 The credibility of this witness was 5 obviously at the center of the decision 6 made by Commissioner Barden in this case, 7 and she issued nine separate Findings of 8 Fact that address Mr. Osmanski's lack of 9 credibility. And we maintain that the 10 substantial evidence would support the 11 affirmation of those findings, even though 12 we know that the Full Commission Panel 13 is the ultimate fact finder, and it's within 14 this Panel's right to address the 15 credibility of witnesses, but Mr. Osmanski's 16 lack of credible testimony is consistent 17 --- 18 COMMISSIONER HUFFSTETLER: Could I 19 ask you something before you get away from 20 the McDevitt & Street? 21 MR. LOCKHART: Yes, Your Honor. 22 COMMISSIONER HUFFSTETLER: The 23 third leg, causal relationship between the 24 accident and the pre-existing condition, 25 what evidence is there that there is a	1 healthy arms, and you're moving a big box 2 and it shifts, you could hurt your arm. 3 I mean, if somebody drops a piano on you, it 4 doesn't matter if you have a pre-existing 5 condition, you're going to get hurt. So, 6 did anybody ask the doctor about that? 7 MR. LOCKHART: Yes, Your Honor. 8 Again, Pages 16 through 20 of Dr. Chidgey's 9 deposition was a line of questioning that 10 dealt with what the actual injury was that 11 Mr. Osmanski suffered in November of 2008. 12 COMMISSIONER HUFFSTETLER: But did 13 anybody ask the "but for" question, "But for 14 the pre-existing condition, would he have 15 had this injury"? 16 MR. LOCKHART: Yes, Your Honor, 17 Pages 16 through 20, because what 18 Dr. Chidgey says is that based on the 19 diagnostic testing of the elbow that was 20 performed after the 2008 accident, he 21 couldn't determine if the actual damage was 22 to the prosthesis, the prosthetic elbow or 23 to any of the tissue surrounding the 24 prosthetic. One of the issues that came up 25 at this hearing was what the injury was,

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1 what physical tissue had actually been 2 compromised by the incident of November 1st, 3 2008. And if you go and you read 4 Dr. Chidgey's deposition testimony, 5 he's not certain as to what injury actually 6 occurred. He doesn't know if there was a 7 biceps rupture. The only thing that he 8 could tell based on a review of the 9 diagnostic testing was that there had been 10 some loosening of this prosthesis. 11 So, to answer your question, Your Honor, 12 I believe that his deposition testimony 13 addresses your concerns, but the bigger 14 question is, we don't really know, and 15 neither does Dr. Chidgey or anyone else what 16 actually was damaged on November 1. 17 But again, I would also point out to 18 you, Your Honor, the Givens case stands for 19 the proposition, and Givens deals with this 20 prong of the McDevitt & Street defense about 21 the causal connection between the 22 misrepresentation and the injury, and the 23 Givens case says that the causal connection 24 is established when evidence shows that the 25 prior injury caused the current accident and	1 contained in the DOT's physical and the Post 2 Job Offer Questionnaire. That's at Pages 18 3 through 19 in Mr. Grandy's deposition. I'll 4 also point out, too, that -- you know, I 5 find it interesting that Mr. Osmanski 6 testified at the hearing that he had no 7 recollection of having this telephone 8 conversation with a representative of 9 Watkins & Shepard. So, both Mr. Grandy and 10 Rodney Stevens who is Mr. Osmanski's direct 11 supervisor both testified via deposition 12 that it was standard practice on behalf of 13 the employer to have this Post Job Offer 14 Questionnaire completed during a telephonic 15 interview. Thank you, Your Honors. 16 COMMISSIONER ROCHE: Mr. Smith. 17 MR. SMITH: I was just looking 18 through the file trying to find a copy of 19 the hearing transcript to follow up on the 20 question from Commissioner Huffstetler, and 21 you actually raised an interesting point, 22 and interestingly, before I came here, one 23 of the instructions I was given by David 24 Pearlman was to listen very closely to the 25 questions. You can also -- often have good
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1 injury. 2 And in this particular case, the 3 Claimant testified in his deposition and 4 at the hearing that he's having the same 5 problems with the same part of his body now 6 that he had back in 2002. And Dr. Chidgey 7 testified that, of course, this permanent 8 work restriction that he had placed upon the 9 Claimant, as well as the presence of the 10 prosthesis made the Claimant more 11 susceptible to suffering injuries to that 12 arm as a result of physical activity, 13 especially that in excess of the 14 restrictions that had been assigned. 15 We dealt with, I guess, the first and 16 the third prong of the McDevitt defense. 17 The second prong, of course, is whether the 18 defendants relied upon the Claimant's false 19 representation and whether their reliance 20 was a substantial factor in hiring. 21 Matt Grandy who testified via deposition 22 on behalf of the defendants testified at 23 Pages 29 through 30 that the defendants 24 relied upon the Claimant's false 25 representation, relied upon the information	1 insight from the questions other people 2 raise from their view of this. So, 3 Commissioner Huffstetler raised the 4 question. 5 If you look at the transcript of the 6 hearing, one of the very first things that 7 the defendants start to say was, and they 8 said it again here today, "We don't know 9 what was damaged. We don't know what the 10 Injury was." Now, keep in mind, to show the 11 causal connection, that is a burden of proof 12 on the defendants themselves. This is not 13 something I'm required to put forward. 14 They, instead of establishing a causal 15 connection, they are saying in the record, 16 "We don't know what the injury was". Well, 17 if they don't know what the injury was, how 18 can they be contending that they're proving 19 a causal connection between the injury and 20 the pre-existing condition. Again, it was 21 over and over in their pre-hearing 22 conference, in the record and here today as 23 an answer to you all. Simply showing that 24 the person is more susceptible to injury 25 because of the pre-existing condition is not

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1 enough. You've got to show the "but for" 2 question, and Commissioner Huffstetler, the 3 "but for" question was not asked. If the 4 "but for" question was asked, they would 5 know what the injury was. 6 Dr. Chidgey testified in that deposition 7 that Mr. Lockhart keeps referencing, he 8 testified in that deposition he thought he 9 had a ruptured tendon that had nothing to do 10 with the prosthesis. 11 Now, there's other evidence regarding 12 ruptured tendons and things like that, but 13 anyway, the evidence that they put forward 14 and the doctor they put forward to establish 15 this supposed causal connection when they 16 didn't even know what the injury was and 17 is still their position today, that doctor 18 thought it was a ruptured tendon which would 19 have had nothing to do with the pre-existing 20 condition. 21 So, thank you for the question. It does 22 raise an interesting point. And as I was 23 looking for the transcript, it came again 24 out, we don't know what the injury was. So, 25 I submit you, if you don't know what the	1 like me -- I know I'm out of time. If you'd 2 like me to respond? 3 COMMISSIONER ROCHE: Yes, you can 4 respond. 5 MR. SMITH: That's interesting, as 6 well, because what we have to prove, I 7 guess, is a little bit different than what 8 he has to prove, but I see your point, 9 absolutely. Our position was that he 10 suffered a loosening of his prosthesis and 11 that he suffered a ruptured tendon. And 12 those are what were borne out in the 13 testimony, the medical evidence and things 14 like that, to show beyond that, that causal 15 connection between the injury and the 16 pre-existing condition, not just more 17 susceptible to injury because of the 18 pre-existing condition. That burden of 19 proof is separately on the defendant. 20 Can I just make one last point? 21 MS. ROCHE: I think your time is 22 up. Thank you. We do have your Brief. 23 (Whereupon, the Full Commission Panel Hearing 24 concluded at 4:22 o'clock p.m.) 25
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1 injury was, you certainly can't ... 2 COMMISSIONER HUFFSTETLER: You 3 didn't have the same burden, though. 4 MR. SMITH: No, sir, not with the 5 Cooper and McDevitt & Street Defense, it's 6 not my burden to prove that defense. 7 COMMISSIONER HUFFSTETLER: If 8 you'll let me finish. 9 MR. SMITH: Yes, sir. 10 COMMISSIONER HUFFSTETLER: If 11 you're claiming an injury by accident, so 12 that when you have to show -- you don't know 13 what it is. If nobody knows what it is, 14 then what is it that we're to find as the 15 injury? I mean, you both have -- from 16 your arguments, it sounds like you both have 17 that burden, and it's to show that 18 whatever the injury is, that it's causally 19 related to this pre-existing problem and not 20 something that would have happened anyway, 21 but I mean, you do have to show there's an 22 injury by accident, so I mean, you seem to 23 be arguing that in a way that might apply to 24 both of you. 25 MR. SMITH: Yes, sir. Would you	1 STATE OF SOUTH CAROLINA) 2 : C-E-R-T-I-F-I-C-A-T-E 3 COUNTY OF RICHLAND) 4 I, Jill H. Vickers, Certified Court 5 Reporter and Notary Public, certify that I did 6 have the Full Commission Panel Hearing before me 7 at 4:00 p.m., on Monday, April 18th, 2011, at the 8 South Carolina Workers' Compensation Commission, 9 1333 Main Street, 5th Floor, Columbia, South 10 Carolina; that the foregoing pages constitute a 11 true and accurate transcript of the proceedings 12 held at that time and place. 13 I further certify that I am not of 14 counsel or kin to any of the parties to this cause 15 of action, nor am I interested in any manner in 16 its outcome. 17 IN WITNESS WHEREOF I have hereunto set 18 19 my hand and seal this 14th day of June, 2011. 20 21 22 23 24 Notary Public for South Carolina. 25 My commission expires July 5th, 2016.

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STATE OF SOUTH CAROLINA
WORKERS' COMPENSATION COMMISSION
CASE NUMBER - 0818219

JOE A. OSMANSKI,)
)
CLAIMANT,) SINGLE COMMISSION HEARING
)
VS.) BEFORE
)
WATKINS SHEPARD TRUCKING,) COMMISSIONER SUSAN S. BARDEN
)
EMPLOYER,)
)
ZURICH AMERICAN,)
)
CARRIER,)
)
DEFENDANTS.)
_____)

COPY

WORKERS' COMPENSATION COMMISSION HEARING TAKEN
BEFORE SARA L. QUATTLEBAUM, A NOTARY PUBLIC IN AND FOR
THE STATE OF SOUTH CAROLINA, COMMENCING AT THE HOUR OF
10:26 AM ON THURSDAY, APRIL 29, 2010, SOUTH CAROLINA
WORKERS' COMPENSATION COMMISSION, 1333 MAIN STREET,
COLUMBIA, SOUTH CAROLINA.

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1 THE COURT: Today's date is April 29, 2010. This
2 is South Carolina Workers' Compensation Commission
3 File No. 0818219.

4 This is the case of the Claimant, Mr. Joe
5 Osmanski, who is present today and represented by
6 Attorneys David Pearlman and Kevin Smith versus the
7 Employer, Watkins and Shepard Trucking and its
8 Carrier, Zurich American, both of which are
9 represented by Attorney Jason Lockhart.

10 The purpose of today's hearing is to determine
11 issues raised in Forms 50 and 51.

12 This is a denied claim. However the parties do
13 agree and stipulate that Mr. Osmanski's average weekly
14 wage is \$1,068.84 yielding a compensation rate of
15 \$661.29. The date of this alleged accident was
16 November 1, 2008. Are there any objections to APAs,
17 jurisdiction, venue or any other items?

18 MR. PEARLMAN: None from the Claimant, Your
19 Honor.

20 MR. LOCKHART: None from the Defendants, Your
21 Honor.

22 THE COURT: Thank you both. Without objection
23 the Commission File becomes a part of the record with
24 the exception of self-serving declarations and
25 unstipulated medical reports.

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1 The body parts alleged in this claim are the left
2 elbow and biceps. At this time I'm going to ask each
3 party to put a brief position on the record. and as
4 you are the moving party, Mr. Pearlman and Mr. Smith,
5 I will begin with you.

6 MR. PEARLMAN: Thank you, Your Honor. Your
7 Honor, Mr. Osmanski sustained a significant injury to
8 his left upper extremity on November 1, 2008 while in
9 the course and scope of his employment at Watkins and
10 Shepard. He had been employed with Watkins and
11 Shepard for approximately two years, Your Honor.

12 What the records will reflect, Your Honor, is
13 that Mr. Osmanski is 44 years old, married, has nine
14 children. And the reason I point this out to you once
15 again as important is for this reason. He had a
16 serious work-related injury many years ago, had to
17 have multiple surgeries and ultimately required a
18 total elbow replacement in his left arm. He
19 eventually was released in, I believe 2002 with an
20 impairment and some restrictions but was given some
21 work hardening program and told how to perform work
22 using both arms.

23 He did return to work, Your Honor, in the
24 trucking industry from that point forward and
25 eventually found this job with Watkins in 2000. The

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1 doctor that treated him down in Florida was a
2 Dr. Chidgey. Dr. Chidgey's deposition has been
3 presented to Your Honor. And what Dr. Chidgey
4 testified to in his deposition is that yes, he had
5 some limitations. Yes, he had some impairment with
6 his left arm. But with both arms he could perform the
7 type of work he was doing.

8 That's important, Your Honor, because that goes
9 directly to the Defense argument that somehow this is
10 a Capers' defense, that he was doing something beyond
11 the scope of what the doctor had told him and
12 therefore it was not an unexpected result and
13 therefore wouldn't be an accident.

14 In any event, Your Honor, again, I pointed out
15 his family and his children because he wanted to work.
16 This is not a gentleman that didn't want to work. He
17 goes back to work and works from 2002 to 2008
18 performing activities.

19 He joined Watkins in 2006. He finds out about
20 the Watkins job and he gets hired. He's living here
21 in South Carolina and is told to go up to Hickory,
22 North Carolina to complete the application forms and
23 do whatever is necessary to start working.

24 He goes up there, Your Honor, and they put him
25 through an employment application process. He talks

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1 to a number of individuals. During the employment
2 application process there's some question of whether
3 he is called from Missoula to answer some questions
4 over the telephone. That form, Your Honor, was
5 presented to you.

6 THE COURT: Right.

7 MR. PEARLMAN: And if you will look at that form,
8 Your Honor, carefully, it's an odd form. Number one,
9 we don't object to it's submission. We withdraw
10 objection with regard to hearsay. But again, the form
11 asks these questions. Did you have a prior
12 work-related accident? And the answer on the form is
13 no. It's not completed by Joe. It's purportedly what
14 he told someone over the telephone, but it doesn't go
15 on. It goes on to say if you did have a work-related
16 accident what is the extent of your injuries? That
17 form is before you without objection. We would ask
18 Your Honor to take note and assign it whatever weight
19 you deem necessary.

20 The reason we believe it should be afforded less
21 weight is if this is such an important form in the
22 employment application, why not have Mr. Osmanski
23 complete it himself and sign it where it says on the
24 bottom he should sign it. It's signed by whoever
25 supposedly completed the form and puts the name Joe

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1 Osmanski on it.

2 That's at issue because that is, in essence, the
3 falsity that the Defendants claim prevents him from
4 getting benefits under the McDevitt Street defense.
5 And I would argue to Your Honor that that falsity, if
6 it occurred at all, does not meet the requirements of
7 the McDevitt Street defense in this respect. McDevitt
8 Street defense says that you have misled someone
9 regarding your physical condition.

10 Now, the only question asked on that form is did
11 you have a work related accident? That's not what
12 McDevitt Street says. McDevitt Street doesn't say
13 well you have got to say whether you had a
14 work-related accident or a non-work-related accident.
15 McDevitt Street says you have to mislead someone
16 regarding your physical condition. And if he answered
17 only that first part of the form, did you have a work
18 related accident, and if he truly lied or misled
19 someone, that's of no consequence under McDevitt
20 Street.

21 Secondly, Your Honor, they then go on to say that
22 after he has this form they conditionally - after they
23 had him answer these questions over the telephone,
24 didn't have him answer them in person, that they then
25 additionally employed him.

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1 They then send him for a physical, a DOT physical
2 with Dr. Osbahr. You have those records. You have
3 his deposition. Dr. Osbahr's records clearly reflect
4 that he had an impairment to his left arm and clearly
5 reflect that he was limited in the use of his left
6 arm. Dr. Osbahr says he fully has functional use of
7 that left arm. So if they had any falsity, if he for
8 some reason met the requirements of McDevitt Street
9 that we stated earlier, they now know, they now have
10 knowledge of his condition. And under Fuller
11 (phonetic), Your Honor, the case that we handed up as
12 an element of fraud is the hearers ignorance of its
13 falsehood. Once the hearer knows that the information
14 is false, it's no longer false anymore. It doesn't
15 comply with fraud. They have knowledge of it.

16 So at that point once Dr. Osbahr puts in his
17 records that he has an impairment, has limitations,
18 they now know about his condition.

19 They go further, Your Honor, in the employment
20 process and put him through a lift test. And the lift
21 test, even though you don't have a copy of it, I think
22 the parties agree that it occurred, that he passed it
23 and that they had it available to him. And he was
24 fully capable of performing all of the essential
25 requirements of the job.

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1 So they then formally hired him. So by the time
2 that they say; Here, start this job, they know about
3 his impairment, they know about the limitations in his
4 arm, he has been able to complete a lift test that
5 says he can do the essential elements of the job.

6 So we contend, Your Honor, that McDevitt Street
7 doesn't apply, but even if he thought that there was a
8 falsity, even if you said, well he lied when he gave
9 the information over the telephone, they now know the
10 truth of the matter. They never had it. They never
11 went back to Mr. Osmanski and said, Joe, what's the
12 story here? They knew about it. They had every
13 opportunity to question him further. They did nothing
14 further and they let him work for two years. And he
15 works for two years without a problem until this event
16 on November 1.

17 This event occurred when - he is a deliverer of
18 furniture, Your Honor. He's a local deliverer. And
19 one of the boxes, as he was trying to reset the back
20 of his truck, shifted and the box took his arm back
21 and hyper-extended it. Now, one of the defenses, Your
22 Honor, is that we don't meet the requirements under
23 42-1-160 in that the medical records don't reflect the
24 exact nature of his injury. I would respectfully
25 argue to Your Honor that 42-1-160 says that you need

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1 to have medical evidence to a reasonable degree of
2 medical certainty or other medical evidence by a
3 health care provider that shows the nature and extent
4 of the injury.

5 No one has claimed that Joe Osmanski was unable
6 to do his job before this injury. Mr. Osmanski went
7 to the doctor with more pain in his arm, was unable to
8 continue to work. Everyone agrees he has been unable
9 to work since this injury. From a temporal
10 standpoint, clearly his problems are related to this
11 injury.

12 Now, while the doctors have not clearly stated
13 exactly whether he had a biceps tendon rupture, which
14 would be something separate and apart from the elbow
15 so McDevitt Street wouldn't even apply to that,
16 whether he had a fractured arm or whether he had a
17 broken prosthesis. Clearly, whatever his condition
18 was with his left extremity for which he has now
19 required multiple surgeries, it's related to this
20 event. The medical records, I think, are clear as can
21 be.

22 One of the things, Your Honor, I would point out
23 to you under 42-1-160, when the law changed and the
24 legislature changed, the argument was if you require a
25 reasonable degree of medical certainty for every case,

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1 then someone falls off a ladder and breaks their leg,
2 it's clear as a bell, you mean to tell me that some
3 doctor is going to have to say that to a reasonable
4 degree of medical certainty that fractured leg is
5 because he fell off the ladder? It was never intended
6 to deny cases or to be used to deny cases where the
7 medical evidence clearly shows the condition is
8 related to the event.

9 So I believe that is a meritless argument with
10 all due respect to my colleague by the defense. We
11 believe he's had a compensable injury by accident
12 arising out of and in the course and scope of his
13 employment. We believe that McDevitt Street does not
14 apply. We believe that the Defendants, the Employer,
15 had full knowledge of his medical condition with
16 regard to his arm and made no effort to question or to
17 ask him further information.

18 And so any reliance that they contend on that
19 initial telephone form I believe is misplaced in the
20 sense that they now have - they had a medical
21 evaluation and a lift test, and they watched him work
22 for two years. We request an award of temporary
23 compensation and past, present and future medical
24 treatment.

25 THE COURT: Okay. And that would be temporary

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1 total from the date of the accident, which would be
2 November 1, 2008, the reimbursement for
3 causally-related medicals, the medical treatment,
4 ongoing medical treatment with Dr. Shealy?

5 MR. PEARLMAN: Correct.

6 THE COURT: The authorized treating physician for
7 all the problems with the left upper extremities?

8 MR. PEARLMAN: Yes, ma'am.

9 THE COURT: All right. Not at MMI. Permanency
10 would be premature if it's compensable. Okay. Thank
11 you.

12 MR. PEARLMAN: Thank you, Your Honor.

13 THE COURT: All right. Mr. Lockhart.

14 MR. LOCKHART: Your Honor, in reply, first of all
15 let me address as far as temporary total medical, if
16 you find it's compensable we would agree that
17 temporary total should be paid from the date of the
18 injury forward and that the Claimant is not at maximum
19 medical improvement. So if you do deem this is
20 compensable injury -

21 THE COURT: Would you have any objection to
22 Dr. Shealy being the authorized treating physician?

23 MR. LOCKHART: I don't have any objection to
24 that, Your Honor.

25 THE COURT: All right. Okay.

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1 MR. LOCKHART: Your Honor, let me deal with
2 these arguments individually and first of all start
3 with the argument that we raised that Mr. Osmanski's
4 injury was not accidental in nature.

5 We base that primarily upon, Your Honor, his
6 testimony in his deposition and medical records and
7 deposition testimony of Dr. Chidgey.

8 His records have been offered up into evidence.
9 You will see that Dr. Chidgey informed Mr. Osmanski on
10 three separate occasions what his permanent
11 restrictions would be with regard to the use of his
12 left arm. He informed him first in January 2001 and
13 again in February 2002 and in March 2002 when he
14 released Mr. Osmanski from his care that he would have
15 a restriction of no lifting in excess of 10 to 15
16 pounds with his left arm due to his severe
17 work-related injury that occurred in the late 1980s
18 and the subsequent medical care that he received from
19 Dr. Chidgey.

20 THE COURT: Were the restrictions ever lifted for

21 -

22 MR. LOCKHART: We would argue if you read
23 Dr. Chidgey's deposition he indicates that they had
24 not been lifted. I would respectfully disagree with
25 Mr. Pearlman's characterization of Dr. Chidgey's

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1 testimony. You can read it.

2 THE COURT: It sounds like somebody -

3 MR. LOCKHART: He thinks it says one thing. I
4 think it says something else. You have the luxury of
5 deciding what you think it means. And your opinion is
6 the only one that matters at this stage frankly.

7 THE COURT: Go ahead.

8 MR. LOCKHART: Mr. Osmanski testified in his
9 deposition that he performed activities which were
10 clearly in excess of those restrictions. So we would
11 argue that his injury was not accidental because he
12 knew what his restrictions were as indicated by both
13 the records and testimony of his previous treating
14 physician and that he engaged in activities that were
15 outside of those restrictions. Clearly if that is the
16 case then the result, an injury to his arm, is not
17 accidental in nature but should have been expected.
18 In other words, it was just a matter of time before
19 this injury occurred.

20 With regards to McDevitt & Street defense we, of
21 course, argue that Mr. Osmanski knowingly and
22 willfully made a false representation as to his
23 physical condition when he began working at Watkins
24 and Shepard. Not only did he not inform my client of
25 his prior work-related injury he didn't inform them of

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1 his restrictions. He did not inform them of his
2 prior rating. Clearly had he done so he probably
3 would not have proceeded as far in the application
4 process and ultimately then, provided with employment.
5 I think if you read Mr. Grandy's deposition, he was
6 deposed yesterday, we should have his transcript to
7 you here within the next 24 hours, you will see that
8 Mr. Grandy's deposition clearly supports the issue of
9 the Employer's reliance upon the false representation
10 and the fact that it was a substantial factor in the
11 hiring of Mr. Osmanski.

12 The medical records too, Your Honor, when you
13 look at them, and I know you will review them
14 thoroughly, indicate that when Mr. Osmanski was
15 examined following this accident there were occasions
16 where he denied to his physician the extent of his
17 prior problems, the number of surgeries that he had
18 undergone and his prior work-related injury. So there
19 are medical records that support this pattern of
20 dishonesty that we think began in November of 2006
21 when Mr. Osmanski sought employment with Watkins and
22 Shepard. In particular, Your Honor, the DOT physical
23 that Mr. Pearlman discussed earlier, it's at our APA
24 Page 109, Claimant's APA 13, Mr. Osmanski was given an
25 opportunity to inform Dr. Osbahr at that time of any

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1 impairment he had to his arm. He denied having
2 impairment.

3 If you look at the medical records of Lexington
4 Medical Center where he was seen in November of 2008,
5 he was asked about prior surgeries and only gave his
6 physicians there a very limited history of the extent
7 of medical treatment he had received previously for
8 this same left elbow. So again, I think the medical
9 records support our contention that there was a
10 pattern of dishonesty that began again in November of
11 2006 when Mr. Osmanski began employment.

12 And finally, of course, is a causal connection
13 between the false representation and the injury. That
14 is clear. The previous injury involved the left arm
15 and left elbow. This injury involved the left arm and
16 left elbow. There is clearly a causal connection
17 between the misrepresentation and the injury which is
18 the subject of the claim before you today.

19 Your Honor, with regard to the issue of the
20 Claimant's ability to satisfy his burden of proof
21 under Section 42-1-160, again I certainly would
22 disagree with Mr. Pearlman that our argument on this
23 issue has no merit because I think it has significant
24 merit. 42-1-160 deals with - defines injury by
25 accident. So in every case that you hear or that your

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1 colleagues hear you have to determine what is the
2 injury. I think what we are looking at in this case
3 is medical evidence when read as a whole in
4 conjunction with Dr. Chidgey's deposition testimony,
5 we don't exactly know what the injury was that was
6 sustained by Mr. Osmanski as a result of this incident
7 on November 1, 2008.

8 Dr. McIntosh, who is an orthopedist here in
9 Lexington, South Carolina, saw Mr. Osmanski after the
10 accident occurred. In his records at Pages 54 through
11 55 of our APAs, he can't find any objective evidence
12 of what the injury was that Mr. Osmanski sustained
13 allegedly on the date of accident. Dr. Chidgey
14 provided an opinion regarding causation in response to
15 a questionnaire from Ms. Amick's office, I believe,
16 who was handling this case at one point. If you go to
17 read his deposition testimony, however, that causation
18 opinion is not consistent with his deposition
19 testimony.

20 The medical records suggest, Your Honor, that the
21 damage was a compromise that occurred in this case,
22 for lack of a better term, was to Mr. Osmanski's
23 prosthesis and not to his left arm. His prosthesis,
24 of course, was inserted as a result of his prior work-
25 related injury. Dr. Chidgey, Claimant's APA Page 5,

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1 notes that
2 Mr. Osmanski has a loose, quote/unquote "loose
3 prosthesis." In Dr. Shealy's records, Your Honor, you
4 will see Claimant's APA Page 28, the surgery that's
5 documented in the records that have been submitted
6 only deal with the removal and the replacement of the
7 prosthesis. We are not looking at a situation where
8 Dr. Shealy went in to address any other injuries, any
9 other pathology. Neither Dr. Chidgey nor Dr. Shealy,
10 who is seeing Mr. Osmanski currently, has provided an
11 opinion as to whether he suffered an injury to his
12 elbow or to any other part of his arm.

13 So while, you know, again Mr. Pearlman maintains
14 respectfully that this argument has no merit. I think
15 it has a significant amount of merit because
16 ultimately the decision you are going to have to make
17 is what is the injury he sustained as a result of this
18 accident? And I don't think the medical records tell
19 us. And if the records don't tell us then how can he
20 satisfy his burden of proof under 42-1-160 or 42-9-35
21 if there is an argument that there is some type of
22 aggravation of a prior problem?

23 Dr. Chidgey was asked about this in his
24 deposition. I asked him specifically what is the
25 injury? Tell us what the diagnosis is. What did you

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1 find? What is wrong with this gentleman's arm? He
2 said Page 30 to 32 of the deposition he wasn't certain
3 as to the extent of the injuries. He said at Page 32
4 there was a possible bicep tendon tear or rupture, but
5 he had no medical evidence to support or confirm that
6 diagnoses. What Dr. Chidgey also went on to say, Your
7 Honor, which I found quite interesting, is the
8 loosening of the prosthesis which appears to be
9 documented in a number of medical records including
10 those of Dr. Chidgey and those of Dr. Shealy is a
11 phenomenon that could have occurred without an acute
12 event.

13 So again, I think the issue of what is the injury
14 and did this accident lead to that injury are
15 essential to rendering a decision on the
16 compensability of this claim.

17 Now, just to touch on a couple of other things
18 Mr. Pearlman raised. Mr. Pearlman, again, maintained
19 that the totality of the medical evidence supports the
20 Claimant's burden of proof under 42-1-160. And again,
21 you know, we have to ask ourselves what is the injury
22 which is the basis for an award of compensation in
23 this case.

24 To address Dr. Osbahr's DOT physical and his
25 subsequent deposition, Your Honor, if you look at his

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1 report you will see that Dr. Osbahr certified
2 Mr. Osmanski to drive a commercial motor vehicle.
3 Under federal regulations that address - I believe
4 these regulations have been handed up by Mr. Pearlman
5 and Mr. Smith, 49 CFR 391.41. That regulation deals
6 with the driving of the motor vehicle, commercial
7 motor vehicles. It doesn't address the physical
8 requirements that were placed upon Mr. Osmanski as a
9 driver with Watkins and Shepard which includes a
10 number of physical activities which are documented in
11 a job analysis that we have offered up. And so it
12 doesn't take away from the fact that again McDevitt &
13 Street asked the Court, asks the Commission to
14 determine if the Employee knowingly and willfully made
15 a false representation as to his condition.

16 So the findings of Dr. Osbahr's physical doesn't
17 take away or render mute our argument that the
18 Claimant knew he had a prior problem, he knew he had
19 prior restrictions, and he knowingly and willfully did
20 not share those or inform my client of those when he
21 began working there.

22 Thank you, Your Honor.

23 THE COURT: All right. Anything in response?
24 You don't have to. I'm just offering you that
25 opportunity.

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1 MR. PEARLMAN: I don't want - I know you will
2 read everything.

3 THE COURT: If you would like to go ahead.

4 MR. PEARLMAN: I would just point out to Your
5 Honor, just briefly, Commissioner, this is exactly
6 what Dr. Shealy says that he - until November when he
7 was caught in a truck in an attempt to extricate the
8 box he re-injured his left elbow. You will find in
9 the medical records sufficient medical evidence to
10 indicate that he injured his left arm and left elbow
11 as a result of this event.

12 Your Honor, also with regard to any type of
13 Capers defense, the idea that he doesn't have an
14 accident because this was not unexpected, remember
15 Dr. Osbahr certifies him as fully functional with the
16 use of that arm. The lift test says that he can
17 perform a functional - all the essential functional
18 capabilities of that job. So at that point, all the
19 doctors and their own internal lift test say you are
20 capable of doing this job.

21 So the event that happened was clearly an
22 accident and clearly was unexpected on those two
23 issues. With regard to the fraud once the hearer, the
24 Employer, knows of the falsity, it's not false
25 anymore. It's not fraud anymore. And that's one of

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1 the cases we handed up to you.

2 THE COURT: Okay.

3 MR. PEARLMAN: We just reiterate those reasons,
4 Your Honor.

5 THE COURT: Thank you.

6 MR. PEARLMAN: Thank you, Your Honor.

7 THE COURT: Mr. Lockhart, I will give you the
8 same opportunity.

9 MR. LOCKHART: Your Honor, again, I mean we could
10 be here all day.

11 THE COURT: I know. That's why I usually -

12 MR. LOCKHART: If we leave the last sentence to
13 Mr. Pearlman.

14 THE COURT: - open the record. But because I
15 haven't reviewed any of this evidence and it's
16 important to some of the points you are making, I'm
17 glad we are doing it this way.

18 MR. LOCKHART: Yes, ma'am. Just very briefly.
19 Mr. Grandy in his deposition testified yesterday that
20 the Employer was never provided by Mr. Osmanski with
21 notification of his prior restrictions and impairment
22 until the initiation of this litigation. So the fact
23 that he was certified to work by Dr. Osbahr under the
24 federal regulations does not change the fact that he
25 never informed my client of his restrictions and his

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1 prior impairment.

2 So this notion that they had knowledge of all
3 these restrictions and impairments once this DOT
4 physical and lift test took place is certainly - is
5 not true. And I think Mr. Grandy's deposition will
6 support our position on that issue. That's all I
7 have.

8 THE COURT: Thank you. Our only witness today is
9 Mr. Osmanski; is that correct? And I understand you
10 are supplying the deposition on Mr. Grandy.

11 MR. LOCKHART: Yes, Your Honor. Thank you.

12 THE COURT: All right. Mr. Osmanski, if you will
13 raise your right hand, please and look at me.

14 JOSEPH ARTHUR OSMANSKI,
15 having been first duly sworn, testified as follows:

16 THE COURT: Please state your full name for the
17 record.

18 THE WITNESS: Joseph Arthur Osmanski.

19 THE COURT: Thank you very much. Please answer
20 any questions of Mr. Smith.

21 MR. SMITH: Thank you, Your Honor.

22 DIRECT EXAMINATION

23 BY MR. SMITH:

24 Q Please state your full name.

25 A Joseph Arthur Osmanski.

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- 1 Q Mr. Osmanski, where do you currently live?
- 2 A Pelion, South Carolina.
- 3 Q What's your date of birth?
- 4 A 9/24/64.
- 5 Q How old does that make you?
- 6 A 45.
- 7 Q Are you married?
- 8 A Yes.
- 9 Q How long have you been married?
- 10 A 25 years.
- 11 Q How many children do you have?
- 12 A nine.
- 13 Q What do their ages range from the youngest to the
- 14 oldest?
- 15 A Three years to 24 years old.
- 16 Q What's your wife's name?
- 17 A JoAnne.
- 18 Q All right. And she is here with us today?
- 19 A Yes.
- 20 Q Where did you grow up, Mr. Osmanski?
- 21 A Most of my life was in Florida.
- 22 Q Okay. When did you move to South Carolina?
- 23 A Around 2004, I believe it was, 2003.
- 24 Q Did you finish high school?
- 25 A No.

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- 1 Q What grade did you last complete?
- 2 A Eleventh.
- 3 Q Did you get a GED?
- 4 A No.
- 5 Q Have you ever been in the military?
- 6 A No.
- 7 Q Let's talk about your work in the past. What kind of
- 8 work have you done? For most of your life, what would
- 9 you categorize?
- 10 A Hard labor, construction, tree service; I've done.
- 11 Q Okay. What were you doing - when was that old injury
- 12 you had?
- 13 A That was carpenter.
- 14 Q Carpenter back then?
- 15 A Yes.
- 16 Q And what kind of work did you end up doing afterwards?
- 17 A Driving a truck.
- 18 Q Okay. Let me talk about your previous injury. When
- 19 was it? What year was it?
- 20 A 1987.
- 21 Q And you said you were working as a carpenter?
- 22 A Yes.
- 23 Q Which arm did you injure?
- 24 A My left arm was the most injury. I injured both arms,
- 25 but the left arm was the one that was requiring more

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- 1 surgery.
- 2 Q Do you recall the name of the company you were working
3 for at the time?
- 4 A Patrician Construction.
- 5 Q Where are they located?
- 6 A Sayreville, New Jersey.
- 7 Q And what happened in that accident?
- 8 A I was on a ladder and I fell 32 feet. The ladder slid
9 out down the wall. I stayed on the ladder and my
10 elbows hit first.
- 11 Q You had two surgeries?
- 12 A Yes.
- 13 Q Ultimately what did they do for you?
- 14 A Eventually they put in a total implant, a total
15 replacement elbow.
- 16 Q That was on your left?
- 17 A Yes.
- 18 Q And did you also have surgery on the right?
- 19 A Yes.
- 20 Q Did you have surgical scars from both of those
21 procedures?
- 22 A Yes.
- 23 Q How many scars did you have on each arm from those
24 procedures?
- 25 A Three on the left arm and one on the right arm.

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1 Q Okay. As part of that treatment, did you go to
2 physical therapy?

3 A Extensively, yes.

4 Q Were you taught lifting techniques in physical
5 therapy?

6 MR. LOCKHART: I object to the leading form of
7 the question.

8 THE COURT: Counsel at this point refrain from
9 leading. Objection is sustained. Please refrain from
10 leading.

11 MR. SMITH: Yes, ma'am.

12 BY MR. SMITH:

13 Q Tell me what they taught you in physical therapy.

14 A They taught me how to use my legs and to lift mainly
15 with my right arm, more or less use my left arm as a
16 guide. It was very, very extensive. It was five days
17 a week I was going there.

18 Q For about how long?

19 A I don't really remember for how long. I know it was a
20 few months.

21 Q Did you also do a pain management program?

22 A That was included in that same program.

23 Q Was that a different group that was doing the pain
24 management?

25 A Same people, same people.

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1 Q Okay. How about lifting, pushing and pulling with
2 Dr. Chidgey?

3 A I talked to him about using my left - my right arm
4 more than my left. Of course I learned how to do a
5 lot of different things with my right arm more than my
6 left.

7 THE COURT: Are you right hand dominant?

8 THE WITNESS: Yes, very much. I was very
9 physical when I performed my job. And I learned
10 really, really fast how to do things with my right arm
11 more than my left.

12 BY MR. SMITH:

13 Q Was that consistent with what you learned from
14 Dr. Chidgey?

15 A Yes.

16 Q You went back to work after Dr. Chidgey released
17 you?

18 A Yes.

19 Q I believe you said you went to truck driving?

20 A Yes.

21 Q Do you recall the name of the company you were working
22 for?

23 A It was CPC Logistics. We hauled freight for Walgreens
24 Pharmacy. And I had to deliver freight to the store.
25 I touched - everything on the truck I picked up and

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1 lifted and put on rollers.

2 Q How did you handle the lifting and pushing and pulling
3 that was associated with that job?

4 A It actually made me stronger. I gained more range of
5 motion in both arms from it and lifting using my legs
6 and my right arm, I eventually got stronger and
7 stronger.

8 Q Now, do you recall when the last time you had actually
9 seen Dr. Chidgey before your injury in this case?

10 A I think it was 2002, I believe.

11 Q And since 2002, and I know you just touched on this
12 with increasing the strength in the arm and range of
13 motion and things like that. But in terms of your
14 activity after you had been released by Dr. Chidgey,
15 tell us about how those activities went using the arm.
16 Did you go out there and just start using the arm
17 completely all of a sudden? Did you work up to it?
18 Describe to us -

19 MR. LOCKHART: Your Honor, again I object to the
20 leading form of the question.

21 THE COURT: All right. If you will rephrase.

22 BY MR. SMITH:

23 Q Describe to us your level of activity involving your
24 left arm following your release from Dr. Chidgey?

25 A After I went through the physical therapy it

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1 definitely increased more and more as I felt
2 stronger. I was always conscious about it. I always
3 took care of lifting with my legs and mainly with my
4 right arm. A lot of things that you do with a truck
5 was done with a hand truck or it was done with a
6 pallet jack. So I used my right arm. I used my legs.
7 Pushing, I could use more of my body in my legs, so
8 there was a lot of different ways I was able to do
9 things without using my arms.

10 Q Okay. I want to move now to the time that you were
11 applying for the job at Watkins Shepard. How did you
12 learn they were hiring?

13 A Through a newspaper.

14 Q They ran an ad?

15 A Yes.

16 Q Did you contact them?

17 A Yes.

18 Q What position did they have open?

19 A Local delivery position.

20 Q Who did you speak to initially?

21 A Rodney Stephens.

22 Q Did Mr. Stephens offer you a job over the phone?

23 A I filled out applications and after a background
24 check, yes.

25 Q Okay. Was that contingent upon something?

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- 1 A Yes.
- 2 Q What was that contingent upon?
- 3 A A DOT physical, a drug test and a lift test.
- 4 Q Okay. Where did you go to do these things?
- 5 A Hickory, North Carolina.
- 6 Q How long were you there?
- 7 A Two days.
- 8 Q Did they have you fill out all the forms you were
- 9 required to complete?
- 10 A Yes.
- 11 Q Did you do a drug test?
- 12 A Yes.
- 13 Q Passed the drug test?
- 14 A Yes.
- 15 Q Did they send you to a doctor for a physical?
- 16 A Yes.
- 17 Q Was that Dr. Osbahr?
- 18 A Yes.
- 19 Q Did you fill out any forms with Dr. Osbahr?
- 20 A I believe it was the top part of the DOT physical I
- 21 had to fill out.
- 22 Q I've actually got a copy of that here.
- 23 MR. SMITH: Commissioner, this is Page 13.
- 24 THE COURT: Okay. Thank you.
- 25 MR. SMITH: Actually, it's a little clearer on

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1 Page 14.

2 THE COURT: Okay.

3 BY MR. SMITH:

4 Q Mr. Osmanski, I want to show you this document, Page
5 14 of our documents we have submitted into evidence.

6 Is this the form that you had filled out with
7 Dr. Osbahr?

8 A Yes.

9 Q This top part here, this health history section, are
10 those things you have filled out?

11 A Yes.

12 Q Is that your signature down below?

13 A Yes.

14 Q Dated October 30, 2006?

15 A Yes.

16 Q Everything here, these are your indications in this
17 health history form?

18 A Yes.

19 Q All right. I want to turn your attention straight to
20 the question that asked if you have a missing or
21 impaired hand, arm, foot, leg, finger or toe. And you
22 indicated no in that position; is that correct?

23 A Yes.

24 Q Explain to us why that was.

25 A On part of the DOT physical it states that in the last

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1 five years was anything in your history. And in the
2 last five years, no, I have never had a missing or
3 impaired arm. In my opinion I was physically able to
4 do everything that this states. And then it would be
5 discussed with the doctor. And I eventually discussed
6 with him about my arm.

7 Q Okay. Were you intending to mislead anyone by
8 answering no to that question?

9 A No.

10 MR. LOCKHART: I have to object to the leading
11 form of the question.

12 THE COURT: Sustained.

13 BY MR. SMITH:

14 Q So after you filled out this form -

15 THE COURT: Let me make sure I understand. And
16 I'm not trying to put words in your mouth, I'm trying
17 to make sure I understand. You said that you thought
18 that a missing or impaired hand, arm, foot, leg
19 applied to within five years?

20 THE WITNESS: With this part of the questionnaire
21 on that top part that I fill out for any DOT physical
22 it states in the last five years have you had any of
23 this history. And that's what I was going by.

24 THE COURT: Okay.

25 MR. SMITH: I believe that that question is the

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1 first question on the top left-hand corner,
2 Commissioner.

3 THE COURT: Okay.

4 MR. SMITH: On the same page as you see in the
5 past five years.

6 THE COURT: Okay.

7 BY MR. SMITH:

8 Q Mr. Osmanski, I want to also - after all of - after
9 you were hired - shortly before your injury did you go
10 get another DOT physical?

11 A Yes.

12 Q And that was with Dr. Fisher?

13 A Yes.

14 Q All right.

15 MR. SMITH: And that's APA 10 of ours, Your
16 Honor, Page 40.

17 THE COURT: Thank you.

18 BY MR. SMITH:

19 Q I believe on that form -

20 MR. SMITH: And this would be in the Defendants
21 APAs, Your Honor, there is a DOT physical dated
22 October 22, 2008, and I think without looking at it I
23 can recall it.

24 BY MR. SMITH:

25 Q Mr. Osmanski, did you put the same indication no on

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- 1 that same answer on your physical at that time?
- 2 A Yes.
- 3 Q Okay. In here in this medical record from that same
- 4 visit it states here "he does have a history of a fall
- 5 in 1997. Good bit of problems, bad injury, left
- 6 elbow, had limited range of motion, supination." Did
- 7 you discuss your prior injuries with your doctor for
- 8 that DOT physical?
- 9 A Yes.
- 10 Q Okay. The reason that you had checked no in 2008,
- 11 what was that?
- 12 A I'm going by in the last five years. I mean, that's
- 13 the way I interpreted the application - the part of
- 14 the physical that is in the last five years. So I'm
- 15 thinking everything in the last five years; no, I have
- 16 had nothing in the last five years.
- 17 Q Okay. Let's go back to Dr. Osbahr. You saw him for
- 18 the DOT physical. After you had filled out the forms
- 19 did he examine you?
- 20 A Yes.
- 21 Q Physically examine you, put his eyes on you, touch
- 22 you, things like that?
- 23 A Yes.
- 24 Q All right. Did you tell him about your arm?
- 25 MR. LOCKHART: Your Honor, again I object to the

1 leading form of the question.

2 THE COURT: I'm not sure that one was but did you
3 or did you not tell him?

4 THE WITNESS: Yes.

5 THE COURT: Okay.

6 BY MR. SMITH:

7 Q Did he test the movement of your arm?

8 A Yes.

9 THE COURT: The only thing I'm going to ask is
10 that - and I know it's not intentional, but don't
11 suggest the answer with your head, okay?

12 MR. SMITH: I'm sorry.

13 THE COURT: That's all right.

14 MR. SMITH: I didn't realize I was doing that.

15 BY MR. SMITH:

16 Q And so when he tested the movement of your arms with
17 Dr. Osbahr did he see your arms?

18 MR. LOCKHART: Your Honor, I'm sorry, but I'm
19 objecting to what Dr. Osbahr sees. I think a lot of
20 these questions have been asked in the deposition.

21 MR. SMITH: I'll rephrase.

22 THE COURT: He's going to rephrase.

23 BY MR. SMITH:

24 Q Did you show Dr. Osbahr your arms?

25 THE COURT: There you go.

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1 THE WITNESS: Yes.

2 BY MR. SMITH:

3 Q Did you have scars from prior surgery in those
4 arms?

5 A Yes.

6 Q And those are the ones we were talking about before
7 with - I think you said with three scars on the left
8 and two scars on the right?

9 A Yes.

10 Q Your surgical scars on your left arm and surgical
11 scars on your right arm, the ones on your right arm,
12 Mr. Osmanski, have they changed at all since you saw
13 Dr. Osbahr?

14 A No.

15 Q Okay. Would you mind rolling up your sleeve for
16 us?

17 THE COURT: You can stay right where you are.
18 I'm going to come over to you.

19 MR. SMITH: This is for the right arm?

20 THE WITNESS: It's the right arm?

21 MR. SMITH: We are going to do both but right arm
22 for now.

23 THE COURT: Okay.

24 BY MR. SMITH:

25 Q You have got one surgical scar there and right here

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1 and then where is the other one you were talking
2 about?

3 A There's only - this one right here.

4 THE COURT: And let me see your left.

5 THE WITNESS: Yes.

6 MR. SMITH: Go ahead and do that arm, too.

7 THE COURT: So you've had more surgeries since
8 then; haven't you?

9 THE WITNESS: The only surgery I've had was just
10 the recent one.

11 THE COURT: Right. Okay. Thank you.

12 BY MR. SMITH:

13 Q Did you describe with Dr. Osbahr why you have the
14 scars?

15 A Yes.

16 Q What did you tell him?

17 A That I had a fall in 1987, that I had reconstructive
18 surgery on my left elbow.

19 Q And after -

20 THE COURT: Did you tell him you had a prosthesis
21 in there or just surgery?

22 THE WITNESS: Reconstructive surgery.

23 THE COURT: Okay.

24 BY MR. SMITH:

25 Q After Dr. Osbahr was done examining you, did he fill

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- 1 out portions of this form, as well?
- 2 A Yes.
- 3 Q And then after that, were you sent to do any
- 4 additional testing by Watkins?
- 5 A A lift test.
- 6 Q Okay. Now this test, we have sort of been referring
- 7 to it as the lift test. What all kinds of things did
- 8 they test in that evaluation?
- 9 A Pushing, pulling, carrying weight. They tested - I
- 10 pushed up to 75 pounds and then they checked my heart
- 11 rate. I'd hold weight for ten minutes and they would
- 12 check my heart rate. It was pretty extensive. I
- 13 crawled on my hands and knees. I crawled on my arms.
- 14 They made me run in place A lot of it was holding
- 15 weight, pushing weight, pulling weight.
- 16 Q Did they test the range of motion in your arms?
- 17 A Just mainly if I could lift the weight.
- 18 Q Do you remember how much weight they asked you to
- 19 lift?
- 20 A I believe it was right around 75 pounds.
- 21 Q Were you able to do that?
- 22 A Yes.
- 23 Q Mr. Osmanski, at the time you were going through the
- 24 application process and reviewing these forms and
- 25 taking these tests, did you think you would be

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1 physically able to perform this job?

2 A Yes.

3 Q Why did you think that?

4 A Because all the training that I had through physical
5 therapy and the job I took with Walgreens and throwing
6 all that freight just made me stronger and stronger
7 and the techniques that I learned on how to lift with
8 my legs and my right arm. And the job with Watkins
9 and Shepard was mainly pushing and pulling.

10 Q What do you mean by that?

11 A My truck was always loaded when I got the trailer.
12 The only thing I had to do with that truck was unload
13 it to stores. And the only thing I had to do was drop
14 the freight down and push it to the back of the truck.
15 I was able to do that, no problem.

16 Q What would happen after the freight would get pushed
17 to the back of the truck?

18 A The workers from the store would pull it off.

19 Q So it was your job to take the freight and get it to
20 the back of the van?

21 A Back of the trailer. Yes.

22 Q Okay. All right. Now, during the application process
23 while you were in Hickory for two days do you recall
24 speaking to anyone on the phone?

25 A I did a lot of things in those two days. I don't

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1 recall speaking to anybody on the phone.

2 Q Do you recall anyone at Watkins asking you about any
3 prior injuries?

4 A Not that I recall. No.

5 Q If someone asked, what would you have said?

6 A I would have told them exactly. That is a big part of
7 my life. I mean, I fell 32 feet in 1987. It's pretty
8 hard to hide my physical - the way I look. My arm
9 hangs differently. It was a big part of my life, and
10 I would have definitely told anybody about it.

11 Q So you started working for Watkins?

12 A Yes.

13 Q All of this information was filled out, at least the
14 DOT physical on October 30, 2006. How long after the
15 DOT physical did you actually start working for
16 Watkins?

17 A I think I drove the truck home the day after
18 Halloween, October 31.

19 Q And you were describing earlier why you thought you
20 could do the job. You were telling us what sort of
21 work you were doing. Were you doing anything else
22 other than that?

23 A No.

24 Q And that's the work that you did for two years?

25 A Yes.

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1 Q How was your left arm feeling during that time,
2 during those two years?

3 A Great. I had no problems.

4 Q And you said in response to the Commissioner's
5 question that your right arm is your dominant arm?

6 A Yes.

7 Q Which arm is stronger?

8 A My right arm.

9 Q Explain to us how using more with the right arm how
10 does that - how does that affect you? How has it
11 helped you? What does that do, you know, to the way
12 you use your arm?

13 A It really - I don't know if it really affected me. I
14 mean, it was just something I was able to do with my
15 right arm. The job required mainly with my - when I
16 lifted with my legs, and if I used a hand truck. I
17 used my legs to push the hand truck and this arm to
18 pull back on the freight. And I was able to roll it.
19 If I couldn't roll it I pushed it.

20 Q Okay. Let's move to your injury in this case. We've
21 got the date down as November 1, 2008; does that sound
22 correct to you?

23 A Yes.

24 Q Where were you when it happened?

25 A Aiken, South Carolina.

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- 1 Q What were you doing in Aiken?
- 2 A I had just finished delivering furniture to a store.
- 3 Q Okay. Tell us how you injured yourself.
- 4 A After I had finished delivering I pulled the truck up
- 5 to close the doors and I noticed that the freight was
- 6 all stacked and it could have fell down. So I jumped
- 7 back in the trailer and I broke down - I tried to
- 8 break down the freight. And the recliners were
- 9 stacked three high. And when they are stacked three
- 10 high they are pretty close to the ceiling. Sometimes
- 11 it has a tendency to get caught. And at that time it
- 12 did. And when I went to pull it down with this arm it
- 13 got stuck and twisted. The weight shifted and came
- 14 down and caught my arm and straightened it all the way
- 15 out.
- 16 Q All right. Let's back up just a moment. When you
- 17 said you reached up with this arm, which arm are you
- 18 referring to?
- 19 A My right arm.
- 20 Q Okay. When you said it got caught on this arm, which
- 21 arm are you referring to?
- 22 A It got caught up here - this arm, my right arm was up
- 23 here like this, and this arm was here. And when it
- 24 shifted I was holding this just like this with the
- 25 guide and as I'm pulling it down the weight shifted

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1 and it swung down and straightened my arm out, my
2 left arm.

3 Q Where was the first place that you went for medical
4 treatment?

5 A I believe I went to the hospital first.

6 Q Then you came to a Dr. McIntosh in Columbia?

7 A Yes.

8 Q And Dr. Bethea, these are your medical records from
9 him?

10 A Yes.

11 Q Then you returned to Dr. Chidgey?

12 A Yes.

13 Q And Dr. Chidgey, is he down in Florida?

14 A Yes.

15 Q And you came back up to Charleston and saw
16 Dr. Shealy?

17 A Yes.

18 Q All right. Is Dr. Shealy the doctor who has currently
19 been taking care of you?

20 A Yes.

21 Q What did he do for you? What has he done for you so
22 far?

23 A He removed the top part of my implant.

24 Q Okay.

25 A And replaced it.

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1 Q Tell us about your arm currently. How long ago did
2 you put the piece back into the prosthesis?

3 A The first surgery they removed it and it was in July,
4 I believe. And they had to wait for it to be
5 remanufactured. I think in October they replaced it.
6 It was only the top. The implant is in two pieces.
7 The top part of the implant was the only one that was
8 -

9 THE COURT: That was 2009, just for the record,
10 correct?

11 THE WITNESS: Yes.

12 BY MR. SMITH:

13 Q And Mr. Osmanski, how long ago was the last procedure
14 that you just had?

15 A I just had the procedure a week ago from Wednesday and
16 they removed a pin that was sticking out. They just
17 cut it at the bone.

18 Q Okay. And I've seen some mention in the medical
19 records to a k-wire that was sticking out?

20 A Yes.

21 Q Is that the same thing?

22 A Yes.

23 Q All right. So you are still seeing Dr. Shealy
24 currently?

25 A Yes.

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1 Q All right. Are you able to work right now?

2 A No.

3 Q Do you think you will be able to work after you get
4 some more treatment, follow through at home?

5 A Yes.

6 Q Is that your ultimate plan?

7 A Yes.

8 MR. SMITH: Mr. Osmanski, please answer any
9 questions Mr. Lockhart might have.

10 THE COURT: Mr. Lockhart.

11 CROSS EXAMINATION

12 BY MR. LOCKHART:

13 Q Mr. Osmanski, you testified earlier that you informed
14 Dr. Osbahr that you had been involved in a
15 work-related accident back in the late 1980s; is that
16 correct?

17 A I don't believe I told him it was work related. I
18 told him I had an accident.

19 MR. LOCKHART: I'm looking at Page 7 of
20 Dr. Osbahr's deposition which has been offered up into
21 evidence in this case.

22 THE COURT: Okay. What was the page number?

23 MR. LOCKHART: Page 7, Your Honor.

24 THE COURT: Thank you.

25 BY MR. LOCKHART:

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1 Q Mr. Osmanski, we conducted Dr. Osbahr's deposition in
2 preparation for this hearing, and I asked him the
3 following questions: "When you examined Mr. Osmanski
4 on October 30, 2006 the records reflect or do you have
5 any personal recollection of him telling you if he was
6 involved in a work-related accident in 1987?"
7 Dr. Osbahr replies: "It might be surprising to you."
8 He testified: "My records don't indicate the
9 specifics of any accident." He did not put that into
10 his health history. I would only have a limited
11 knowledge of this based on my examination information
12 which shows limitations. But on my record I don't
13 have that he had an accident."

14 So Dr. Osbahr's testimony regarding what you
15 shared with him is a little inconsistent with yours.
16 So let me ask you the question again. Did you tell
17 Dr. Osbahr that you had had an accident previously and
18 injured your left elbow?

19 A Yes.

20 Q You testified earlier in response to questioning from
21 your lawyer that you had informed Dr. Osbahr that you
22 also had undergone a left elbow replacement; is that
23 correct?

24 A Yes.

25 MR. SMITH: Let me just pose an objection, just

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1 maybe for clarification. I think his testimony was
2 that he had reconstructive surgery, Your Honor.

3 THE COURT: I know he told Dr. Osbahr that he had
4 reconstructive surgery. That's in the transcript. I
5 don't know if my note is correct but that's what I
6 wrote down.

7 MR. SMITH: Either way it was just for
8 clarification.

9 THE COURT: Okay. Thank you.

10 BY MR. LOCKHART:

11 Q Mr. Osmanski, I asked Dr. Osbahr the following
12 questions. I asked him: "Do you have any information
13 in your records or any personal recollection following
14 your examination of Mr. Osmanski that he had informed
15 you about having undergone a left elbow replacement?"
16 His answer: "I do not have anything in my record from
17 my examination that shows that this man underwent a
18 surgery." So again, is it your testimony today that
19 you told Dr. Osbahr that you had surgery on your left
20 elbow or left arm?

21 A Yes.

22 Q Did you inform Dr. Osbahr of the permanent restriction
23 that had been placed upon you by Dr. Chidgey?

24 A Not that I recall. No.

25 Q Any particular reason why?

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1 A Because of all of the training that I had as far as
2 lifting I didn't feel I had a restriction.

3 Q Your accident with Patrician happened in December
4 1987; is that correct?

5 A Yes.

6 Q You injured your left elbow?

7 A Yes.

8 Q Your right elbow?

9 A Yes.

10 Q Your left shoulder?

11 A Yes.

12 Q Your right shoulder, correct?

13 A Yes.

14 Q Your left wrist?

15 A Yes.

16 Q Your right wrist, correct?

17 A Yes.

18 Q And Dr. Chidgey was your primary physician for those
19 injuries that you suffered in that accident,
20 correct?

21 A Yes.

22 Q If the medical records reflect that he performed
23 approximately six - five or six surgeries on your left
24 elbow, does that sound correct to you?

25 A I believe so.

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1 Q And in your deposition I asked you if he performed
2 surgery on your left shoulder and I believe you told
3 me that he had not.

4 A Dr. Chidgey didn't, no.

5 Q You did have surgery on your left shoulder
6 ultimately?

7 A Ultimately, yes.

8 Q And that was a result of this accident with Patrician,
9 correct?

10 A I don't believe so.

11 MR. LOCKHART: The records are reflected on Pages
12 94 and 95 in the APAs, Your Honor.

13 THE COURT: Okay.

14 BY MR. LOCKHART:

15 Q Those records indicate that you actually had
16 left-shoulder surgery in November of 1999 and it was
17 also at the hospital clinic associated with
18 Dr. Chidgey's practice. Was that for something not
19 related to this accident?

20 A I don't think it was related. I think I dislocated my
21 shoulder at one time and it was cleaned out. It was
22 just arthroscopic surgery that I had done on my left
23 shoulder that needed to be cleaned out so it wouldn't
24 - as a matter of fact it was stapled so it wouldn't
25 slide out.

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1 Q When you initially went to Lexington Medical Center
2 for treatment related to your accident at Watkins and
3 Shepard, were you asked to complete a health history
4 form?

5 A Not that I remember.

6 MR. LOCKHART: Your Honor, may I approach the
7 witness?

8 THE COURT: Sure.

9 BY MR. LOCKHART:

10 Q Mr. Osmanski, this is a copy of the document that's
11 been offered up into evidence.

12 MR. LOCKHART: That's Page 56 of the APA
13 submissions from the Defendants.

14 THE COURT: Defendants. Okay.

15 BY MR. LOCKHART:

16 Q This is a Lexington Medical Center patient history
17 form dated November 2, 2008. Is that your handwriting
18 and signature on that form?

19 A Yes.

20 Q Did you complete those questions or that questionnaire
21 prior to being seen by a physician?

22 A Yes.

23 Q Under it it asked about surgeries, please be as
24 specific as possible, orthopedic and you
25 indicated -

1 A Left-elbow implant.

2 Q Any particular reason why you didn't talk about your
3 left-shoulder surgery or the other surgeries that you
4 had undergone?

5 A That wasn't bothering me. I mean, there is so much
6 things I could put down there for the surgery that I
7 had from an accident in 1987. I told him about the
8 implant.

9 Q Don't you think it would have been important for your
10 physicians to have had a specific description of your
11 entire medical history? As a matter of fact, the form
12 asked you to be as specific as possible.

13 A About an implant, that's what was bothering me at the
14 time.

15 Q That implant had been bothering you since 2002 when
16 you were released from the care of Dr. Chidgey; hadn't
17 it?

18 A No. I never saw a doctor again when I was released
19 from Dr. Chidgey for my left elbow.

20 Q After you were injured with Patrician you received
21 Workers' Compensation benefits, I believe you
22 testified in your deposition, for approximately seven
23 years?

24 A Yes.

25 Q And ultimately you settled or received a settlement in

- 1 the amount of approximately \$86,000?
- 2 A Yes.
- 3 Q Were you able to return to work at Patrician?
- 4 A No.
- 5 Q Why not?
- 6 A Because I moved from there.
- 7 Q You moved from where?
- 8 A From Sayreville, New Jersey to Florida.
- 9 Q You weren't able to return to work with Patrician
- 10 because you had the permanent restrictions from
- 11 Dr. Chidgey regarding your lifting?
- 12 A Oh, I wouldn't be able to do any construction. No.
- 13 Q So again, you didn't go back to Patrician because you
- 14 had a restriction that had been placed upon you by
- 15 Dr. Chidgey?
- 16 A No. I went to work cutting trees down.
- 17 Q Where was the first place that you worked after being
- 18 released from the care of Dr. Chidgey in March of
- 19 2002?
- 20 A Burnside Trucking.
- 21 Q Where was that located?
- 22 A Palm City, Florida.
- 23 Q How long did you work there?
- 24 A A year and a half.
- 25 Q Why did you leave that employer?

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- 1 A I went to work for CPC Logistics delivering freight
2 for Walgreens.
- 3 Q Where were they located?
- 4 A Jupiter, Florida.
- 5 Q How long did you work for them?
- 6 A Eventually I transferred here to South Carolina with
7 them.
- 8 Q Why did they transfer you to South Carolina?
- 9 A To a higher job position within the company.
- 10 Q Why did you leave that company?
- 11 A I was terminated from that company for taking a
12 part-time job, not driving a truck, at an auto parts
13 store, and I didn't log the hours for that job that I
14 was performing.
- 15 Q Explain that to me in a little bit more detail.
- 16 A I didn't realize that I had to log hours - being a
17 driver I have to log hours that I drive. I didn't
18 realize that I had to log the hours that I was working
19 for another company even though I wasn't driving.
- 20 Q So you were working for someone else and not informing
21 your employer that you were working for another
22 business.
- 23 A They knew I worked for them, but I didn't log the
24 hours.
- 25 Q You were terminated for that?

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- 1 A Yes.
- 2 Q Is it reasonable to conclude they were calling your
3 honesty into question, your integrity into question?
- 4 A No. I think it was more of a safety issue.
- 5 Q It must have been fairly significant for you to have
6 lost your job over it.
- 7 A Yes.
- 8 Q How long were you out of work before you applied for
9 the position with Watkins and Shepard?
- 10 A I wasn't really out of work. My son was born
11 September 15. That's when I came back from First
12 Express in Nashville. I believe it was roughly a
13 month.
- 14 Q Mr. Osmanski, I want to talk to you for a moment about
15 your treatment with Dr. Chidgey. You testified
16 earlier that Dr. Chidgey released you from his care in
17 March of 2002. In your deposition I asked you when
18 you were released by Dr. Chidgey if he had placed any
19 restrictions upon you with regard to the use of your
20 left arm. In your deposition you told me that he had
21 not. So is it your understanding that when you were
22 released from Dr. Chidgey's care that you were
23 released without any restrictions at all?
- 24 A I didn't remember that.
- 25 Q You didn't remember being provided with restrictions?

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1 A With restrictions, yes.

2 MR. LOCKHART: Your Honor, looking at Defendants'

3 APA Page 88.

4 BY MR. LOCKHART:

5 Q Did the records reflect that Dr. Chidgey released you
6 with restrictions of no lifting in excess of 10 to 15
7 pounds to the left upper extremity? Does that sound
8 consistent to you with what you were told when you
9 were last seen by him in March of '02 when you were
10 released?

11 A To no lifting with my left arm?

12 Q In excess of 10 to 15 pounds.

13 A Yes.

14 Q So when you were discharged you were aware of that
15 restriction?

16 A Yes.

17 Q Isn't it true that he had actually given you that
18 restriction in February '02, a month prior, and as far
19 back as January of 2001?

20 A That I don't remember.

21 Q If his records reflect that he assigned a restriction
22 to you as early as January of 2001 of no lifting in
23 excess of 10 to 15 pounds to the left arm, would you
24 have any reason to dispute that?

25 A No.

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- 1 Q When you began working for Watkins and Shepard in
2 October of 2006, had you been back to see Dr. Chidgey
3 at all -
- 4 A No.
- 5 Q - when you were released in March '02?
- 6 A No.
- 7 Q Had you received any information at all from
8 Dr. Chidgey's office between March of '02 and October
9 of 2006 indicating that your lifting restrictions were
10 no longer in existence, they were no longer in effect
11 with regards to your left arm?
- 12 A No.
- 13 Q So when you started working at Watkins and Shepard in
14 October of 2006, you had a permanent restriction of no
15 lifting in excess to 10 to 15 pounds with your left
16 arm?
- 17 A With my left arm.
- 18 Q When you contacted Watkins and Shepard and you spoke
19 with Rodney Stephens did you ever tell Mr. Stephens
20 about these restrictions?
- 21 A No.
- 22 Q Why not?
- 23 A I wasn't asked.
- 24 Q Why wouldn't you have told Mr. Stephens about that?
- 25 A Because I thought I could perform the job. If it was

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- 1 asked I would have definitely told him.
- 2 Q So your testimony here today is that if somebody asks
- 3 you a question you will give them the answer but you
- 4 won't volunteer information to them otherwise?
- 5 A No.
- 6 Q Don't you think that would have been important to your
- 7 employer to have known that you had a 10 to 15 pound
- 8 restriction with your left arm if you were being hired
- 9 to drive a truck and deliver furniture?
- 10 A It would have been important if there was a problem
- 11 with my arm, but there was no problem.
- 12 Q But Dr. Chidgey had given you a restriction of no
- 13 lifting -
- 14 A With one arm.
- 15 Q I understand that, sir. But that arm is the subject
- 16 of this claim. And you have already testified that
- 17 you had the restriction when you were released. And
- 18 you testified that you didn't tell Mr. Stephens.
- 19 A I testified that I wasn't asked.
- 20 Q You didn't volunteer that information; did you?
- 21 A No, I didn't.
- 22 Q And you had no intention of volunteering that
- 23 information unless you were asked?
- 24 A Correct.
- 25 Q Isn't it true the reason that you didn't volunteer

1 that information to Mr. Stephens is you knew that you
2 wouldn't have gotten the job at Watkins and Shepard if
3 you had told them about that restriction?

4 A I don't believe so.

5 Q Well, if it wasn't a concern why didn't you tell him
6 about it voluntarily?

7 A It didn't come up.

8 Q Were you informed of what your job duties and
9 responsibilities were going to be at Watkins and
10 Shepard from the standpoint of your physical
11 requirements of the job?

12 A Yes.

13 Q Once you became aware of those requirements, wouldn't
14 it have been a good idea at that point to have
15 informed your employer or potential employer of what
16 your restrictions were?

17 A I felt like I could do the job.

18 Q You would agree, though, that there were requirements
19 of your job that were outside of the restrictions that
20 had been placed upon you by Dr. Chidgey. In other
21 words, you were going to have to lift objects with
22 your left arm that weighed more than 15 pounds.

23 A I didn't say I was going to lift with one arm on the
24 job description. It said lifting weight and with all
25 the training that I had I knew I could perform the

1 position.

2 Q Mr. Osmanski, there is a form that is sort of at the
3 center of your case.

4 MR. LOCKHART: It's Page 108 of the Defendants'
5 APAs, Your Honor.

6 BY MR. LOCKHART:

7 Q This is a post job offer questionnaire. Is it your
8 testimony today that you never had a conversation with
9 this David Hughley in regards to the completion of
10 this form?

11 A Not that I recall.

12 Q You completed a variety of paperwork before beginning
13 work with Watkins and Shepard. But your testimony
14 today is that you don't recall -

15 A No, I don't.

16 Q - seeing this form? Did you inform Watkins and
17 Shepard of your prior work-related injury?

18 A No.

19 Q Why not?

20 A It wasn't on the application. I didn't think I had to
21 fill anything out about it.

22 Q In light of the significant injury that you sustained
23 in that accident at Patrician Construction don't you
24 think it would have been a good idea to have told
25 Watkins about the injuries that you sustained and the

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1 impact on you?

2 A Probably, yes.

3 Q But you didn't bother telling them?

4 A No.

5 Q When Dr. Chidgey released you from his care in March
6 of 2002, he assigned a 20-percent impairment to
7 your -

8 MR. LOCKHART: I want to rephrase that, Your
9 Honor.

10 BY MR. LOCKHART:

11 Q When Dr. Chidgey released you from his care in March
12 of 2002, he assigned a 14-percent impairment to your
13 left arm; are you aware of that?

14 A No.

15 Q That wasn't the basis for the settlement you received
16 from Patrician?

17 A I didn't know what they were basing it on.

18 Q When you were released by Dr. Chidgey in March of
19 2002, were you still having problems with your left
20 arm?

21 A No.

22 Q Was it limited in any way?

23 A I had a range-of-motion limitation.

24 Q So it was impaired? It wasn't 100 percent?

25 A No.

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- 1 Q What percentage use of your arm do you think you had
2 when you were released from the care of Dr. Chidgey in
3 March of 2002, between zero percent being no use and
4 100 percent being full use?
- 5 A About 80 percent.
- 6 Q Okay. So you would agree that you lost about 20
7 percent of the use of your arm?
- 8 A Until I was through physical therapy. I eventually
9 gained back. I would say I was 95 percent.
- 10 Q So you did have some impairment of your arm, however?
- 11 A Yes.
- 12 Q Going back to the DOT physical that you underwent with
13 Dr. Osbahr in October of 2002, and I apologize,
14 Mr. Smith's copy is a little bit clearer than mine,
15 you were asked whether or not you had any impairment.
16 The form indicates that you answered no.
- 17 A Yes.
- 18 Q Why?
- 19 A Because on the very top question it says in the last
20 five years and that's what I was going by.
- 21 Q Okay. You would agree with me, would you not, that
22 the form asked if you had any illness or injury in the
23 last five years, correct?
- 24 A Correct.
- 25 Q And you would agree with me that the remaining

- 1 questions don't reference five years, correct?
- 2 A No. That's not what I was under that understanding of
- 3 when I filled out that.
- 4 Q Let me ask you this. This form was completed in
- 5 October of 2006, correct?
- 6 A Yes.
- 7 Q All right. And you weren't released from the care of
- 8 Dr. Chidgey until March of 2002, correct?
- 9 A Right.
- 10 Q So within five years of completing this document you
- 11 were still under the care of an orthopedic
- 12 physician.
- 13 A No.
- 14 Q Well, your records reflect that you were.
- 15 A If it's five years, - well, I'm under the impression
- 16 that I had nothing to do in the last five years,
- 17 surgery or anything like that.
- 18 Q You were still seeing a doctor for your left elbow
- 19 within five years of October of 2006.
- 20 A That I didn't recall if it was five years or not.
- 21 Q You worked for Watkins and Shepard for approximately
- 22 two years; is that correct?
- 23 A Yes.
- 24 Q During that two-year period did you ever tell anyone
- 25 at all about your prior restrictions that you had been

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1 provided by Dr. Chidgey?

2 A No.

3 Q I believe you testified in your deposition that your
4 job with Watkins and Shepard required you to lift
5 objects that weighed anywhere from 150 and 250 pounds;
6 is that correct?

7 A About 100 to 150, yes.

8 Q These are couches, recliners, boxes.

9 A Most of it was recliners.

10 Q You would agree that performing that activity was
11 outside of the restriction that you had been assigned
12 by Dr. Chidgey?

13 A Yes.

14 Q This restriction you are aware of but your employer at
15 Watkins and Shepard was not?

16 A Yes.

17 MR. SMITH: Your Honor, I just would I guess pose
18 the same objection given earlier. He can testify to
19 what his knowledge is. It's not necessarily to what
20 other people's knowledge is. That's in the records
21 and depositions and things like that.

22 THE COURT: Well, I will read everything.

23 MR. SMITH: Well, it's just an objection to the
24 question about what their knowledge is.

25 THE COURT: Would you ask your question again

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1 because the answer was yes. But ask it again and
2 make sure I understood it or I heard it right.

3 BY MR. LOCKHART:

4 Q I asked you a few moments ago if you were required in
5 your job at Watkins to lift objects that weigh between
6 I think 150 and 250. You testified to that at your
7 deposition. I believe your answer was the objects
8 weighed between 100 and 150 pounds, right?

9 A Yes.

10 Q And then I asked you if lifting objects that weighed
11 between 100 and 150 pounds was outside of the
12 restrictions that Dr. Chidgey had placed upon you and
13 you answered that yes, that would have been the case,
14 correct?

15 A Yes.

16 Q I believe I asked you if you were aware of your
17 restrictions with Dr. Chidgey but that you had never
18 provided that restriction or informed your employer,
19 Watkins and Shepard of that restriction?

20 A Yes.

21 THE COURT: Okay. Thank you, Mr. Lockhart, for
22 reconstructing that.

23 BY MR. LOCKHART:

24 Q There was some questions earlier in regards to a DOT
25 physical that you underwent with a Dr. Fisher in

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1 Lexington, South Carolina in November of 2008 - I'm
2 sorry, October of 2008. Did you see a Dr. Fisher?

3 A Yes.

4 Q Had your card expired or was it on the verge of
5 expiring? Is that why you went and had another DOT
6 physical?

7 A Yes.

8 Q Did you go to see Dr. Fisher after your accident
9 occurred on November 1 of 2008?

10 A I saw Dr. Fisher for a physical that I had. I had my
11 physical for a health physical. I had some kidney
12 stones before that in November and October. I had
13 kidney stones, so I had to go back and see him. But I
14 don't believe I saw him for my injury at all.

15 Q Did you provide him with any complaints about your
16 left elbow?

17 A No.

18 Q Any particular reason why you wouldn't have told your
19 family physician about this injury you suffered on or
20 about November 1?

21 A I don't believe I saw Dr. Fisher after that for my
22 elbow.

23 MR. LOCKHART: I'm at Page 59 of the Defendants'
24 APAs.

25 BY MR. LOCKHART:

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1 Q Mr. Osmanski, this is a note from Dr. Fisher's office
2 dated November 13, 2008 which would have been
3 approximately 12 days after your accident. Does that
4 refresh your memory?

5 THE COURT: Wait a minute. The accident was
6 November 1, 2008?

7 MR. LOCKHART: Yes, Your Honor.

8 THE COURT: You are looking at -

9 MR. LOCKHART: I'm looking at Page 59 of our
10 APAs, which is actually two notes. One is -

11 THE COURT: I see.

12 MR. LOCKHART: Two notes from two visits on one
13 piece of paper.

14 THE COURT: I see it. I'm sorry. I see the date
15 on it. Go ahead.

16 BY MR. LOCKHART:

17 Q November 13, 2008, do you recall being seen at
18 Dr. Fisher's office?

19 A That was a recheck - I believe that was for the test
20 that I had. And that's all I went in there for is to
21 get the results from the tests; the cholesterol test,
22 the blood tests that I had. It wasn't for anything to
23 do with the elbow. He did ask me about my elbow and I
24 did speak to him about that.

25 MR. LOCKHART: I object to anything he asked you

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1 about, Your Honor.

2 THE COURT: Sustained. Hearsay. Go ahead.

3 BY MR. LOCKHART:

4 Q In this follow-up visit on November 13, you told
5 Dr. Fisher that you had been injured at work on
6 November 1?

7 A I don't recall if I ever spoke to him about that or
8 not. I know that that appointment was for my
9 cholesterol, my blood work, my iron, all of that. And
10 that's all it was. I don't even think - I don't even
11 think I saw Dr. Fisher right there.

12 Q Okay. When you saw him for the DOT physical in
13 October of 2008, did you have to fill out a health
14 history form and document before you were seen by him
15 for the first time?

16 A I think the top part of the DOT physical.

17 Q Let me show you a copy of something here that was in
18 the records that I received from his office pursuant
19 to a subpoena. This is something from Lexington
20 Family Practice. It's got a date October 22, 2008.
21 Is that your handwriting on that form?

22 A Yes.

23 Q Okay. And is that a form that you would have
24 completed prior to seeing Dr. Fisher for the first
25 time?

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- 1 A I don't - yeah, I guess.
- 2 Q Okay. There is a section of the form labeled past
3 history. It says list operations in the past.
4 Include the year the surgery occurred. What answer
5 did you put?
- 6 A I put 1987 elbow surgery.
- 7 Q Is there any mention of your shoulder surgery in
8 there?
- 9 A No.
- 10 Q Any particular reason why you didn't mention
11 that?
- 12 A Probably because it was just too much to write
13 down.
- 14 Q There were three lines, two or three lines there.
- 15 A Yeah, I know. It's just all the surgeries that I had.
16 And then I talk to him about it when I go see him.
17 And I say to him that I didn't write down all my
18 surgeries and I did explain to him everything that
19 happened.
- 20 Q You explained to him everything that happened?
- 21 A Well, I explained all the surgeries that I had. I
22 didn't go in there and say. well this date I had
23 because I don't remember the exact dates of the exact
24 surgeries.
- 25 Q There was another question on this form that said list

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- 1 serious injuries or accidents in the year. Is that
2 filled out at all?
- 3 A No.
- 4 Q Any particular reason why you left that blank?
- 5 A It's because I wrote down the surgery.
- 6 Q You would agree that asked you a question about an
7 accident or an injury and the year and you left that
8 blank.
- 9 A Well, I put 1987 elbow surgery. I figured that would
10 be just as good.
- 11 Q I understand, sir. The question, though, was list
12 serious -
- 13 A No. I didn't answer it.
- 14 Q There were no witnesses to your accident on
15 November 1?
- 16 A No.
- 17 Q It's my understanding you went down to Gainesville and
18 saw Dr. Chidgey in January of '09 after your November
19 '08 accident happened; is that correct?
- 20 A Yes.
- 21 Q And initially, I believe the records reflect and you
22 told me in your deposition that he gave you some
23 medication and gave you a sling to wear on your arm;
24 is that correct?
- 25 A Yes.

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1 Q And this sling was very similar to, if not identical
2 to the sling that you had worn several years prior to
3 what he was treating you for your elbow condition; is
4 that correct?

5 A Yes.

6 Q Do you recall seeing a Dr. McIntosh. He was an
7 orthopedic physician in Lexington, South Carolina?

8 A Yes.

9 Q Did you see Dr. McIntosh for another problem related
10 to your hand?

11 A Yes. I got a bump on my finger.

12 Q Did he remove that?

13 A No.

14 MR. LOCKHART: Your Honor, I'm on Page 54 of his
15 APAs.

16 BY MR. LOCKHART:

17 Q Mr. Osmanski, the records reflect that you were seen
18 by Dr. McIntosh on or about 11/5/08 for the injury you
19 suffered on November 1. Did you tell Dr. McIntosh
20 about your prior left-elbow injury and medical
21 treatment that you received as a result?

22 A Yes.

23 Q His records reflect: "Back in the late 1990s when a
24 total elbow arthroplasty in his thirties. This is all
25 in regard to being a truck driver and has been doing

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1 this for some time. He is right-hand dominant." Is
2 that consistent to what you told Dr. McIntosh?

3 A Yes, I believe so.

4 Q His records go on to say: "Ever since the injury he
5 has numbness." Even after being released from the
6 care of Dr. Chidgey in March of 2002 did you still
7 continue to have numbness in your left arm and left
8 elbow?

9 A Occasionally.

10 Q So you had some limited range of motion and numbness,
11 occasional numbness in that arm. Anything else at
12 all?

13 A No.

14 Q I believe his records reflect that you described a
15 hyperextension injury which you described to the Court
16 a few moments ago. You are not testifying today that
17 a box actually fell on your arm on November 1,
18 correct?

19 A No.

20 Q Your arm got straightened out.

21 MR. SMITH: Wait, wait wait. I'm sorry. Let him
22 finish answering the question.

23 MR. LOCKHART: Just -

24 MR. SMITH: Let him finish answering your
25 question.

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1 MR. LOCKHART: I think he was finished but -

2 THE COURT: Go ahead.

3 MR. SMITH: I don't mean to make a big stink of
4 it. It just sounded to me like he was continuing his
5 answer.

6 BY MR. LOCKHART:

7 Q Please take as long as you want to answer my
8 question.

9 A The box, actually it come down and pulled my arm. It
10 didn't fall. It pulled straight down.

11 Q It pulled your arm. It didn't actually strike your
12 elbow?

13 A No.

14 Q Or the crease of your arm?

15 A No.

16 Q Mr. Osmanski, I think Mr. Smith asked you about this.
17 I want to make sure I'm clear.

18 MR. LOCKHART: This is Page 62 of the Defendants'
19 APAs, Your Honor.

20 BY MR. LOCKHART:

21 Q This appears to be another DOT form you filled out
22 before seeing Dr. Fisher in October of 2008; is that
23 correct?

24 A Right.

25 Q And you would agree that in response to the question

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1 of whether you had a missing or impaired hand, arm,
2 foot, leg, finger or toe you answered no to that
3 question; is that correct?

4 A Right.

5 Q Mr. Osmanski, I want to go back to this issue of your
6 knowledge of your restrictions when you began working
7 with Watkins and Shepard. You admitted to me that you
8 weren't asked. You maintain that you weren't asked
9 about your restrictions. You went on to testify, I
10 believe, that you did not inform anyone of those
11 restrictions. Would you agree with me that you would
12 have an incentive to not tell Watkins and Shepard
13 about your prior impairment and your restrictions?

14 A No.

15 Q You wouldn't agree with me that the incentive would be
16 the possibility of employment and a wage at a time
17 that you were unemployed and that if you had notified
18 them of these restrictions you might have not gotten a
19 job with them?

20 A I was still employed with First Express. I took the
21 Watkins and Shepard job because it was a local
22 position.

23 Q You had an incentive to take the job with Watkins and
24 Shepard and to not tell them about your prior
25 restrictions.

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- 1 A If it was on the application I would have told them
2 immediately.
- 3 Q Well, if you worked for them for two years why didn't
4 you ever bother to tell anyone about it?
- 5 A Because I really never saw anybody.
- 6 Q You told your lawyer earlier that through therapy and
7 other forms of retraining that you learned to use your
8 right arm primarily?
- 9 A Yes.
- 10 Q I would presume the reason that you used your right
11 arm primarily is because you continued to have
12 problems with your left arm even after being released
13 to Dr. Chidgey's care?
- 14 A No. I never had any problems with my left arm. I
15 never saw another doctor for my left arm.
- 16 Q I understand that, sir. But you went through a long
17 explanation earlier about how you used your right arm.
18 You used it a lot. Why were you using your right arm
19 so much if you had a completely healthy left arm?
- 20 A I didn't say I had a completely healthy left arm. I
21 had a restriction with it where there was a
22 restriction of range of motion. You learn how to use
23 your right arm and use your left arm as a guide. I
24 was taught that through all the training I had through
25 the rehabilitation and pain management.

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1 MR. LOCKHART: I beg the court's indulgence just
2 briefly.

3 THE COURT: Okay.

4 BY MR. LOCKHART:

5 Q You told Mr. Smith earlier that you are currently -
6 you are still under the care of Dr. Shealy; is that
7 correct?

8 A Yes.

9 Q The procedures that you have had up to this point, I
10 believe the records reflect this, have dealt primarily
11 with your prosthesis.

12 A Yes.

13 Q Your replacement; is that correct?

14 A Yes.

15 Q To your knowledge have you undergone any other kind of
16 surgery or any other procedure other than the
17 prosthesis replacement and repair and the removal of
18 the wire, I believe, that you testified to earlier?

19 A No.

20 Q Do you have any knowledge of whether when you reached
21 a settlement with Patrician Construction if they were
22 going to remain responsible for your elbow replacement
23 for the remainder of your life?

24 A No.

25 Q When was the last time you saw Dr. Shealy?

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1 A Yesterday.

2 Q And to your knowledge you are still being placed out
3 of work or written out of work by him?

4 A Yes.

5 Q When is your follow-up visit scheduled?

6 A A month and a half, I think.

7 Q Are you undergoing any therapy - physical therapy or
8 any other treatment right now besides your visits to
9 Dr. Shealy?

10 A Not as of yet.

11 Q Are there recommendations for therapy or other forms
12 of treatment?

13 A I believe so, yes.

14 Q Are you scheduled to begin - what is the therapy? Are
15 you seeing a doctor or what exactly is your -

16 A I believe I'm going to be going through vocational
17 rehab.

18 Q Through the assistance of Dr. Shealy's office?

19 A I believe he's going to coincide with South Carolina
20 Vocational Rehab.

21 MR. LOCKHART: One final question and I'll be
22 finished.

23 BY MR. LOCKHART:

24 Q Mr. Osmanski, there was a document in your personnel
25 file that's been offered into evidence in this case.

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1 MR. LOCKHART: And that's page 110 of the
2 Defendants' APAs, Your Honor.

3 BY MR. LOCKHART:

4 Q Does that appear to be a document that has your
5 handwriting on it?

6 A Yes.

7 Q It's something called Watkins and Shepard Trucking
8 Incorporated Affirmative Action Program Information.
9 Would that have been something you would have
10 completed when you began employment?

11 A I don't remember if I filled that paper out when I
12 began.

13 Q But that does have your signature on it, correct?

14 A Yes.

15 Q There's a section that's entitled disabled. The
16 question asks: "Do you have an impairment, physical
17 or mental that substantially limits one or more of
18 your major life activities, i.e. any mental or
19 physical function which if impaired creates a
20 substantial barrier to employment, or you have a
21 record of such an impairment or society regards you as
22 having such an impairment?" There's a box for yes and
23 a box for no. Which one is checked?

24 A No.

25 Q Now, you testified earlier that you knew of your

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1 restriction from Dr. Chidgey when you were released
2 in March of '02; is that correct?

3 A Uh-huh.

4 Q You need to say yes.

5 A Yes.

6 Q So you would agree that there was a record of your
7 impairment with Dr. Chidgey, an impairment to your
8 left arm including the restrictions that were placed
9 upon you when he released you in March of '02.

10 A Yes.

11 Q So would you agree that you answered this question
12 untruthfully?

13 A I answered no that I'm not disabled. That's what I
14 answered to.

15 Q Well, the question asked you if you had an impairment.
16 It didn't ask you about disability, per se. It asked
17 you if you were impaired.

18 A I must have not understood that then.

19 Q Did you ask anybody for clarification or assistance -

20 A No.

21 Q - in determining what -

22 A I was under the impression of it saying disabled and
23 I'm not disabled.

24 MR. LOCKHART: Your Honor, those are all the
25 questions I have.

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1 Thank you, Mr. Osmanski.

2 THE COURT: Mr. Smith, do you have anything on
3 redirect?

4 MR. SMITH: Yes, ma'am.

5 REDIRECT EXAMINATION

6 BY MR. SMITH:

7 Q Mr. Osmanski, I just want to revisit a moment the
8 testimony exchange you had with Mr. Lockhart regarding
9 the visit with Dr. Osbahr. He had read you some
10 portions of the deposition testimony and asked you to
11 respond to those things. I will ask you again, did
12 you show your scars to Dr. Osbahr when you had the DOT
13 physical for Watkins?

14 A Yes.

15 Q Describe for me the appearance of those scars at that
16 time. How would you describe what those scars looked
17 like at the time that Dr. Osbahr was seeing you?

18 A They were very visible. At some point they were
19 raised. Through the years they smoothed out, but they
20 were definitely noticeable.

21 Q When Dr. - and you said Dr. Osbahr had checked the
22 range of motion in your arms?

23 A Yes, I believe so.

24 Q And when he is checking the range of motion, did you
25 have any discussions with him about why your range of

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1 motion was only half of what it should be?

2 A Yes.

3 Q What was that?

4 A I told him that I had reconstructive surgery where
5 they did one bone in the forearm. My range of motion
6 was, although gaining each year, but I was still
7 limited.

8 Q Okay. And when you filled out the top portion of that
9 form I think you thought - your testimony was that
10 when asked if you had any injuries or illness in the
11 past five years -

12 A Yes.

13 Q - you were thinking that all of those questions dealt
14 with the five years.

15 A Yes.

16 MR. LOCKHART: Your Honor, again, I object to the
17 leading form of the question.

18 MR. SMITH: That wasn't necessarily my question,
19 Your Honor.

20 THE WITNESS: Well, that was his testimony.

21 MR. SMITH: Okay.

22 THE COURT: Let him go ahead and ask. He is
23 recapitulating or restating what his testimony was, so
24 let me hear what the question is.

25 MR. SMITH: Thank you, Your Honor.

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1 BY MR. SMITH:

2 Q And then in 2008 when you see Dr. Fisher and you give
3 him a history of your accident you have the same
4 answer, no. Tell me why you are interpreting those
5 forms the way that you were.

6 A From it being the last five years. I mean, that's the
7 way I looked at it was in the last five years have you
8 had anything. And that's how I answered all the
9 questions.

10 Q When you told Dr. Fisher in 2008 before your injury,
11 when you told Dr. Fisher about your left arm or your
12 arm - your accident, your prior accident, keeping in
13 mind you had already checked no to that question up
14 top, how did it come about when you told Dr. Fisher
15 about the problems and about your prior injury?

16 A From the physical of him looking at and seeing my
17 scars.

18 Q The questionnaire -

19 MR. SMITH: And I believe, Your Honor, that's at
20 - that would be the first page of the Defendants'
21 APAs.

22 MR. LOCKHART: It's 108, Your Honor.

23 MR. SMITH: It's 108. I'm sorry.

24 BY MR. SMITH:

25 Q Mr. Osmanski, I want to ask you about this form in

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1 particular. Is this your signature?

2 A No.

3 Q Is any of the information on this form in your
4 handwriting?

5 A No.

6 Q Okay. I want to ask you a few of these questions on
7 here. Question No. 1, after receiving a copy of the
8 job description and central function and minimum
9 qualification standards for over-the-road drivers, and
10 upon review of it, let me ask you this: Can you
11 complete all of the essential functions listed in that
12 job description?

13 A Yes.

14 MR. LOCKHART: I have to object to the form of
15 the question because the thing asked, is it being
16 asked in 2010? Is it being asked in 2008? Are we in
17 a time machine back in 2006?

18 THE COURT: Why don't you clarify?

19 MR. LOCKHART: What is the context of when these
20 questions are being answered right now?

21 BY MR. SMITH:

22 Q Mr. Osmanski, I want you to assume we are in 2006.
23 You are completing the application process. And I am
24 asking you these questions. Okay. I want to ask you
25 these questions. I don't know if your knowledge has

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1 changed from then to now, whatever it is, but I just
2 want to ask you these questions. Let me just set it
3 up for a moment. You testified you didn't recall
4 speaking to anyone asking you these questions,
5 correct?

6 A Yes.

7 Q I just want to go over what these questions were and
8 see what your answers would be if you were asked
9 them.

10 MR. LOCKHART: Your Honor, I guess I'm having a
11 hard time understanding what the point of this
12 exercise would be because he has already testified
13 that this is not - that he didn't complete it.

14 THE COURT: He says he doesn't recall.

15 MR. LOCKHART: And we have evidence that seems to
16 suggest that he, in all likelihood, did. You can
17 decide how you want to rule on that issue. He has
18 already testified as to his knowledge of his
19 restrictions. He's already testified he didn't
20 disclose it. I'm not really sure what the point of
21 all of this is.

22 THE COURT: He has also testified that anything
23 that he was asked he would have disclosed.

24 MR. LOCKHART: Yes, ma'am.

25 THE COURT: I don't know that you need -

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1 MR. LOCKHART: I think what I'm -

2 THE COURT: I'm trying to give you some leeway.

3 MR. SMITH: I understand that. I'm not sure
4 exactly what the objection is and whether, you know,
5 we are just asking what the point of the exercise is,
6 but here is the defense. The defense is that
7 Mr. Osmanski was asked these questions.

8 THE COURT: Right, which he did not recall which
9 means, you know, I have to decide. But he does not
10 recall.

11 MR. SMITH: Yes, ma'am. And then our position -

12 THE COURT: If he doesn't recall, the responses
13 on that questionnaire may not have been his. He
14 doesn't recall.

15 MR. SMITH: Yes, ma'am. And our position has
16 always been that A, he doesn't remember filling out
17 this form.

18 THE COURT: Right.

19 MR. SMITH: But B, our position has been that
20 even if he did fill out this form, he wasn't
21 untruthful in this form. And that's why I'm trying to
22 ask him these questions because, I mean, the question
23 asked can you complete all the essential job
24 functions? I'm asking him in your opinion did you
25 think you could complete all the essential job

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1 functions?

2 THE COURT: And he has already testified that he
3 thought he could.

4 MR. SMITH: Yes, ma'am. And I was just going to
5 go through these questions and ask him -

6 THE COURT: I'm going to let you do it. And you
7 have got a running objection to this exercise and to
8 this process and to this testimony, I should say,
9 Mr. Lockhart.

10 MR. LOCKHART: Okay. So I want to make sure what
11 we are doing here because -

12 THE COURT: He's asking him if he was filling it
13 out himself, if he was completing it himself in 2006
14 how would he have responded is what I understand. If
15 he had been given the forms and asked to fill it out,
16 how would he have responded; is that right?

17 MR. SMITH: Yes, ma'am. The defense says that he
18 gave untruthful answers. I'm asking him if these
19 answers, if he gave them, were truthful.

20 THE COURT: Well, he says he doesn't recall, so
21 he can't - this is kind of - I'm trying to make sure
22 everybody gets to put up their case but -

23 MR. LOCKHART: I mean, I'm happy to on re-cross --

24 THE COURT: He has already said he doesn't recall
25 this. We know that.

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1 MR. LOCKHART: If we want to go - I mean, I
2 guess what I'm trying to figure out is what relevancy
3 this has based on the totality of the testimony
4 provided up to this point.

5 THE COURT: Well, you've got the woman that
6 completed this, and so I guess the point here is, and
7 I'm not trying to say what you are trying to do. But
8 what I'm guessing you are trying to do is to say if he
9 was, in fact, filling it out would you now fill it out
10 the same way; is that right?

11 MR. SMITH: Yes, ma'am.

12 THE COURT: I'm going to let him do it. You have
13 got a running objection. Go ahead, Mr. Smith.

14 MR. SMITH: And I apologize. I'm sure I didn't
15 set it up correctly. I apologize for the confusion.

16 THE COURT: I know where you are coming from. Go
17 ahead.

18 BY MR. SMITH:

19 Q Question No. 3, have you had any non-work-related or
20 work-related injuries or illnesses? What's the
21 truthful answer to that question?

22 A Non-work-related injuries, yes.

23 Q What were the non-work-related injuries that you
24 had?

25 A I had a dislocation of my shoulder playing softball.

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- 1 Q And when was that?
- 2 A It could be '87, '88, '86, '85.
- 3 Q Well over 20 years?
- 4 A Yes.
- 5 Q Have you been injured or suffered an occupational
- 6 disease?
- 7 A Yes.
- 8 Q Do you have any physical limitations or restrictions
- 9 such as lifting, squatting, bending, kneeling that
- 10 would prevent you from performing the essential job
- 11 functions?
- 12 A I probably would have said no to that because in my
- 13 opinion I could perform the job. Yes, I have a
- 14 limitation with my left arm, but I also have two arms
- 15 and two legs so that I can use what I've learned to
- 16 perform that job.
- 17 Q Question No. 6, are you currently being prescribed any
- 18 medication by a physician which may affect your
- 19 ability to perform the essential job functions?
- 20 A No.
- 21 Q Have you been certified by any subsequent injury funds
- 22 by any state's department of labor and industry such
- 23 as an impairment rating from a disability or
- 24 settlement of claim?
- 25 A I would have said yes.

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- 1 Q What's the indication on the form?
- 2 A N/A.
- 3 Q Do you currently have or previously had a DOT waiver?
- 4 A No.
- 5 Q Mr. Osmanski, when you answered Mr. Lockhart's
- 6 questions regarding the ten to fifteen pound lifting
- 7 restriction, I believe your testimony was that you
- 8 were aware of that; is that correct?
- 9 A Yes.
- 10 Q Yet you testified here today that you thought you
- 11 could perform the essential functions of the job.
- 12 A Yes.
- 13 Q All right. And one of those essential functions of
- 14 the job that you went over with Mr. Lockhart was the
- 15 lifting.
- 16 A Yes.
- 17 Q And you admitted to Mr. Lockhart that the lifting part
- 18 of the job was more then 10 to 15 pounds?
- 19 A Yes.
- 20 Q All right. Did you think that - why did you think you
- 21 could - here's the first question. Did you think you
- 22 were violating what Dr. Chidgey had told you by
- 23 working at Watkins?
- 24 A No.
- 25 Q Why did you think that?

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1 A Because of all the training that I had as far as
2 lifting with my legs and my arm, my right arm.

3 Q You mentioned earlier that Watkins didn't say this was
4 75 pounds lifting with one arm. What did you mean by
5 that?

6 A Because usually a job, you are using both your arms
7 and your legs. And, I mean, any job description is
8 not going to say, okay, you must lift 100 pounds with
9 one arm. That's not reality. Reality is you use both
10 arms. And over the years of working the position I
11 worked with Walgreens and gaining strength, I felt I
12 was able to do it and I did for two years.

13 MR. SMITH: All right, Mr. Osmanski, thank you.

14 THE COURT: Mr. Lockhart, since I let him go
15 through that is there something you would like to
16 follow up with?

17 MR. LOCKHART: Sure. I have a couple of things,
18 Your Honor.

19 RE-CROSS EXAMINATION

20 BY MR. LOCKHART:

21 Q Mr. Osmanski, you testified in response to your
22 lawyer's questions that you informed Dr. Osbahr of
23 your scarring or showed him the scarring on your left
24 arm and provided him with an explanation as to why
25 those scars were there; is that correct?

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1 A Yes.

2 Q Are you certain about that?

3 A Yes.

4 Q I'm looking at Page 20 of Dr. Osbahr's deposition.

5 Dr. Osbahr was asked: "So if he", meaning you, Mr.

6 Osmanski, "had a scar on his arm that would have

7 represented a surgical scar whether or not you saw a

8 surgical scar." His answer: "If it was not. I did

9 not remark on that so it might not have been very

10 obvious.

11 Next question: "I can represent to you that he

12 has one, but you have to look at the arm?" His

13 answer: "I do."

14 Next question: "So if he has a scar, it would

15 have been - it's obvious to anybody, it would have

16 been obvious to a doctor, I would assume; is that

17 fair?" His response: "Yeah, sometimes the scars are

18 hidden pretty good so it was not showing up to me in

19 terms of the exams."

20 So does that sound consistent with the testimony

21 you provided us here today?

22 A I'm pretty sure he could see the scars. I showed them

23 to him. They are very visible. And not only are they

24 visible it's the way my arm hangs.

25 Q When you saw Dr. Osbahr in November of 2008 it had

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1 been several years since you last had surgery in your
2 left or right arm, correct?

3 A Yes.

4 Q Go back to the questionnaire for a moment. It's my
5 understanding now that if we could go back in time
6 that you would have answered these questions in a
7 certain way that is much different than what this form
8 indicates.

9 A Yes.

10 Q Let's talk about No. 5 for a moment. My question to
11 you: "Do you have any physical limitations or
12 restrictions such as lifting, squatting, bending,
13 kneeling, etcetera that would prevent you from
14 performing the essential functions - the essential job
15 functions? If so, what?" I believe you told
16 Mr. Smith that your answer still would be no to that
17 question; is that correct?

18 A Yes.

19 Q But you would agree with me -

20 THE COURT: No, that's correct or yes, that's
21 correct? We want to make sure the record is -

22 BY MR. LOCKHART:

23 Q What would your answer be to question five?

24 A I believe what I said was I would have said no because
25 I would feel that I would be able to perform the

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1 essential job functions.

2 Q But you would agree with me that that answer is not
3 consistent with the records of Dr. Chidgey who placed
4 a 10- to 15-pound restriction on you with regard to
5 the use of your left arm?

6 A Yeah. Yes.

7 Q All right. That answer would not be consistent with
8 his records?

9 A Yes.

10 Q Sir?

11 A I said yes.

12 MR. LOCKHART: Your Honor, those are all the
13 questions I have.

14 MR. SMITH: We have no further questions.

15 THE COURT: That concludes this proceeding.

16 (The hearing concluded at 12:22 PM)

STATE OF SOUTH CAROLINA)
)
 COUNTY OF LEXINGTON)

CERTIFICATE

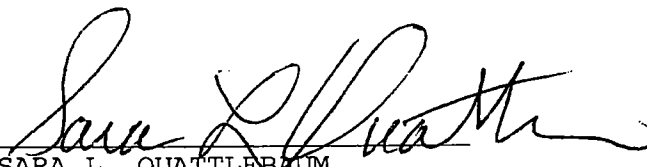
BE IT KNOWN THAT I TOOK THE FOREGOING
 WORKERS' COMPENSATION HEARING;

THAT I WAS THEN AND THERE A NOTARY PUBLIC IN
 AND FOR THE STATE OF SOUTH CAROLINA-AT-LARGE;

THE FOREGOING TRANSCRIPT REPRESENTS A TRUE,
 ACCURATE AND COMPLETE TRANSCRIPTION OF THE TESTIMONY SO
 GIVEN AT THE TIME AND PLACE AFORESAID TO THE BEST OF MY
 SKILL AND ABILITY;

THAT I AM NOT RELATED TO NOR AN EMPLOYEE OF
 ANY OF THE PARTIES HERETO, NOR A RELATIVE OR EMPLOYEE OF
 ANY ATTORNEY OR COUNSEL EMPLOYED BY THE PARTIES HERETO,
 NOR INTERESTED IN THE OUTCOME OF THIS ACTION.

WITNESS MY HAND AND SEAL THIS 8TH DAY OF JULY
 2010.


 SARA L. QUATTLEBAUM
 NOTARY PUBLIC FOR SOUTH CAROLINA
 MY COMMISSION EXPIRES JULY 12, 2012

SARA QUATTLEBAUM, Independent Court Reporter
 (803)447-0272

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CONDENSED TRANSCRIPT WORD INDEX

Deposition
Of
JOE A. OSMANSKI

JOE A. OSMANSKI v. WATKINS & SHEPARD TRUCKING, INC. AND
ZURICH NORTH AMERICA
WCC #0818219

3/4/2009

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South Carolina Workers' Compensation Commission
W.C.C. File #0818219

Joe A. Osmanski,	)	
	)	
Claimant,	)	Deposition
	)	
vs.	)	of
	)	
Watkins & Shepard Trucking,	)	Joe A. Osmanski
Inc.,	)	
	)	
Employer,	)	
	)	
Zurich North America,	)	
	)	
Carrier.	)	
	)	

Deposition of Joe A. Osmanski, pursuant to the Rules of the South Carolina Workers' Compensation Commission, taken before Cheri B. Williams, Certified Court Reporter and Notary Public in and for the State of South Carolina, scheduled for 10:00 a.m. and commencing at the hour of 10:10 a.m., Wednesday, March 4, 2009 at the office of George Sink, P.A., 240 Stoneridge Drive, Suite 402, Columbia, South Carolina.

Reported by:
Cheri B. Williams, CVR

Appearances

For the Claimant: Paula Amick, Esq.
George Sink, P.A.
240 Stoneridge Drive, Suite 402
Columbia, SC 29210

For the Employer/
Carrier: Jason W. Lockhart, Esq.
McAngus, Goudelock & Courie,
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Columbia, SC 29211

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Exhibits

No exhibits marked.

Transcript Legend

dashes (--) speaker interrupted
ellipsis (...) halting speech, omission of word(s)
(ph) denotes phonetically written
(sic) written as said

Stipulations

It is stipulated by and between counsel for the respective parties that all objections are reserved until the time of trial, except as to the form of the questions.

- - - -

The reading and signing of this deposition is waived by the deponent and counsel for the respective parties.

Whereupon,

Joe A. Osmanski, being duly sworn and cautioned to speak the truth, the whole truth, and nothing but the truth, testified as follows:

EXAMINATION

BY MR. LOCKHART:

Q Mr. Osmanski, good morning.

A Good morning.

Q My name is Jason Lockhart. I'm a lawyer from a law firm here in Columbia called McAngus, Goudelock & Courie. I represent Watkins & Shepard and their workers' comp carrier, Zurich, in your workers' comp case. We've got a hearing coming up in your case here in the next couple of weeks, and so I'm here this morning to take your deposition.

1 A Okay.

2 Q Have you ever had your deposition taken before?

3 A No.

4 Q Okay. Well, a deposition is just a legal term to
5 describe a conversation that you and I are going to
6 have this morning in the presence of your lawyer,
7 Ms. Amick. I'm going to ask you some questions
8 about your job with Watkins & Shepard. We're going
9 to talk about your accident. I'm going to talk to
10 you about the medical care that you've received as
11 a result of this accident. I'm going to talk to
12 you about some previous medical care you've gotten
13 for the same part of your body that's the subject
14 of this claim. Then I want to talk to you about
15 how you're doing today, what kind of problems you
16 still may be having, et cetera. This should take
17 us about an hour or so. There are a couple of
18 things I ask you to keep in mind during the
19 deposition. The first is that the court reporter
20 is taking down everything that we say to each
21 other, so I need you to speak your answers or
22 verbalize your answers for me, okay?

23 A Okay.

24 Q If you nod your head or shake your head, it's very
25 difficult for her to get that down on the

1 recording. The second thing is if I ask you a
2 question that is confusing or that you don't
3 understand in any way, please let me know. I'll be
4 happy to repeat myself or clarify my question. I'm
5 not here to trick you or mislead you in any way, so
6 it's important that you understand my questions
7 before you answer them. And if you answer my
8 question I'm going to assume that you understood
9 what I was asking you, okay?

10 A Yes.

11 Q And then, finally, if at point during the
12 deposition you need to stop and you need to take a
13 break and go to the restroom, do anything like
14 that, let me know. We'll be happy to stop what
15 we're doing and let you take whatever breaks you
16 need and then get back to the deposition, okay?

17 A Yes.

18 Q Mr. Osmanski, if I could get you to state your full
19 name for the record, please.

20 A Joseph Arthur Osmanski.

21 Q And, sir, what's your present address?

22 A 155 01155 d.

23 Q And that's --

24 A Pelion, South Carolina.

25 Q And what type of residence is that? Is that a

- 1 house or an apartment or a mobile home?
- 2 A A home.
- 3 Q It's a house?
- 4 A Yeah, a house.
- 5 Q How long have you lived at that residence?
- 6 A Five years.
- 7 Q And are you renting that or do you have a mortgage
- 8 on that home?
- 9 A I have a mortgage.
- 10 Q How long have you lived in South Carolina?
- 11 A Five years.
- 12 Q Where are you from originally?
- 13 A Florida.
- 14 Q And what's your date of birth?
- 15 A
- 16 Q So how old does that make you today?
- 17 A Forty-five.
- 18 Q Who lives with you at your residence in Pelion?
- 19 A My wife, Joanne.
- 20 Q And how long have you been married to Joanne?
- 21 A Twenty-five years.
- 22 Q Is she the only lady you've ever been married to?
- 23 A Yes.
- 24 Q Do you have any children?
- 25 A Yes.

1 Q How many children do you have?

2 A Nine.

3 Q Do they all live with you at your residence?

4 A No.

5 Q How many live with you at your residence?

6 A Eight.

7 Q How many of those eight are under the age of 18?

8 A Seven.

9 Q Are all eight of your children reliant upon you for
10 financial support?

11 A No. Seven are.

12 Q Seven of them are? One has their own source of
13 income or employment?

14 A Yes.

15 Q Besides your wife and your children, do you have
16 anyone else living with you at your home?

17 A No.

18 Q Besides your seven children who are under 18 and
19 your wife, do you have anybody else, family
20 members, friends, anyone who relies upon you for
21 financial support?

22 A No.

23 Q How far did you go in school?

24 A Eleventh grade.

25 Q Have you ever gotten your GED?

1 A No.

2 Q Have you ever taken any courses at an institution
3 outside of high school, like a tech school or a
4 community college or any type of institution at
5 all?

6 A I did a driving school.

7 Q And where was that at?

8 A In West Palm Beach, Florida.

9 Q Did you receive any type of certificate or
10 certification from that driving school?

11 A I finished the school and got my CDL license.

12 Q And when was that?

13 A I don't remember exactly.

14 Q Was it in the 80s or the 90s or was it sooner than
15 that?

16 A It was after 2000.

17 Q Any other driving courses or coursework --

18 A No.

19 Q -- besides this one in West Palm? Okay. Have you
20 ever been in the military?

21 A No.

22 Q Have you ever served any time in jail for any type
23 of arrest or criminal conviction?

24 A No.

25 Q Other than the workers' comp case we're here to

1 talk about today that came about as a result of
2 your injury with Watkins & Shepard, have you ever
3 had a workers' comp claim before?

4 A Yes.

5 Q Okay. How many workers' comp claims have you had?

6 A One.

7 Q Who were you employed with for this prior claim?

8 A Patrician Construction.

9 Q And where was Patrician Construction located?

10 Where was their headquarters?

11 A Saraville, New Jersey.

12 Q And what was your job with Patrician?

13 A I was a carpenter.

14 Q Where were you working for them when you had your
15 accident?

16 A Saraville.

17 Q Is that S-a-r-a-v-i-l-l-e? Is it spelled like it
18 sounds?

19 A Yes.

20 Q Okay. When did your accident occur?

21 A 12/18/87.

22 Q Tell me about your accident. What happened?

23 A A ladder slid out from -- a 40 foot extension
24 ladder slid out. Sliding down the wall, I fell 32
25 feet.

1 Q What parts of your body did you injure in this
2 accident?

3 A Both elbows, both wrists, cheekbone. Left
4 cheekbone. Sorry.

5 Q Any other injuries?

6 A Both shoulders.

7 Q Anything else?

8 A No.

9 Q I understand from looking at some of your medical
10 records that you eventually received some medical
11 care down at the University of Florida for your
12 injuries; is that correct?

13 A Yes.

14 Q Before you began treating at the University of
15 Florida, where were you treating for your injuries,
16 do you recall?

17 A The injuries for the original accident?

18 Q Yes, sir. Following this December 1987 accident,
19 the one you just told me about, I understand you
20 eventually ended up at the University of Florida,
21 but was there anywhere else you were treated
22 before?

23 A They were originally -- the original accident was
24 treated in South Amboy, New Jersey.

25 Q Did you see an orthopaedic physician --

1 A The original doctor was -- I believe his name was
2 Dr. Grover.

3 Q Okay. And he was located in New Jersey?

4 A Yes.

5 Q How long did you treat with Dr. Grover?

6 A I don't recall.

7 Q Was it less than a year or more than a year?

8 A I believe it was the period of time that I -- I
9 moved back to Florida. I'm not sure.

10 Q Do you recall what type of treatment Dr. Grover
11 provided to you? Did he perform any surgeries on
12 any of your injuries?

13 A He did reconstruction of the elbow, left elbow.

14 Q How many surgeries did he perform on your left
15 elbow, do you recall?

16 A I believe the one, the original, and then he had to
17 remove pins and a screw, I believe it was. So I
18 think it was a total of two.

19 Q Do you recall any other physicians in particular
20 that you treated with besides Dr. Grover before you
21 ended up going to the University of Florida?

22 A It was transferred to I believe a Dr. Haas in
23 Stewart, Florida, and he referred me to the
24 University -- to a university and the University of
25 Florida took the case.

1 Q And where was Dr. Haas?

2 A Stewart, Florida.

3 Q Stewart, Florida, okay. How long did you treat
4 with him before you ended up over at the
5 University?

6 A I don't recall. I don't remember how long I saw
7 him.

8 Q Did he perform any surgeries on you?

9 A No.

10 Q So you eventually end up over at the University of
11 Florida. And am I saying this physician's name
12 right, Dr. Chidgey?

13 A Chidgey.

14 Q Chidgey, okay. So he assumed your care at this
15 point?

16 A Yes.

17 Q And did you treat primarily with Dr. Chidgey --

18 A Chidgey, yes.

19 Q -- Chidgey during this entire time you were at
20 Florida?

21 A Yes.

22 Q Okay. I have a number of his records, so I can
23 look at the records and look at the dates and --
24 but just trying to make sure I'm clear with you, I
25 want to go through the surgeries that he did and

1 see if I can get a feel for what actually he did
2 for you. And I'm going to go back to the injuries
3 you told me about. You said you injured your left
4 and right elbow in your fall; is that correct?

5 A Correct.

6 Q How many surgeries did he perform on your elbow,
7 your left elbow, do you recall?

8 A I don't remember that.

9 Q Okay. Was it multiple surgeries?

10 A It was multiple surgeries.

11 Q Did he perform any on your right elbow?

12 A No.

13 Q How about on your left wrist?

14 A The first surgery that he did included the left
15 wrist, but it was only -- it was called a one bone
16 forearm.

17 Q Okay. Did he ever perform any type of hardware
18 removal or pin removal from your wrist?

19 A No.

20 Q How about your right wrist, did he perform any
21 surgery on it?

22 A No.

23 Q How about on your cheekbone, did he ever do any
24 surgery on it?

25 A No.

1 Q How about your left shoulder?

2 A No.

3 Q How about your right shoulder?

4 A No.

5 Q So the best to your recollection, then, your
6 surgeries were primarily on your left elbow and
7 your left wrist; is that correct?

8 A It was mainly my left elbow.

9 Q Okay. All right.

10 A The reason I said the wrist was because that's
11 where they went into.

12 Q Okay. The records that I have, Mr. Osmanski, seem
13 to suggest that you started treating with Dr.
14 Chidgey -- I'm going to just butcher his name. I'm
15 going to call him Dr. C, how about that, out of
16 respect for him. The records indicate that you
17 began treating with Dr. C sometime in 1992 and
18 treated with him for about ten years. Does that
19 sound about right? If the records indicate he
20 released you for your injuries with Patrician in
21 March of 2002, do you have any reason to dispute
22 that?

23 A No.

24 Q Okay. So would you agree that you treated with him
25 for approximately ten years?

1 A Yes.

2 Q Following this accident in December of 1987, did
3 you begin receiving any type of workers'
4 compensation benefits?

5 A Yes.

6 Q How long did you receive workers' comp benefits?

7 A For, I believe, until I was released from the
8 doctor. I think there was a -- I don't remember
9 exactly, but I believe it was there was a
10 settlement.

11 Q So during the period of time that you were under
12 the care of Dr. C, were you receiving workers' comp
13 benefits?

14 A Not the whole time.

15 Q How long did you receive benefits? Do you remember
16 how many years you may have received benefits?

17 A I know it was seven years.

18 Q And you were receiving those benefits weekly?

19 A It changed biweekly to monthly.

20 Q At some point in time you received a settlement?

21 A Yes.

22 Q What was the value of your settlement?

23 A I believe it was 86.

24 Q 86,000?

25 A I believe so.

1 Q Was that the amount that you received or did you
2 have an attorney who took a portion of that as a
3 fee?

4 A I believe the attorney took some of that.

5 Q And who was your attorney?

6 A The office was Weiman, Goldman & Spitzer.

7 Q Weiman, Goldman & Spitzer?

8 A And I believe Mr. Spitzer was the attorney.

9 Q And where are they located?

10 A Woodbridge, New Jersey.

11 Q When did you reach this settlement? How long ago
12 has it been since you settled your workers' comp
13 case with Patrician?

14 A I don't remember.

15 Q Was it within the last five years or was it prior
16 to that?

17 A I don't remember.

18 Q As part of the settlement, did Patrician remain
19 responsible for any medical care for the remainder
20 of your life or any treatment related to your elbow
21 or to your surgeries?

22 A I don't remember that, either.

23 Q Did you have to go back to New Jersey when you
24 settled your case or were you living somewhere else
25 at that point?

1 A I believe I went back to see a doctor, but that was
2 -- I don't remember when that was.

3 Q Did you ever have to go to any type of workers'
4 compensation hearings in New Jersey because of your
5 case?

6 A No.

7 Q When your case settled, were you living in Florida
8 or were you living --

9 A Yes.

10 Q -- in New Jersey? And, Mr. Osmanski, I'm sorry.
11 If you could just let me finish my questions before
12 you answer them. I think you anticipate what I'm
13 asking you. It just -- it makes it difficult for
14 her. So I'll try to finish my questions and if
15 you'd just wait until I finish before you answer.
16 Let me go back to Dr. C for just a moment. Again,
17 I think his records reflect that he released you
18 from his care for your accident with Patrician back
19 on March 22, 2002. When he released you from his
20 care, were you aware if he placed any work
21 restrictions upon you as far as what you could or
22 could not do with your arms or shoulders or elbows
23 or wrists?

24 A Not that I recall.

25 Q Once you started treating with Dr. C, did you

1 remain under his care or did he ever send you to
2 any other doctors for any type of medical
3 treatment?

4 A No.

5 Q All right. He never referred you out to anyone?

6 A No.

7 Q Other than Dr. C, Dr. Haas, Dr. Grover, were there
8 any other orthopaedic physicians, any specialists,
9 that you treated with following your accident with
10 Patrician?

11 A No.

12 Q And I believe you said this to me a few moments
13 ago, but this is the only workers' comp claim
14 you've ever had besides the one we're talking about
15 today?

16 A Yeah.

17 Q Have you ever been in a car accident?

18 A Yes.

19 Q How many car accidents have you been involved in?

20 A One.

21 Q Did that accident result in you suffering any
22 injuries?

23 A No.

24 Q Did that accident occur here in South Carolina?

25 A No.

1 Q Where did it occur?

2 A Florida.

3 Q How long ago has it been?

4 A Nine, ten years.

5 Q Was there another driver, another vehicle, involved
6 in the accident?

7 A Yes.

8 Q Sometimes when folks are in car accidents and there
9 is another driver involved, sometimes people file
10 suit against each other over who was at fault. Was
11 there any type of lawsuit that came about as a
12 result of your car accident in Florida?

13 A I don't remember.

14 Q Did you have a lawyer? Did you file a lawsuit that
15 you can recall?

16 A I believe the person didn't have any insurance.

17 Q But you weren't injured in that accident at all?

18 A No.

19 Q Have you ever been involved in a lawsuit as a
20 plaintiff? And when I ask you that question, I
21 mean retained a lawyer or you yourself filed a
22 lawsuit against another person or an entity in the
23 court?

24 A I don't believe so.

25 Q Okay. To your knowledge, have you ever been sued

1 before as a defendant in a lawsuit?

2 A No.

3 Q Since living in South Carolina, have you ever filed
4 for or received unemployment benefits?

5 A No.

6 Q Have you ever received unemployment benefits in any
7 other state?

8 A Yes. I believe Florida.

9 Q How long ago was that?

10 A Five, six, seven years. Six years.

11 Q Six years ago or --

12 A Six years ago.

13 Q All right. Have you ever filed for or received
14 social security benefits?

15 A Just filed for social security.

16 Q How long ago has that been since you filed for
17 social security?

18 A Three weeks.

19 Q Is Ms. Amick handling that matter for you?

20 A No.

21 Q Is there someone in her firm who's handling that or
22 are you handling that on your own?

23 A On my own.

24 Q Do you have any income at the present time?

25 A Food stamps.

1 Q Is your wife employed?

2 A No.

3 Q Mr. Osmanski, I want to talk to you now about your
4 job with Watkins & Shepard and then we're going to
5 talk about your accident here in just a few
6 moments. What information I've been given by
7 Watkins & Shepard states that you started working
8 for them on or about October 31, 2006. Does that
9 sound about right to you or do you think you may
10 have started working for them --

11 A October 30, 2006.

12 Q What were you hired to do?

13 A Truck driver. Local truck driver.

14 Q How did you go about getting employment with
15 Watkins & Shepard?

16 A I saw an ad in the paper and phoned. Of course,
17 called the number and talked to Rodney Stephens.

18 Q Who is Rodney Stephens?

19 A Terminal manager.

20 Q Is he located here in Columbia?

21 A Hickory, North Carolina.

22 Q What did you and Mr. Stephens talk about?

23 A The employment.

24 Q Did he offer you a position over the telephone?

25 A Yes.

1 Q Did he offer you the position of local driver?

2 A Yes.

3 Q And did you accept that position?

4 A Yes.

5 Q What happened next?

6 A I had to -- they arranged a ride for me to travel
7 to Hickory to do a DOT and a lift test.

8 Q DOT meaning a physical?

9 A Physical DOT.

10 Q And what's a lift test?

11 A A test that they perform to be hired with their
12 company.

13 Q Is that a test, a physical test?

14 A Physical lifting test.

15 Q So you went to Hickory with another driver and
16 underwent this physical --

17 A I went and met with Rodney Stephens.

18 Q Okay.

19 A And the whole process was to finish the application
20 out, their physical, their lift test. Drug test,
21 lift test, physical.

22 Q When you met with Mr. Stephens in Hickory, did you
23 have any conversations with him at all about your
24 accident with Patrician and the injuries that you
25 suffered as a result of the accident?

1 A No.

2 Q Did you have to complete paperwork, application
3 paperwork or any other paperwork, while you were in
4 Hickory?

5 A I believe I did most of that before I got there
6 online.

7 Q Where was that paperwork sent? Was it sent to
8 Hickory or somewhere else?

9 A Mazola, Montana.

10 Q Did you have contact with anyone in Montana before
11 you went to Hickory to meet with Mr. Stephens?

12 A No.

13 Q After you arrived in Hickory and you met with Mr.
14 Stephens, did you at that point speak with anybody
15 in Montana?

16 A No.

17 Q Have you ever had any conversations with a
18 representative of Watkins & Shepard who was in
19 Montana?

20 A During the application?

21 Q Yes, sir.

22 A No.

23 Q Okay. After you became an employee of Watkins &
24 Shepard, did you ever have any conversation with
25 anyone who was in Montana who was a representative

1 of Watkins & Shepard?

2 A Through working for them. I worked for two years.

3 Yeah, I've talked to them before.

4 Q Who are some of the people in Montana that you've
5 communicated with?

6 A I don't really know their -- some payroll
7 department, a person named Shamus who handles the
8 insurance and a couple safety directors.

9 Q A few moments ago you told me that you didn't have
10 any conversations with Mr. Stephens during this
11 meeting in Hickory about your prior accident with
12 Patrician. During the two years that you worked
13 with Watkins & Shepard, at any point in time did
14 you ever speak to anyone at Watkins & Shepard about
15 your prior work accident or the injuries you
16 suffered?

17 A No.

18 Q Mr. Osmanski, what were you earning? What were
19 your wages back in November of '08 when your
20 accident occurred? What were you getting paid?

21 A November of '08? For this current accident?

22 Q Yes.

23 A 918 a week.

24 Q How many hours a week were you working?

25 A It varied. 40 to 60.

1 Q And how many days a week was it? Was it a five
2 day, six day?

3 A Most of the time it was a five day.

4 Q Back in November of last year, of '08, who was your
5 supervisor? Who did you answer to?

6 A Rodney Stephens.

7 Q Has Mr. Stephens been your supervisor the entire
8 time you were employed with Watkins & Shepard?

9 A Yes.

10 Q Any other supervisors besides him?

11 A No.

12 Q And has he been located in Hickory this entire
13 time, this two years that you worked for them?

14 A Yes.

15 Q Is there anyone in South Carolina that you answer
16 to?

17 A No.

18 Q Give me an idea, if he's in Hickory and you answer
19 to him, give me an example of how a typical day
20 would work. You wake up, you're ready to go to
21 work. What do you do? Do you call him to get
22 instructions from him? How does it work?

23 A I usually get instructions the day before of how
24 the route will go. It's usually a two-day run.

25 Q So he tells you where to go?

1 A He gives me the information of the stores and I
2 usually set it up the way it would run better
3 timewise.

4 Q He tells you where you've got to be; you figure out
5 how to get there. Is that a fair statement?

6 A Exactly.

7 Q Do you have a way of communicating with him while
8 you're on the road?

9 A Nextel Direct.

10 Q And what type of places or customers are you
11 delivering to?

12 A Furniture stores.

13 Q We're going to talk about your accident here in
14 just a -- in just the next few moments. But were
15 you working alone? Were you working by yourself
16 when your accident occurred?

17 A Alone.

18 Q Typically is that how you would do your job was
19 alone?

20 A Yes.

21 Q And what was the last day that you worked at
22 Watkins & Shepard?

23 A I don't understand that question.

24 Q When was your last day of work? Was it the day
25 that your accident happened or did you work at all

1 after the accident?

2 A 11/1.

3 Q Which was the date of your accident?

4 A Correct.

5 Q All right. Have you had any contact with Watkins &

6 Shepard or Mr. Stephens since your accident

7 occurred?

8 A Yes.

9 Q When did you last speak with Mr. Stephens? Today

10 is -- just for a point of reference, today is March

11 the 4th.

12 A January 24th.

13 Q What did y'all talk about on January 24th?

14 A The letter I received from Watkins.

15 Q In regards to?

16 A Voluntary termination.

17 Q Tell me about the conversation you had with Mr.

18 Stephens.

19 A Just was trying to discuss why that was going on.

20 Q What did he tell you?

21 A He didn't have any idea.

22 Q Did that letter come from Mr. Stephens or come from

23 someone else?

24 A Come from someone else.

25 Q Who did it come from, do you recall?

1 A No.

2 Q Was it someone in Montana?

3 A Yes.

4 Q And have you spoken with anyone else besides Mr.

5 Stephens who is with Watkins & Shepard since the

6 date of your injury in November?

7 A Spoke to Char Lewis.

8 Q Who is Char Lewis?

9 A She is the workman's comp nurse for Watkins &

10 Shepard.

11 Q Is she in Montana?

12 A Yes.

13 Q How long ago has it been since you spoke with her?

14 A I want to say in December.

15 Q And what did y'all talk about in December?

16 A That it was being transferred to Zurich.

17 Q Is Mr. Stephens the last person from Watkins &

18 Shepard that you've spoken with?

19 A Yes.

20 Q Besides he and Ms. Lewis, have you had any

21 conversations with anyone else at Watkins & Shepard

22 since your accident happened?

23 A Not that I recall.

24 Q Mr. Osmanski, let me talk to you now about your

25 accident. And, again, all the documents that I

1 have indicate it occurred on November 1st of 2008;
2 is that correct?

3 A Yes.

4 Q Where were you working on November 1st of '08?

5 A At the time I was in Aiken County.

6 Q Were you delivering furniture?

7 A I just finished delivering.

8 Q Take me through how your accident happened and kind
9 of give me -- let's start with what you were doing
10 in maybe the half hour/hour before the accident
11 happened and tell me what happened when you were
12 injured.

13 A I was delivering to Lawson's Furniture in Aiken.

14 Q Lawson's, okay. What happened next?

15 A I delivered I don't remember how many pieces, but I
16 slid them to the back and out of the truck. As I
17 finished the delivery, they signed the paperwork.
18 They closed their door. I went out and pulled the
19 truck up. I look in the back and I notice I needed
20 to break down the freight of the truck so it would
21 not fall as I was driving.

22 Q And when you say break down freight, tell me what
23 you mean.

24 A Just stack it down.

25 Q What happened next?

1 A I went -- jumped in the back of the truck to stack
2 down the freight, and one of the recliners got
3 stuck on -- up top. And when I kept pulling on it
4 and pulling on it, finally it released quicker than
5 I thought. The weight shifted on it and pulled my
6 arm straight down.

7 Q Which arm is that?

8 A Left arm.

9 Q Other than your left arm, did you injure any other
10 parts of your body in this accident?

11 A No.

12 Q Where were you having pain or if you were having
13 pain or problems where was it located?

14 A I heard a pop and a crack and it was in the elbow.
15 It was extreme pain for a little bit. I was able
16 to get out and close the doors of the truck. I sat
17 in the truck for about ten minutes. I started to
18 feel a little better. I was able to drive the
19 truck home.

20 Q Back to your home?

21 A Yes.

22 Q And how long of a drive is that from Aiken?

23 A About 45 minutes.

24 Q And I believe I asked you this before, but I want
25 to make sure I'm clear. Were there any witnesses

1 to your accident?

2 A No.

3 Q When you say this recliner released, was it in a
4 box?

5 A Yes.

6 Q Okay. All right. This particular recliner, how
7 much did it weight, do you recall?

8 A I don't remember.

9 Q Do you have any idea?

10 A Probably 100 pounds, 150 pounds.

11 Q When you were delivering -- or let's go back just
12 to the day of this incident. You were delivering
13 furniture to Lawson's Furniture in Aiken. The
14 process of you loading or unloading furniture, tell
15 me what that involves. How do you go about doing
16 that?

17 A I only unload it. Most of the time I pull
18 everything off and slide it to the back of the
19 truck. If there's workers there, I don't -- once
20 it gets to the back of the truck, I don't touch it
21 again. They pull it off. If nobody's there, I
22 usually pull it off.

23 Q And what type of objects are we talking about?

24 A Recliners and sofas.

25 Q And these can weigh anywhere, you said, from 100 to

1 150 pounds?

2 A The recliners.

3 Q How about the sofas, how much do they weigh?

4 A They can weigh anywhere from 150 to 250.

5 Q Pulling these recliners and sofas, is it something

6 that requires you to use both your left and your

7 right arm?

8 A Yes.

9 Q After your accident occurred, did you speak to

10 anyone at Watkins & Shepard about what had happened

11 to you?

12 A Yes.

13 Q Who did you speak with?

14 A Rodney Stephens.

15 Q How did you get in touch with Mr. Stephens?

16 A Called him.

17 Q Did you call him the day the accident occurred?

18 A No.

19 Q When did you speak with him?

20 A The following day, in the morning.

21 Q What did you tell him?

22 A I told him that I had a recliner that straightened

23 -- fell and straightened my arm out. I thought it

24 was something that I could ice up and get over.

25 When I woke up this morning, I could not move my

1 arm.

2 Q What did he say?

3 A He told me to go to an Urgent Care.

4 Q Did you speak with anyone else the day after your
5 accident besides Mr. Stephens?

6 A No.

7 Q Did you ever have any conversations with Ms. Lewis,
8 Char Lewis, about your accident?

9 A The following -- the following day. I believe it
10 was the 3rd.

11 Q What did you tell Ms. Lewis?

12 A She actually told me to go back to Urgent Care.

13 Q You told Ms. Lewis about what happened to you as
14 well?

15 A Yes.

16 Q Did you ever have to fill out any documents,
17 paperwork or report, about what occurred to you or
18 was that filled out by someone else or do you know?

19 A I filled it out.

20 Q And did you send that to who?

21 A I believe it went to Char Lewis.

22 Q How did you send it to her?

23 A Fax.

24 Q Did you have any conversations with Ms. Lewis about
25 your accident after you sent her your report? Did

1 you have any further discussions with her about it?

2 A Not that I recall.

3 Q So both she and Mr. Stephens told you to go to an

4 Urgent Care?

5 A Yes.

6 Q And did you do so?

7 A Yes. When I went to an Urgent Care in Lexington,

8 they told me I needed to go to the emergency room.

9 Q And that was over at Lexington Medical Center?

10 A Yes. Well, because they told me it was -- to go to

11 Lexington Medical Center because it was like a nine

12 hour wait and to go over to the emergency room and

13 they'd see me faster.

14 Q Okay. When you got to the emergency room, what

15 type of problems were you having with your arm at

16 that time?

17 A Extreme pain, unable to move my arm.

18 Q Did you tell your physicians about your accident?

19 A Yes.

20 Q What type of medical treatment did they provide to

21 you, if any?

22 A X-ray and put me in a sling.

23 Q How many times were you seen over at Lexington

24 Medical Center?

25 A I believe once.

1 Q Did they refer you to someone else?

2 A No. They -- Char Lewis referred me to go back to
3 Urgent Care.

4 Q Did you go to Urgent Care?

5 A Yes.

6 Q And where were they at? Was that in Lexington as
7 well?

8 A Yeah. They're Lexington on -- they're a medical
9 center too, but I believe they're an Urgent Care.

10 I believe they're affiliated but --

11 Q Were they in the hospital or near the hospital or -

12 -

13 A No.

14 Q They weren't? Okay. All right. How many times
15 were you seen at Urgent Care?

16 A Once.

17 Q What type of medical treatment did they provide to
18 you?

19 A X-ray and a sling.

20 Q Did Urgent Care refer you to a doctor?

21 A Yes.

22 Q Who did they refer you to?

23 A Dr. McIntosh, Lexington Orthopaedics.

24 Q And I have a copy of his records, Mr. Osmanski, so

25 I -- I don't expect you to remember the specifics,

1 but we can talk about them. Looking at his
2 records, it looks like he saw you for the first
3 time on or about November 5th or 6th. Does that
4 sound about right to you?

5 A Uh-huh.

6 Q I just need you to say yes for me.

7 A Yes.

8 Q Did you tell Dr. McIntosh about your accident?

9 A Yes.

10 Q Did you tell Dr. McIntosh about the prior medical
11 treatment you had received for your elbow?

12 A Yes.

13 Q What type of complaints did you provide to him?

14 A Extreme pain and unable to move my arm.

15 Q And what type of medical treatment did he provide
16 to you?

17 A X-rays, a sling and pain medication. A better
18 sling.

19 Q Did the medication help at all? Did your pain
20 improve with the medication?

21 A Somewhat.

22 Q Looking at his records, Mr. Osmanski, it looks like
23 he saw you three times. Does that sound about
24 right to you?

25 A Yes.

1 Q And the last visit would have been in December? It
2 looks like December 15th of 2008. Does that sound
3 correct to you?

4 A Yes.

5 Q How was your arm, your elbow, doing in December
6 when you last saw him?

7 A There was no change.

8 Q So had your problems gotten worse or had they
9 gotten better or they were just like they had
10 always been?

11 A They were the same, yes.

12 Q What type of treatment did he provide you during
13 this most recent visit?

14 A He didn't want to treat me that day.

15 Q Any particular reason why?

16 A They did not have the medical records from the
17 previous doctor, from --

18 Q Dr. C?

19 A Yes.

20 Q All right. And he wanted to see those?

21 A Yes.

22 Q So during that last visit, did he give you any more
23 medicine or do any more x-rays or --

24 A No x-rays. More pain medicine and he referred me
25 to go back to Dr. C.

- 1 Q Who was the next doctor that you saw after this
- 2 visit with Dr. McIntosh on December 15th?
- 3 A Dr. Bethea, I believe it was.
- 4 Q He's here in Columbia?
- 5 A Yes.
- 6 Q How many times have you seen Dr. Bethea?
- 7 A Once.
- 8 Q The records indicate that he saw you on December
- 9 23rd. Does that sound about right?
- 10 A Yes.
- 11 Q And what type of complaints did you provide to him?
- 12 A Extreme pain, unable to move my arm.
- 13 Q Dr. Bethea just saw you once, correct?
- 14 A Yes.
- 15 Q And did he provide you with any treatment at all?
- 16 A He referred me to Dr. Chidgey.
- 17 Q Did he give you any medications?
- 18 A Yes.
- 19 Q Did he do anything else for you at his office
- 20 besides give you medicine?
- 21 A No. X-ray.
- 22 Q So both he and Dr. McIntosh provided you with x-
- 23 rays?
- 24 A Yes.
- 25 Q Do you know if they determined that you suffered

1 any type of fracture to your arm? Do you know what
2 the x-rays revealed, I guess is my question.

3 A They determined they didn't know what was wrong.

4 Q So they referred you back to Dr. C?

5 A Yes.

6 Q And did you go down and see him in Gainesville?

7 A Yes.

8 Q His notes reflect that he saw you on December 12th

9 -- I'm sorry. January 12, 2009. Does that sound
10 about right to you?

11 A Yes.

12 Q What type of complaints did you provide to him

13 during this examination on January 12th?

14 A Extreme pain and unable to move my arm.

15 Q Did you tell him about your work accident?

16 A Yes.

17 Q What exactly did you tell him?

18 A I hyper -- it felt like I hyper-extended my elbow.

19 Q Did he provide you with any treatment?

20 A X-rays, pain meds and he put me in this brace.

21 Q The one you're wearing here today?

22 A Yes.

23 Q Is the brace you're wearing today similar to any

24 that you wore after your 1987 accident?

25 A Yes.

- 1 Q How many times have you seen Dr. C since your
- 2 accident in November?
- 3 A Three.
- 4 Q When was your last visit with him? Today, again,
- 5 is March --
- 6 A February 23rd.
- 7 Q Okay. What type of complaints did you provide to
- 8 him at that time?
- 9 A The same. Extreme pain and unable to move my arm.
- 10 Q What type of treatment did he provide to you?
- 11 A New x-rays, pain meds.
- 12 Q Do you have a follow up visit scheduled with him?
- 13 A Yes.
- 14 Q When is it scheduled?
- 15 A March 23rd.
- 16 Q Does he have any idea -- or what is your
- 17 understanding of your problem?
- 18 A The new x-rays revealed a crack in the upper bone.
- 19 He feels that, in turn, cracked the cement that
- 20 holds the implant in.
- 21 Q I know that your claim with Watkins & Shepard has
- 22 been denied. Who's paying for your medical
- 23 treatment or your visits with Dr. C? Do you have
- 24 insurance that's paying for that or how is it being
- 25 paid, do you know?

1 A I'm probably going to have to pay for it.

2 Q And, again, you're supposed to see him again on
3 March 23rd?

4 A Yes.

5 Q All right. During your last visit with him on
6 February 23rd, did he address your work status at
7 all, whether you're able to work?

8 A Yes.

9 Q What type of work restrictions has he provided to
10 you?

11 A No use of left arm.

12 Q Are you left-handed or right-handed?

13 A Right-handed.

14 Q Okay. Mr. Osmanski, let me go over the doctors
15 that you've seen since your November 2008 accident
16 to make sure that I've covered every one. I
17 believe you told me you've been to Lexington
18 Medical Center and to Urgent Care, which is
19 affiliated with that hospital; is that correct?

20 A Yes.

21 Q I believe you told me you've seen Dr. McIntosh; is
22 that correct?

23 A Yes.

24 Q And you've told me you've seen Dr. Bethea; is that
25 correct?

1 A Yes.

2 Q And you told me that you've seen Dr. C down at
3 University of Florida; is that correct?

4 A Yes.

5 Q Have you seen any other physicians for your work-
6 related injury since November '08 besides the ones
7 that we've talked about?

8 A No.

9 Q All right. Has Ms. Amick sent you to a doctor?

10 A No.

11 Q All right. To your knowledge, do you have any
12 visits with a physician that she has scheduled for
13 you?

14 A No.

15 Q Do you have a family physician here in South
16 Carolina?

17 A Yes.

18 Q All right. Who is your family doctor?

19 A Lexington Family Medical Center.

20 Q Is that Dr. Fisher?

21 A Yes.

22 Q I believe he's at Lexington Family Practice. Does
23 that sound right?

24 A Yes.

25 Q Has he provided you with any treatment at all for

1 the injuries that you suffered in your accident?

2 A No.

3 Q Have you seen him since the accident occurred?

4 A No.

5 Q And, again, you haven't seen him since your

6 November 1, '08 accident?

7 A No.

8 Q Is Dr. Fisher treating you for any type of medical

9 problem or health condition like high blood

10 pressure, diabetes, cholesterol, anything like

11 that?

12 A No.

13 Q Okay. Are you taking any medicines right now that

14 he's prescribed to you?

15 A No.

16 Q Okay. Dr. C gave you some medication for your

17 elbow; is that correct?

18 A Yes.

19 Q And are you taking that now?

20 A Yes.

21 Q Okay. Mr. Osmanski, since your November 1, 2008

22 accident, have you had any type of surgery at all?

23 A No.

24 Q Have you been hospitalized for any reason since

25 that time?

1 A No.

2 Q Okay. And before this accident occurred -- we
3 mentioned this earlier -- you had multiple
4 surgeries following your 1987 work-related fall; is
5 that correct?

6 A Yes.

7 Q And I've gone through your medical records. I want
8 to make sure that I've got all these surgeries
9 covered just so I'm clear on what you've had. If I
10 leave anything out, let me know, okay? The first
11 record -- and, again, these aren't in chronological
12 order. I just kind of went through your records to
13 try and get them all together. But I'm going to
14 make sure I'm clear. September 14, 2000, it
15 appears you had a left elbow arthroplasty or
16 basically an elbow replacement. Does that sound
17 correct to you?

18 A Yes.

19 Q November 1, 2001, it appears you have a left ulnar
20 nerve transposition. They did another surgery on
21 your elbow in November of 2001. Does that sound
22 correct to you?

23 A Yes.

24 Q February of 2000, it appears that you have a left
25 shoulder -- some type of left shoulder surgery.

1 Does that sound correct to you?

2 A Yes.

3 Q November of 1999, you had something that was called
4 an open reduction and internal fixation of the left
5 elbow. Does that sound correct to you?

6 A Yes.

7 Q December 2000. I'm sorry. Let me rephrase that.
8 August 23, 1988, fusion of your ulna joint. Does
9 that sound correct?

10 A Yes.

11 Q Any other surgeries? That would be one, two,
12 three, four, five, six. Any other surgeries that
13 you can recall that I've left out?

14 A Not that I recall.

15 Q Mr. Osmanski, have you worked anywhere at all since
16 November 1, 2008?

17 A No.

18 Q Do you think you can go back to work for Watkins &
19 Shepard right now?

20 A No.

21 Q Why not?

22 A I'm unable to drive the truck.

23 Q Operating a truck requires both your hands, both
24 arms?

25 A Yes.

1 Q Is it a manual transmission?

2 A Yes.

3 Q Okay. All right. Have you sought work anywhere,
4 looked for work, since you last worked for Watkins
5 & Shepard?

6 A No.

7 Q You haven't applied for work, filled out any
8 applications, contacted any employers?

9 A No.

10 Q Any particular reason why not?

11 A I'm unable to move my arm.

12 Q Earlier we talked about a letter that you got from
13 Watkins & Shepard that caused you -- led you to
14 call Mr. Stephens. And you termed it a voluntary
15 termination. Is that what you said?

16 A That's what the letter states.

17 Q Tell me -- I mean, were you terminated by Watkins &
18 Shepard in this letter?

19 A Yes.

20 Q Okay. And you received that letter when?

21 A The 24th was a Friday. I believe I received it
22 that Monday, the following Monday. So the 27th I
23 received that letter.

24 Q And that would be the 27th of what month?

25 A January.

1 Q January. Did the letter say why you were being
2 terminated?

3 A Misrepresented -- misrepresentation of my abilities
4 to perform my job duties.

5 Q Did it go into any specifics at all about the
6 misrepresentation?

7 A No.

8 Q Do you know what they would have been talking
9 about?

10 A No.

11 Q Did you ask Mr. Stephens for an explanation when
12 you talked to him?

13 A Yes.

14 Q What explanation did he give you, if any?

15 A He didn't. He didn't know.

16 Q During the application process for your job with
17 Watkins & Shepard, did you ever misrepresent your
18 ability or your physical abilities to perform your
19 job?

20 A No.

21 Q Were you ever questioned by Watkins & Shepard
22 during the application process about any previous
23 impairment or injuries you may have had that would
24 prevent you from doing your job?

25 A No.

1 Q During the application process or during the entire
2 period that you worked for Watkins & Shepard, were
3 you ever questioned by them about whether or not
4 you had a prior work-related injury or workers'
5 comp claim?

6 A No.

7 Q Never once?

8 A No.

9 Q I asked you a moment ago about whether Dr. Fisher
10 was treating for any kind of medical problem or
11 health condition and you said no; is that correct?

12 A Yes.

13 Q Do you have any physician treating you for any
14 medical problem or health condition right now?

15 A No.

16 Q Okay. Mr. Osmanski, I've got a few more questions
17 for you and then we should be finished. I
18 appreciate your time and your patience and thank
19 you for answering all my questions this morning.
20 Let's talk about your arm, specifically your left
21 arm. What type of problems are you having with it
22 currently?

23 A Extreme pain, unable to move it.

24 Q And where are you having pain?

25 A Elbow, upper bicep, fingers.

1 Q On a scale of one to ten, if zero is no pain and
2 ten is the most excruciating pain you've ever
3 experienced in your life, how would you rate your
4 pain currently?

5 A Nine.

6 Q Is that with medication or without medication?

7 A With.

8 Q You told me earlier you're taking medication right
9 now that's been prescribed to you by Dr. C.

10 A Yes.

11 Q How frequently do you take it?

12 A Two every six hours.

13 Q So four times a day?

14 A Four times a day.

15 Q Other than taking the prescription medication, do
16 you take any over-the-counter medicines?

17 A No.

18 Q And you're wearing the sling that he gave you; is
19 that correct?

20 A Yes.

21 Q Other than taking your prescription medications and
22 wearing your sling, do you do anything else to try
23 and alleviate your arm or elbow pain?

24 A When I'm laying down in bed, I try to raise it up
25 above my heart level.

1 Q Do you have some type of device that allows you to
2 do that or --

3 A Pillows.

4 Q How has your elbow and your arm pain affected your
5 ability to dress yourself or take showers? How has
6 it impacted that?

7 A My wife helps me do it all.

8 Q Now, you're right-handed, so do you eat and write
9 with your right hand?

10 A Yes.

11 Q Do you shave and brush your teeth with your right
12 hand?

13 A Yes.

14 Q Are you able to raise your arm above your shoulder
15 level?

16 A Sometimes.

17 Q As far as your elbow is concerned right now, do you
18 have swelling or discoloration of the elbow?

19 A Swelling.

20 Q Do you have swelling anywhere else besides your
21 elbow?

22 A Forearm.

23 Q Mr. Osmanski, take me through a typical day, if you
24 would. What do you do when you wake up in the
25 morning? What time do you normally get up?

- 1 A Six thirty a.m.
- 2 Q What do you do when you wake up in the morning?
- 3 A Help the kids with breakfast.
- 4 Q What do you do next?
- 5 A My wife comes in and helps me get dressed.
- 6 Q Okay.
- 7 A Brush my teeth. Usually take the kids to school.
- 8 Q So you drive your children to school?
- 9 A Yes.
- 10 Q How far of a drive is that from your home?
- 11 A Two miles.
- 12 Q What do you do when you return from taking your
- 13 children to school?
- 14 A Pretty much nothing.
- 15 Q Do you do anything around the home to assist your
- 16 wife or your children, like housework of any sort?
- 17 A No.
- 18 Q You are able to drive an automobile, though, at
- 19 least the automobile that you take your kids to
- 20 school in?
- 21 A Yes.
- 22 Q Mr. Osmanski, let me look over my notes. I think
- 23 I'm through for the most part. You mentioned that
- 24 Dr. Fisher over at Lexington Family Practice was
- 25 your family doctor. Would you have gone to him at

1 any point in time for a DOT physical?

2 A Yes. I did a DOT physical there.

3 Q This would have been a DOT physical that you would
4 have needed to stay employed with Watkins?

5 A Yes.

6 Q To keep up your CDL?

7 A Yes.

8 MR. LOCKHART: Okay. All right. Mr.

9 Osmanski, those are all the questions I have.

10 I appreciate your time and thank you for
11 answering all my questions today.

12 MS. AMICK: No questions.

13 (Whereupon, at 11:13 a.m., the deposition in
14 the above-entitled matter was concluded.)

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State of South Carolina)
) Certificate
 County of Lexington)

Be it known that I took the foregoing deposition of Joe A. Osmanski;

That I was then and there a notary public in and for the State of South Carolina-at-large;

That by virtue thereof I was duly authorized to administer an oath;

That the witness was by me first duly sworn to testify the truth, the whole truth, and nothing but the truth, concerning the matter in controversy aforesaid;

The foregoing transcript of 52 typewritten pages represents a true, accurate and complete transcription of the testimony so given at the time and place aforesaid to the best of my skill and ability;

That I am not related to nor an employee of any of the parties hereto, nor a relative or employee of any attorney or counsel employed by the parties hereto, nor interested in the outcome of this action.

Witness my hand and seal this 15th day of March, 2009.

Cheri B. Williams, CVR

Notary public for South Carolina
 My commission expires May 11, 2015.

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1 BEFORE THE SOUTH CAROLINA
2 WORKERS' COMPENSATION COMMISSION
3 WCC NO. 0818219
4

5 JOE OSMANSKI,
6 Employee,

7 vs.

8 WATKINS SHEPARD TRUCKING,
9 Employer,

10 and

11 ZURICH AMERICAN INSURANCE COMPANY,
12 Insurer.

COPY

13
14
15
16 TELEPHONE
17 DEPOSITION OF: RODNEY STEPHENS
18 DATE: March 10, 2009
19 TIME: 9:35 a.m.
20 LOCATION: Law Offices of George Sink, P.A.
21 240 Stoneridge Drive, Ste. 402
22 Columbia, SC
23 TAKEN BY: Counsel for the Employee
24 REPORTED BY: Marie A. Boyce, C.C.R.
25

MARIE A. BOYCE, C.C.R.
(803) 603-2211

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1 (The witness, after having been advised of his right to
2 read and sign this transcript, waives that right.)

3 RODNEY STEPHENS

4 Being first duly sworn, testified as follows:

5 EXAMINATION

6 BY MRS. AMICK:

7 Q. Okay. And, Mr. Stephens, again, my name is
8 Paula Amick, and I represent Joe Osmanski in his workers'
9 compensation claim, and I'm just -- I'm going to ask you a
10 few questions about that claim and about this employment with
11 Watkins and Shepard Trucking?

12 A. Okay.

13 Q. I appreciate you making yourself available this
14 morning. I'm asking you questions, obviously, in your
15 capacity as a representative of Watkins and Shepard Trucking.

16 A. Okay.

17 Q. Okay?

18 A. Okay.

19 Q. Do you have Mr. Osmanski's personnel records
20 with you?

21 A. No.

22 Q. Do you have any documentation with you?

23 A. I've got -- I've got a copy of the application.

24 Most of that paperwork gets sent to our corporate office --

25 Q. Okay.

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1 A. -- to human resources.
2 Q. And that's in Montana?
3 A. That's correct.
4 Q. And if, during the course of this deposition,
5 you can't answer any of my questions or you feel that there
6 is someone else in the company that has that information
7 would be better able to answer it, just let me know that.
8 Okay?
9 A. Okay.
10 Q. And, if you could, state your full name for the
11 record.
12 A. Rodney Scott Stevens.
13 Q. Okay. And is the spelling of your last name
14 with a V?
15 A. No, it's a P-H.
16 MR. LOCKHART: Oh.
17 BY MRS. AMICK:
18 Q. P-H, okay.
19 And where are you presently?
20 A. Sitting in my car at the terminal.
21 Q. Okay. And you work for Watkins and Shepard
22 Trucking?
23 A. That's correct.
24 Q. And what office are you located in?
25 A. I'm in the Hickory, North Carolina, terminal.

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1 Q. Okay. Is there anyone else present with you?
2 A. No.
3 Q. What is your job title?
4 A. Terminal manager.
5 Q. And, are you the -- were you at all times the
6 supervisor to Joe Osmanski?
7 A. Yes.
8 Q. And how much did Mr. Osmanski earn?
9 A. I don't really keep up with that. He was on --
10 he was paid based on a weekly salary. The exact amount, I
11 cannot give you right now. I don't -- that is turned over to
12 the payroll --
13 Q. Okay. And is it a straight salary or is it
14 dependent upon what deliveries he makes and what work he
15 does?
16 A. That's dependent upon working five days a week.
17 Q. Is he still employed with your company?
18 A. I can't answer that. I don't -- I do not know.
19 Q. Okay. What is or was Mr. Osmanski's job title?
20 A. Delivery driver.
21 Q. What were his duties?
22 A. Delivering furniture to our customers, to retail
23 establishments.
24 Q. Okay. And, does he also do loading and
25 unloading of trucks?

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- 1 A. Yes.
- 2 Q. So, does that require -- okay.
- 3 A. He does unloading. We do the loading at the
4 terminal.
- 5 Q. Okay.
- 6 A. And he does the unloading to the retail
7 customers.
- 8 Q. What sort of lifting requirements are there in
9 that position, then?
- 10 A. Must be able to lift strenuous freight. You
11 have to take the product -- I'm not sure if you're familiar
12 with it, with a tractor-trailer, which is a 53-foot trailer.
13 It must come off the trailer onto the ground and what I call
14 a hand truck, you may call it a two-wheel dolly, must be
15 rolled into the customer's location.
- 16 Q. Okay. What sort of weight would you anticipate
17 drivers having to lift?
- 18 A. Well, there's well over a hundred pounds.
19 You're delivering love seats, sofas, chairs, recliners,
20 bedroom furniture, which would be headboards, footboards,
21 dressers, mirrors, chests, armoires.
- 22 Q. Okay. Do you currently have any position with
23 your company where Mr. Osmanski -- that Mr. Osmanski would be
24 qualified to perform where he was -- without using his left
25 arm in any capacity?

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1 A. I can't really answer that. That would be a
2 Montana question.

3 Q. When was Mr. Osmanski initially hired by your
4 company?

5 A. I don't keep up with the exact dates, but he was
6 -- he worked for us somewhere around the two-year mark.

7 Q. Okay. And if I have a medical examination
8 report and a post job offer questionnaire provided by your
9 company in response to a subpoena that's all dated October
10 30th of 2006, would you agree that that's most likely the
11 date of hire?

12 A. I would say it would be within a day or two,
13 yes.

14 Q. Okay. Did he work continuously with your
15 company from the date he was hired until the date he was
16 injured?

17 A. Yes.

18 Q. How was his job performance?

19 A. Joe, he basically delivered his freight on time,
20 he -- he basically -- there was a couple days when he had
21 called in that something come up during the night with a
22 family member, child, that he was not able to run that day,
23 but he did work, you know, pretty much any given day.

24 Q. Okay. So, the only issue that you recall was,
25 perhaps, an attendance issue?

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1 A. Well, he did come up with, actually, a sick
2 child or a child, you know, had to go to a doctor or
3 something. I know one his child's was jumping on a
4 trampoline and broke a hip or something, and he had to take a
5 couple days off under a load due to that.

6 Q. Okay.

7 A. He was scheduled to work, but then this issue
8 came up, and he had to -- he couldn't work.

9 Q. Okay. Was he ever reprimanded?

10 A. He was written up one time for delivering
11 freight wrong -- to the wrong location.

12 Q. Okay. Any other reprimands or write-ups?

13 A. No.

14 Q. Okay.

15 A. Not that I could recall.

16 Q. Did he have any performance reviews?

17 A. No.

18 Q. Okay. I believe you said he was prompt with his
19 deliveries.

20 A. Yes, he made his deliveries with no problem that
21 I'm aware of.

22 Q. Did you ever receive any complaints about him
23 from any of your customers or vendors?

24 A. I can't recall.

25 Q. So, is that none that you can recall?

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1 A. None that I can recall.

2 Q. All right. Prior to his injuries, was there any
3 question about his ability to perform his job?

4 A. No.

5 Q. All right. What, if anything, do you know about
6 Mr. Osmanski's injury?

7 A. Basically, the only thing I'm aware of is the --
8 he got injured on a Saturday, and he called me on a Sunday
9 afternoon and reported the injury to me. And I attempted to
10 get ahold of my work comp manager on a Sunday afternoon, was
11 unsuccessful. I called the safety director and spoken with
12 him and was speaking to him, we both agreed to send him to an
13 Urgent Care to be looked at.

14 Q. Who is the safety director?

15 A. His name is Macon Turner.

16 Q. Okay. And, just to be clear, it happened on a
17 Saturday, and he called you on a Sunday afternoon? That was
18 the very next day?

19 A. That's correct.

20 Q. Do you have any reason to doubt Mr. Osmanski's
21 description of what happened?

22 A. No, I don't have no doubt on that.

23 Q. Okay.

24 A. The way he explained it seems to be very, you
25 know -- the way it could have happened.

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1 Q. Okay. Do you have any information or have you
2 heard anything whatsoever that would cause you to question
3 the injury itself or how it happened?

4 A. No, other than just probably being in too big of
5 a hurry.

6 Q. Okay. Did Mr. Osmanski return to work after
7 this injury?

8 A. No, he hasn't.

9 Q. Prior to this injury, did Mr. Osmanski have any
10 other work-related injuries or accidents while working for
11 Watkins and Shepard Trucking?

12 A. Not employed with Watkins Shepard, no.

13 Q. What is your understanding of why this claim was
14 denied?

15 A. I have no way to answer that.

16 Q. Okay.

17 A. That is a workmen's comp manager handled that.

18 Q. Okay. Did Mr. Osmanski undergo a physical
19 examination before he was hired by Watkins and Shepard
20 Trucking?

21 A. Per DOT regulations, you do have to have a DOT
22 physical prior to employment, a current DOT physical.

23 Q. Okay. Did your company arrange for a DOT
24 physical of Mr. Osmanski in North Carolina?

25 A. Yes.

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- 1 Q. Did he pass that physical?
- 2 A. Yes.
- 3 Q. What is your understanding of what goes on in a
4 DOT physical examination?
- 5 A. Just from what I've been through before, you
6 know, it's -- it's -- it's certain protocol that the doctor
7 must follow on a DOT physical, hearing, eyes -- you know,
8 just general stuff to be qualified.
- 9 Q. Okay. Does he also examine the extremities of
10 drivers?
- 11 A. They -- on a DOT physical, you have a little
12 section there if you've ever had any prior surgeries, if you
13 had any kind of disease, heart disease, anything like that
14 that you must check off before the physical exam.
- 15 Q. Okay. And, have you seen Mr. Osmanski's DOT
16 physical paperwork?
- 17 A. When it was completed, yes, which that's given
18 to the human resources department.
- 19 Q. Okay. And, do you recall if there was a yes
20 checked regarding the extremities and --
- 21 A. I do not. I do not recall.
- 22 Q. Do you recall what date he underwent that
23 physical?
- 24 A. I do not.
- 25 Q. If the paperwork was dated October 30th of 2006,

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1 would that be accurate? Would that be about the time?

2 A. That would be within the time frame.

3 Q. Okay. And was that, again, performed in

4 Hickory, North Carolina?

5 A. From my knowledge, yes.

6 Q. Okay. Did Mr. Osmanski come up to North

7 Carolina to complete the paperwork and take the physical?

8 A. Yes.

9 Q. Is that typical? Do you bring drivers up to

10 your office or your terminal there in Hickory?

11 A. That is correct.

12 Q. Okay. And that would be prospective employees

13 would come up there before they were actually hired?

14 A. Correct.

15 Q. What happened at that point that they come up to

16 your office?

17 A. Well, prior to that, they must fill out the

18 application. Once the application is filled out, we turn

19 that over to what we call the recruiting department. They

20 process the application, as far as checking work history. By

21 DOT regulations you have to check your work history,

22 basically, you have to fax off to previous employers, drug

23 and alcohol information and stuff like that, and you have to

24 get that back on paper. Once all that is completed, then --

25 then they look at it and say he has basically completed that,

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1 and the work history matches. You have to show ten-year
2 history on an application as a driver.

3 Q. Okay.

4 A. And once that is complete, then they make --
5 then they say, Joe is able to come to work per -- you know,
6 as long as the DOT physical and drug screen and lift test
7 come through.

8 Q. Okay. So, he's a prospective employee at that
9 point, and he's invited to come up to Hickory, North
10 Carolina; is that correct?

11 A. Yeah, he comes to Hickory, North Carolina, to do
12 the DOT physical, drug screen and lift test, agility test.

13 Q. Okay. Tell me about that lift test.

14 A. It's a series of things that they do. I can't
15 tell you exactly what they do. I just know that they make
16 them lift, and certain times they lift 25 pounds, 50 pounds,
17 and 100 pounds, and it's repetitive motion. They have to put
18 it up on a shelf three or four times, they have to push a
19 pallet jack back and forth. It's just a series of tests that
20 they have to perform in a certain amount of time.

21 Q. And, just to be clear, this is separate from the
22 DOT physical, correct?

23 A. That is correct.

24 Q. And is that lift test administered by Watkins
25 and Shepard employees?

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1 A. No, it's actually through a third party. It's,
2 like, through a hospital or rehabilitation unit where they do
3 the testing.

4 Q. Okay. And, I assume, Mr. Osmanski passed that
5 lift test?

6 A. Correct.

7 Q. Okay. Did he meet with you when he went up to
8 Hickory, North Carolina?

9 A. Yes.

10 Q. Was he there for more than one day or is it all
11 just done in one time?

12 A. It's probably -- depends. It's really about a
13 two to three-day process.

14 Q. Okay.

15 A. Number one is you have to take a drug screen,
16 and the drug screen does not come back normally the next day.
17 It's usually, like, a day and a half afterwards the drug
18 screen comes back.

19 Q. Do prospective employees when they're there for
20 that two or three-day process, do they fill out paperwork?

21 A. Basically, yes, tax information.

22 Q. What else?

23 A. It's a -- I really can't tell you every little
24 detail in it, but I know that we fill out paperwork,
25 insurance when their 90 days are up, any information to

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1 pertain to that type environment.

2 Q. Okay. Do you also ask them to complete a post
3 job offer questionnaire asking about prior injuries or
4 illnesses?

5 A. Actually, that is done with the Montana office.

6 Q. Okay. So, you don't have those forms in your
7 office?

8 A. No. That is done, to my understanding, via
9 Missoula. They fax the paperwork in. It's been so long
10 since I hired a driver, I can't really recall. Montana is
11 involved with that, the human resources part of it.

12 Q. So, if this form says, Please fax this
13 immediately to Debbie Houle or Janice Peterson in the
14 Missoula safety department, doesn't that suggest it's filled
15 out elsewhere and faxed to the Montana office?

16 A. It could have been faxed from here, yes, if --
17 once it's completed. I just can't recall what was in -- you
18 know, what paperwork is all there.

19 Q. Typically, is the post job offer questionnaire
20 completed and signed by the applicant and then faxed to
21 Montana?

22 A. I think it's done -- I can't recall, really.
23 It's been so long, I can't recall.

24 Q. And it has a place there for a signature.
25 My signature below certifies that this

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1 questionnaire is true and complete to the best of my
2 knowledge.

3 Does that not suggest that it's intended to be
4 signed by the applicant?

5 A. I can't recall. It's been so long since I've
6 looked at this paperwork and processed a driver.

7 Q. Okay.

8 A. I can't recall.

9 Q. All right. Do you have any direct knowledge of
10 Debbie Houle conducting a phone interview of Joe Osmanski on
11 October 30th of 2006?

12 A. I know that it had to be done. I don't know
13 exactly the date and time.

14 Q. Okay. But, again, if his DOT physical was
15 October 30th of 2006 in Hickory, North Carolina, that's when
16 he was up at the Watkins and Shepard terminal in Hickory,
17 North Carolina; is that correct?

18 A. That would be the time frame, yes.

19 Q. But you're saying your office did not simply
20 have him complete and sign the form on that date?

21 A. That would be probably done -- that would have
22 to be done through the Montana office, but it was done at the
23 terminal here. They get together. They put them together on
24 the phone and deal with paperwork.

25 Q. Okay.

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1 A. That's handled through them, too.

2 Q. Okay. So, again, you've got him on the phone in
3 your Hickory, North Carolina, terminal, but he's filling out
4 paperwork over the phone versus just filling it out right
5 there in front of Watkins and Shepard employees; is that what
6 you're telling me?

7 A. Well, he -- from my understanding, it's -- you
8 know, I don't recall the steps right off the top, but there
9 is basically -- I know that they talk on the phone to
10 complete things, but what they complete, I do not know what
11 those are.

12 MRS. AMICK: Okay. Nothing further.

13 EXAMINATION

14 BY MR. LOCKHART:

15 Q. Mr. Stephens, I just have a couple of questions
16 for you. It's Jason Lockhart. Can you hear me?

17 A. Yes, sir.

18 Q. Okay. During the period of time that
19 Mr. Osmanski worked for Watkins and Shepard, you were his
20 supervisor that entire time; is that correct?

21 A. That is correct.

22 Q. Okay. And you said he worked for you for about
23 two years. Does that sound about right?

24 A. That does sound in the time frame, yes.

25 Q. Okay. During the two years that he worked with

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1 you, did he ever inform you that he had suffered work-related
2 injuries as a result of a 1987 work-related accident that he
3 had in New Jersey?

4 A. No.

5 Q. Okay. During the two years that he worked for
6 you, did he ever inform you that he had undergone multiple
7 injuries on his left arm and left elbow as a result of his
8 1987 work-related accident?

9 A. No.

10 Q. All right. During the two years that he worked
11 under your supervision, did he ever inform you that he had
12 been given permanent lifting restrictions by a physician in
13 Florida, as it pertained to his left arm?

14 A. No.

15 Q. Okay. When he came to Hickory, North Carolina,
16 in October of 2006 to go through our application and
17 orientation process, do you have any knowledge that he
18 informed Watkins and Shepard he had been injured in 1987 and
19 suffered injuries to his left arm?

20 A. I have no knowledge of that.

21 Q. Okay. All right. Do you have any documentation
22 or personal knowledge that he ever informed Watkins and
23 Shepard that he injured his left arm in a 1987 work-related
24 accident and had lifting restrictions with regards to that
25 left arm as a result of the accident?

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1 A. No.

2 MR. LOCKHART: All right. Thank you,
3 Mr. Stephens. Those are all the questions I have.

4 EXAMINATION

5 BY MRS. AMICK:

6 Q. Just briefly, Mr. Stephens, in follow-up to
7 that, on the paperwork on the DOT physical paperwork, that
8 would have been returned to Watkins and Shepard; is that
9 correct?

10 A. That is correct.

11 Q. And who --

12 A. They have --

13 Q. Okay. And who would have reviewed that?

14 A. I'm sorry. The human resources driver
15 recruiting department.

16 Q. All right. And if there was an indication of,
17 yes, with loss or impairment to a limb and a range of motion
18 issue with the left arm, would that have disqualified
19 Mr. Osmanski from working for Watkins and Shepard Trucking?

20 A. I can't answer that. I don't -- I don't know
21 that answer.

22 Q. All right. What is the -- if this form
23 indicates that he had a loss or impairment of a limb and a
24 range of motion issue with his left arm, would the company be
25 aware by receiving that form of those issues with

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1 Mr. Osmanski?

2 A. I have no knowledge of that. I do know under
3 DOT requirements there is some issues with limbs under the
4 regulations, but I do not recall what that chapter is.

5 Q. What is your procedure when you have a driver
6 that indicates a loss or impairment of a limb? Do you
7 typically ask for the questions in that regard?

8 A. That would have been noted on the DOT physical
9 -- should have been noted on the DOT physical if anything
10 would have been noted on there.

11 Q. Okay. So, if you got the DOT physical and you
12 reviewed it and you've still hired Mr. Osmanski, you didn't
13 feel that was fatal to his ability to do the job, did you?

14 A. That would have been the recruiting department's
15 decision.

16 Q. But he was hired, was he not?

17 A. He was hired, yes.

18 Q. And he did work after October 30th of 2006?

19 A. That is correct.

20 Q. And did complete the lift test successfully?

21 A. He did. He did complete the lift test, yes.

22 Q. Okay. Did he ever specifically ask Mr. Osmanski
23 if he had ever had a prior workers' compensation injury?

24 A. No.

25 Q. Did you ever ask him if he had had a prior

MARIE A. BOYCE, C.C.R.
(803) 603-2211

1 surgery?

2 A. No.

3 Q. To your knowledge, did he ever say anything to
4 you that was misleading?

5 A. I would say no.

6 MRS. AMICK: All right. Nothing further.

7 MR. LOCKHART: Thank you, Mr. Stephens.

8 THE WITNESS: Thank you, Jason.

9 MRS. AMICK: All right. I'm going to end this
10 call now. Thank you, Mr. Stephens.

11 THE WITNESS: You're welcome.

12 (The deposition was concluded at 10:00 a.m.)

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MARIE A. BOYCE, C.C.R.
(803) 603-2211

1 CERTIFICATE OF REPORTER

2
3 I, MARIE A. BOYCE, Certified Court Reporter, and
4 Notary Public for the State of South Carolina at Large, do
5 hereby certify that the foregoing transcript is a true,
6 accurate, and complete record.

7 I further certify that I am neither related to nor
8 counsel for any party to the cause pending or interested in
9 the events thereof.

10 Witness my hand, I have hereunto affixed my official
11 seal this 12th day of March, 2009, in Lexington, Lexington
12 County, South Carolina.

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16 Marie A. Boyce, C.C.R.

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(803) 603-2211

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BEFORE THE SOUTH CAROLINA
WORKERS' COMPENSATION COMMISSION
WCC FILE NO: 0818219

JOE OSMANSKI,

Employee/Claimant,

vs.

WATKINS SHEPARD TRUCKING,

Employer,

and

ZURICH AMERICAN INSURANCE CO.,

Carrier,

Defendants.

30(b)(6)
TELEPHONIC

DEPOSITION OF: MATTHEW WILLIAM GRANDY

DATE: March 17, 2010

TIME: 3:09 PM

LOCATION: Law Offices of
Steinberg Law Firm
61 Broad Street
Charleston, SC

TAKEN BY: Counsel for the Claimant

REPORTED BY: Laura J. Bash, RPR

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 21 DAVID T. PEARLMAN
 22 JESSE ELISON (via telephone)

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Page 5

1 MATTHEW WILLIAM GRANDY,
 2 being first duly sworn, testified as follows:
 3 EXAMINATION
 4 BY MR. SMITH:
 5 Q. Please state your full name.
 6 A. Matthew William Grandy.
 7 Q. Mr. Grandy, my name is Kevin Smith, I'm
 8 a lawyer at the Steinberg Law Firm. We have been
 9 retained to represent a Mr. Joseph Osmanski with
 10 regards to an injury he suffered on the job.
 11 The purpose for this deposition today
 12 is to take some testimony from you with regards to
 13 the hiring process at Watkins Shipping. Before we
 14 go forward, would you go ahead and just tell me
 15 what your job title at Watkins is?
 16 A. My title is Director of Driver
 17 Recruiting and Training.
 18 Q. And how long have you held that
 19 position?
 20 A. I have held the position twice. From
 21 1989 until 1999; and then again, starting in
 22 January of 2008.
 23 Q. All right. And go ahead and give me a
 24 general description of the position of director of
 25 driver recruiting and training.

1 A. Okay. Well, the job starts with
 2 getting interest in our company through advertising
 3 for open positions with our company. So I'm
 4 responsible for an advertising budget.
 5 Then, also responsible for conducting
 6 background and checks on people. We have a number
 7 of federal mandates through the Department of
 8 Transportation, things that we have to check on a
 9 driver. And ultimately, you know, following that
 10 driver applicant through the hiring process and
 11 into an orientation and then being hired.
 12 Q. All right. Well, you know, like I said
 13 earlier, we have asked Watkins to name someone who
 14 could testify best about y'all's hiring process.
 15 Am I correct in assuming, by your presence and from
 16 that description you just gave me of that job, you
 17 are that person?
 18 A. Yes.
 19 Q. All right. Why don't we just go ahead.
 20 And again, in a general sense, if you can kind of
 21 give me a list of the steps that Watkins would
 22 take, or require an applicant to take, in the
 23 hiring process, assuming they have found out that
 24 y'all are looking for van drivers in one way or
 25 another. How would someone typically contact

1 Watkins? Would they contact a local office? Home
 2 office? How does that generally happen?
 3 A. All hiring is done here at our
 4 corporate headquarters in Missoula, Montana.
 5 Q. So you talked about running
 6 advertisements. What would we typically see in
 7 those advertisements?
 8 A. Quite often it would be -- for example,
 9 in a trucking related magazine an advertisement
 10 that, you know, we have got open positions and
 11 we're seeking applicants.
 12 Q. Okay. And then what sort of contact
 13 information would you list in that advertisement?
 14 A. Would have the 800 number for the
 15 cooperate office here in Montana.
 16 Q. And so who would answer that 800 line
 17 if someone were to call?
 18 A. It would be either myself or one of my
 19 staff members.
 20 Q. All right. And so let's assume
 21 Mr. Osmanski, or really anyone in particular back
 22 in 2006, would have called up and either would have
 23 gotten you or someone in your office. Assuming
 24 that he said I would like to work for you, what
 25 sort of information would be relayed at that point?

2 (Pages 2 to 5)

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1 A. Over the phone, we would give general
2 information about the position, and then we would
3 have the individual fill out an application. And
4 the application is largely dictated by the federal
5 government, as far as the questions. And, in fact,
6 even the exact wording of the questions are laid
7 out in a series called the Federal Motor Carriers
8 Safety Regulations.

9 And so we would have the person fill
10 out the job application. Along with that job
11 application is a copy of the essential functions of
12 the job that the individual has to meet. And we
13 would conduct some screening. For example, we
14 would look at the person's motor vehicle record.
15 We look at the person's criminal record. By law
16 we're required to contact any former employers
17 within the last three years, if those employers are
18 regulated by the Department of Transportation.

19 And there are two things we need to
20 acquire from those former employers. One, is past
21 drug and alcohol test results; and the other is any
22 DOT reportable accidents that have occurred with a
23 DOT regulated employer.

24 Q. All right. Okay. So let's just stop
25 right there and go through a few specifics in that.

1 they would have had already at the Hickory
2 location?

3 A. It's very conceivable that they could
4 have had some there, yes.

5 Q. Okay. And if Mr. Osmanski says that he
6 went to the Hickory location and filled out the
7 application and other paperwork there, would there
8 be anything wrong that you know of with that
9 statement? Or is that entirely possible?

10 A. Yes, that's entirely possible.

11 Q. Okay. And I assume that the home
12 office in Missoula, they have the ability to fax
13 things, e-mail things, get whatever they need to
14 get to the Hickory office for applicants or
15 potential applicants to complete?

16 A. Yes.

17 Q. All right. And in/around 2006, did
18 Watkins change any of their particular hiring
19 processes? What I mean by that, did they add any
20 new forms, delete any old forms, update forms,
21 anything like that that you can recall?

22 A. Not to my knowledge.

23 Q. And so would you assume that whatever
24 the hiring process in 2006 was, that it was
25 probably that way for quite some time?

1 Assume when the person calls the 800 line, either
2 you or the person who answers the phone informs
3 them of what you have just told me about?

4 A. Yes.

5 Q. All right. And so how is the
6 application sent to the person? How is that
7 completed?

8 A. Probably, you know, in that day in age,
9 2006, probably would have mailed an application.
10 Although it's possible that they could have gone by
11 one of our locations and picked up an application.

12 Q. And where would be your -- where would
13 be your local office -- let me ask you this: How
14 many offices do you have in South Carolina?

15 A. We have none in South Carolina. We
16 have one in Hickory, North Carolina.

17 Q. Okay. And I think that's the local
18 office Mr. Osmanski was associated with?

19 A. Yes.

20 Q. All right.

21 A. It's very conceivable he could have
22 picked up an application there, but that
23 application would have been processed here at our
24 corporate office.

25 Q. Okay. Is the application something

1 A. Yes.

2 Q. All right. And has your hiring process
3 changed at all since 2006?

4 A. Not to my knowledge.

5 Q. All right. Okay. So after the
6 application is filled out, the driving record is
7 pulled, the criminal record is pulled, and any past
8 employers for the past three years that are
9 associated with the Department of Transportation
10 are questioned. Tell me, what's the next step in
11 the process.

12 A. Okay. If the application was processed
13 by one of my staff members, that application is
14 brought to me and I make the determination of
15 whether to extend a job offer to the person. And
16 at that point, we issue what we refer to as a
17 conditionable job offer. And a job offer is
18 conditional upon a number of things. Number one,
19 being the drug test which is mandated by the
20 Department of Transportation.

21 We also, at that point, go into a
22 post-job offer phase. The idea behind that is we
23 want our recruiting department to basically be
24 blind to a person's disabilities or perceived
25 disabilities. We want our recruiting department to

1 focus on people's abilities to do the job.
 2 Q. Okay. So what goes on after that? The
 3 drug test and the post-job offer.
 4 A. After the recruiting department has
 5 given a conditional job offer to the applicant,
 6 their file is handed off to our safety department
 7 who has a questionnaire that we call our post-job
 8 offer questionnaire. And that questionnaire is
 9 gone over with the applicant by our safety
 10 department. And they are questions we do not want
 11 our recruiting department to be asking the people.
 12 And then upon completing that
 13 questionnaire, the next step in the process would
 14 be the Department of Transportation drug test. And
 15 then we also have a lift test that we do.
 16 Q. All right. Hold on just a second for
 17 me. All right. So if I understand you correctly,
 18 after all these things -- and it looks like really
 19 the drug test would be the last step in that puzzle
 20 before the post-offer questionnaire. And I think
 21 you said all of that was handled by the recruiting
 22 department, and then HR steps in and they make the
 23 actual post-offer questionnaire?
 24 A. It's actually our safety department.
 25 Q. Okay. I'm sorry. And where is your

1 safety department, physically, in relationship to
 2 the recruiting department?
 3 A. It's on the -- in the same building but
 4 a different floor.
 5 Q. Okay. All right. And then what steps
 6 does the safety department take after the post-job
 7 offer questionnaire is filled out?
 8 A. After the post-job offer questionnaire
 9 is filled out, then the individual goes in for
 10 their drug test and lift test. And at that point
 11 there is also a DOT physical that was administered
 12 at the same time.
 13 Q. All right. With regards to the drug
 14 test, where do you have that done? And let's
 15 just put this in the context of Mr. Osmanski's case
 16 given he's at your Hickory, North Carolina local
 17 shop.
 18 A. We have a number of drug testing
 19 locations around the nation. You know, at each one
 20 of our terminals we have got at least one place to
 21 do drug tests, and quite a few of our terminals,
 22 multiple places. So most likely Mr. -- I don't
 23 have his file directly in front of me -- most
 24 likely it would have been done at a clinic called
 25 Cawtaba, which is part of a hospital that is real

1 near our terminal. But I can't state that that is,
 2 in fact, where he did it without looking at his
 3 file.

4 MR. SMITH: Jason, we're going to go
 5 off the record for just a sec. Is that all right?

6 MR. LOCKHART: Okay.
 7 (Off-the-record discussion.)

8 BY MR. SMITH:

9 Q. All right. Mr. Grandy, we're back on
 10 the record. Sorry about that.

11 A. Okay.

12 Q. I want to touch -- well, let me ask you
 13 this first. Let's just get through the process.
 14 After the safety department takes over, the drug
 15 test is completed, the lift test is completed, the
 16 DOT physical is completed, are there any additional
 17 steps in the hiring process before Mr. Osmanski
 18 would officially start working for Watkins?

19 A. No.

20 Q. All right. Let's go through some of
 21 these pieces. And it might not be in exact order
 22 here so bear with me.

23 The recruiting department, they're the
 24 ones that make the conditional offer of employment;
 25 is that correct?

1 A. That's correct.

2 Q. All right. And you said that one of
 3 the reasons why you don't have your recruiting
 4 department complete this post-job offer
 5 questionnaire is because you don't want them to
 6 know about any disabilities that the applicant may
 7 have?

8 A. That's true. We want the job offer to
 9 be made irregardless of anyone's disabilities.

10 Q. Okay. Do you -- and I just want to get
 11 to sort of the root of that. What affect would it
 12 have if someone in the recruiting department was
 13 made aware that an applicant had any sort of a
 14 disability or prior injury? How would that affect
 15 their process that they do?

16 A. As far as the recruiting department
 17 goes, if someone made us aware of a disability, we
 18 would go over with them what the essential
 19 functions of the job are. But we would continue to
 20 process the application and the conditional job
 21 offers made irregardless of any disability.

22 Q. Okay. And so am I correct in assuming
 23 your testimony here so far, that even if the
 24 recruiting department were to have completed the
 25 post-offer job questionnaire, and the applicant

1 would have checked any sort of disabilities or made
2 y'all aware of any disabilities after a discussion
3 of the essential functions of the job, that
4 wouldn't necessary affect the ability or the
5 decision to make an offer of employment at that
6 time? Is that fair to say?

7 A. I think you have got that a little bit
8 confused. Can you restate that.

9 Q. Sure. Once the conditional job offer
10 has been made -- if we assume for a moment that
11 before the conditional job offer was made, that the
12 applicant had actually completed this post-job
13 offer questionnaire and had made Watkins aware of
14 prior injuries, limitations, any number of things,
15 are you saying that after discussing the essential
16 functions of the job which the applicant is
17 applying for, and making those essential functions
18 known to that applicant, that the fact that the
19 person had any type of an injury or illness or
20 limitations in the movement of their extremities or
21 back or anything like that, that none of that would
22 necessarily affect the conditional offer of
23 employment that was made?

24 A. The way that you stated it, you had it
25 backwards. The conditional job offer is made by

1 made.

2 Q. Okay. All right.

3 A. I mean, I'm confused by your question
4 there.

5 Q. Let me just explain it to you. The
6 reason I'm asking is you had said before
7 that -- and I thought you had said before, so
8 correct me if I'm wrong -- that even if a person
9 indicates that on the post-job offer questionnaire,
10 even if they indicate they have had prior injuries
11 or limitations in the use of their body, that what
12 y'all do is y'all discuss with them the essential
13 function of the job.

14 And depending on that discussion, you
15 may still offer the person that job with or without
16 any sort of restrictions, impairment, or loss of
17 the use of, you know, essential body parts, as long
18 as they feel they can do the essential functions of
19 the job. Do you see where I'm going with that?

20 A. I do. But my recollection of your
21 previous question was if it was asked during -- if
22 the individual made the recruiting department known
23 during the recruiting phase that they had a
24 disability, what would be taken. And the answer I
25 gave you had to do with the pre-job offer phase.

1 the recruiting department and then after that is
2 the post-job offer questionnaire. Which is done by
3 the safety department.

4 Q. Okay. I guess what my question is, is
5 if the post-job offer questionnaire was presented,
6 let's just call it a pre-job offer questionnaire --
7 if that was presented before a conditional offer of
8 employment, are you saying that if the person had
9 indicated they had any prior injuries, illnesses or
10 limitations in the use of their body, that that
11 would not necessarily affect the decision to make a
12 conditional job offer?

13 A. That questionnaire would never be
14 presented to the individual before the conditional
15 job offer is made.

16 Q. But if it was, would that
17 questionnaire, if a positive answer was given about
18 prior injuries, limitations, things like that, if
19 that questionnaire was given to the applicant
20 before the conditional offer of employment was
21 made, would that affect the decision as to whether
22 or not to make that actual conditional job offer?

23 A. I'll just restate what I said before.
24 It's always been our policy to never do that
25 questionnaire before the conditional job offer is

1 And now you are asking about the post-job offer
2 phase. And they're two separate things. We would
3 handle the question differently if it was -- if the
4 question was asked before the conditional job offer
5 is made, and after the conditional job offer is
6 made. Our response would be different depending on
7 where that question was asked.

8 Q. Okay. All right. So y'all select a
9 place for the drug test to be done? And by
10 "y'all," I mean, the recruiting department at this
11 time.

12 A. Yes.

13 Q. All right. But then, that's actually
14 done after the safety department takes over the
15 hiring process at that point?

16 A. Yes. After the safety department gives
17 clearance to the recruiting department, the
18 recruiting department basically takes that
19 individual back over again and schedules the drug
20 test and the lift test.

21 Q. All right. And the DOT physical?

22 A. Yes.

23 Q. All right. And all of those, the drug
24 test, the lift test and DOT physical, are those all
25 done at locations selected by Watkins?

1 A. At that point in 2006, yes.
 2 Q. Okay. And the locations that you would
 3 choose for those particular things to be done, do
 4 y'all choose a new location each and every time, or
 5 would y'all go with the same places over and over
 6 again?
 7 A. Generally it would be the same place.
 8 Q. All right. Let's talk about
 9 the -- well, the drug test, first of all.
 10 Mr. Osmanski, do you have any information that he
 11 did anything other than pass that drug test?
 12 A. To my knowledge, he passed it. We
 13 wouldn't have hired him if he didn't.
 14 Q. Okay. Now when -- when you make
 15 the -- a post-job offer questionnaire, at that
 16 point all that's been made is a conditional offer
 17 of employment, correct?
 18 A. That's true.
 19 Q. All right. And so the only things that
 20 that job offer is conditional upon is the drug
 21 test, the lift test, and the DOT physical?
 22 A. Well, it would be those three things
 23 that you just mentioned. And then, you know, the
 24 other thing is -- you know, the purpose of that
 25 questionnaire is to ensure that the person can

1 that you have a copy of this in front of you. Do
 2 you?
 3 A. I don't. I have got it electronically.
 4 Let me pull it up.
 5 Q. All right.
 6 A. Just give me a second here. I have got
 7 to find it in my computer here.
 8 Q. Sure.
 9 A. Okay. I have got it sitting in front
 10 of me.
 11 Q. All right. So let's make sure we're
 12 both reviewing the exact same thing here. Top of
 13 the center of this form: Employee Screening/Human
 14 Performance Evaluation, Watkins and Shepard
 15 Trucking, Incorporated. And the last full sentence
 16 on that sheet reads: The above demands are based
 17 on the job analysis/job description provided by
 18 Watkins Shepard trucking, Inc.
 19 Is that what is on yours?
 20 A. Yes.
 21 Q. All right. At the very bottom in the
 22 center it just says: For more information,
 23 visit -- and it gives the website wksh.com.
 24 A. Yes.
 25 Q. And I had actually just gotten this not

1 fulfill the essential functions of our job.
 2 Q. Okay. And let's talk about the
 3 essential functions of your job. And I think we
 4 started talking about the lift test a little bit.
 5 Do you have a copy of the document -- I just got a
 6 blank one here -- that the evaluator fills out when
 7 they do the lift test?
 8 And I have just been calling it a lift
 9 test. I'm sorry. I think this is actually
 10 entitled: Employee Screening/Human Performance
 11 Evaluation, Watkins and Shepard trucking.
 12 A. Yes. And we refer to that as the HPE,
 13 for human performance evaluation.
 14 Q. All right. We have heard some other
 15 people in this case talk about a lift test from
 16 time to time. Do you know of any other specific
 17 tests that deal with lifting, or is it safe to
 18 assume the lift test is probably encompassed within
 19 the evaluation for this human performance
 20 evaluation?
 21 A. Yes. They're the same. The phrase
 22 "lift test and human performance evaluation," our
 23 HPE, both terms are interchangeable.
 24 Q. What I'm going to do right now,
 25 Mr. Watkins (sic) -- let me first of all confirm

1 too long ago from Mr. Lockhart, y'all's attorney on
 2 this case.
 3 MR. SMITH: Jason, can you just certify
 4 that -- I know you asked them for this document --
 5 that we are both looking at the same thing?
 6 MR. LOCKHART: Yes. I sent it to you
 7 via e-mail correspondence on March 17th at 9:06
 8 a.m.
 9 MR. SMITH: All right. Great. And
 10 I'll just certify that that is what I'm looking at
 11 now.
 12 I am going to go ahead and mark this
 13 for our court reporter so we'll know what we're
 14 referring to.
 15 (CLAIMANT'S EXH. 1, HPE, was marked for
 16 identification.)
 17 BY MR. SMITH:
 18 Q. All right. This document, and we'll
 19 just call it the HPE because I think that's what
 20 you are used to referring to it as.
 21 A. Yes. Here in our office we refer to it
 22 as the HPE.
 23 Q. All right. This HPE, first of all let
 24 me ask you this: Do you have a copy of the actual
 25 HPE that was completed for Mr. Osmanski?

1 A. No, I do not.
 2 Q. Do you know why y'all wouldn't have
 3 that?
 4 A. I don't know. I have looked through
 5 his employment record and I could not find it. I
 6 also called the clinics that we do them at, there
 7 at our Hickory office, and they stated they only
 8 keep records for one year and then they destroy
 9 them.
 10 Q. All right. Well, when we reviewed this
 11 document -- let me ask you this. Is this the HPE
 12 that was most likely used when Mr. Osmanski went to
 13 whatever doctor it was that y'all selected for this
 14 test to be performed?
 15 A. Yes.
 16 Q. All right. And on the left side of the
 17 page there is a test description, the critical
 18 demands, and then there is an indication where the
 19 person or applicant met or did not meet those
 20 demands. Is that your understanding?
 21 A. Yes.
 22 Q. All right. And we've got in here, you
 23 know, several tests for cervical range of motion,
 24 extremities range of motion. There's some
 25 different dynamic strength tests. Are those lift

1 Mr. Osmanski's job?
 2 A. As far as physical abilities, yes.
 3 Q. Okay. And how does a -- you said also
 4 that the applicant is required to submit to a DOT
 5 physical. Does that add to this HPE evaluation in
 6 any way?
 7 A. The time in 2006 when Mr. Osmanski was
 8 hired, the company did have individuals do a DOT
 9 physical at the same time that the HPE was done.
 10 That is no longer our practice.
 11 Q. Okay. What are y'all doing now?
 12 A. Every individual who has a commercial
 13 driver's license already has a DOT physical. And
 14 so now -- basically the DOT physical was kind of a
 15 perk to the job. You know, the individual would
 16 get a free DOT physical paid for by the company.
 17 And now starting in, I believe it was January of
 18 2009, we just use the existing DOT physical that
 19 the individual already has.
 20 Q. Okay. Let's go back to this
 21 questionnaire we were talking about before. And I
 22 think you and I had got into a little confusion. I
 23 was trying to restate some things and we were
 24 getting off track a little bit about what happens
 25 if a person was to indicate positive answers to

1 tests?
 2 A. Yes.
 3 Q. Floor to waist; floor to shoulder.
 4 Those would both be lift tests?
 5 A. Yes.
 6 Q. And this bilateral carry. I assume
 7 that's carrying 60 pounds, 25 feet?
 8 A. Yes.
 9 Q. And this push or pull, that would be
 10 pushing and pulling 25 pounds -- I'm sorry -- 62
 11 pounds, 25 feet?
 12 A. Yes.
 13 Q. And it's got some other thing about
 14 crawling and walking and bending and all those
 15 sorts of things.
 16 Mr. Grandy, does this form that we have
 17 marked here as Claimant's Exhibit Number 1, the HPE
 18 evaluation, does this represent the essential
 19 functions of Mr. Osmanski's job?
 20 A. They are -- this form itself is not the
 21 essential functions of the job. This is a test
 22 designed to simulate the essential functions.
 23 Q. Okay. But do these tests represent, as
 24 best you can in sort of a clinical setting, the
 25 essential functions or essential requirements for

1 really any of these items on the post-job offer
 2 questionnaire. And we started talking about that
 3 and I used a few hypotheticals. But let's bring it
 4 into context about what we're talking now.
 5 If an applicant were to indicate yes to
 6 any of the questions on the post-job offer
 7 questionnaire; meaning yes he has any disability,
 8 or yes he has any impairment, or yes he has any
 9 limitations in the use of his body. Simply
 10 answering yes to any of those questions, after or
 11 before anything else is done, would simply
 12 answering yes to any of those questions, would that
 13 answer in and of itself preclude the applicant from
 14 getting a job with Watkins?
 15 A. No.
 16 Q. All right. Now assuming the applicant
 17 did indicate yes to any of those questions and did
 18 inform you about impairment, restrictions, the
 19 inability to do certain things, would you still
 20 have that applicant go and do the HPE/human
 21 performance evaluation?
 22 A. No. We would not have them do the HPE
 23 if they answered yes to anything on that form. We
 24 would conduct further research into that before we
 25 sent someone in for the lift tests.

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1 Q. And what sort of research would you do?
 2 A. Probably the first thing would be a
 3 copy of work release from the treating physician at
 4 the time of -- you know, if they indicated that
 5 they, for example, had an on-the-job injury, we
 6 would want to see a copy of a work release from the
 7 treating physician at the time.
 8 Q. Okay. Let's assume for a moment that
 9 work release from the treating physician contained
 10 restrictions that would be above what would be
 11 required from Watkins. Do you also -- are you
 12 interested in getting any DOT physicals from any
 13 other doctors performed since the time that the
 14 physician had released the worker?
 15 A. You kind of asked two questions there.
 16 The question about the DOT physical is -- you know,
 17 we're only required to have one DOT physical on
 18 file.
 19 Q. Yeah. I gotcha. What I'm saying, is
 20 let's assume the worker -- when we talked about
 21 these positive answers, you said you would have
 22 wanted to see that return-to-work note. And I'm
 23 asking you if you were aware of a -- any medical
 24 records, including a Department of Transportation
 25 physical that had happened which contained

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1 different findings, no restrictions, things like
 2 that, is that something you would want to have as
 3 well?
 4 A. Sure.
 5 Q. Okay. Give me one sec.
 6 At what point, Mr. Grandy, is the
 7 post-job offer questionnaire sent? Is that before
 8 the HPE test, or the drug test, or DOT physical?
 9 Is it before any of those are done?
 10 A. Yes, it is. It's before that.
 11 Q. Let's talk about the evaluations done
 12 in this case. I think we already talked about the
 13 drug test that came out clear. We have talked a
 14 little bit about this HPE. I want to ask you a
 15 little bit about the DOT physical. Do you have a
 16 copy of the DOT physical that was done for
 17 Mr. Osmanski?
 18 A. I do not have it in front of me but I
 19 have seen it. You want me to have a copy of it in
 20 front of me?
 21 Q. Is it something you can find? I'm
 22 seeing if I can get it to you real quick. Or -- I
 23 don't know if Jason can point you to where it is.
 24 A. It's in his personnel file which is
 25 downstairs. I can put you on hold.

1 Q. Yes. We may need that eventually.
 2 A. Let me put you on hold and I'll go get
 3 it.
 4 Q. Sure. Thanks.
 5 (A recess transpired.)
 6 BY MR. SMITH:
 7 Q. And I think what we're trying to look
 8 at here was the --
 9 A. DOT physical.
 10 Q. Yeah. Is that Dr. Osbahr?
 11 A. Let me see the doctor's name on it.
 12 The date of it is 10/30 of '06. Yeah. Looks like
 13 Osbahr, I guess would be the spelling. I mean, I'm
 14 trying to read the doctor's handwriting here so --
 15 Q. It looks like it says Al Osbahr?
 16 A. Yes.
 17 Q. Okay. Back in 2006, what was the
 18 purpose for sending applicants to Dr. Osbahr for a
 19 physical examination?
 20 A. Well, like I previously stated, you
 21 know, everyone who has a commercial driver's
 22 license already has a DOT physical. It was kind of
 23 customary in our industry back then that employers
 24 would provide a free DOT physical for people so
 25 that they, you know, start the new job with a fresh

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1 physical.
 2 Q. But y'all weren't sending Mr. Osmanski
 3 to Dr. Osbahr just so Mr. Osmanski could have a
 4 free physical. Were you actually interested in the
 5 information that Dr. Osbahr would relay as a result
 6 of this physical examination?
 7 A. Yes.
 8 Q. And if you'll turn to the very back
 9 page of that examination. I think there are three
 10 pages.
 11 A. Okay. Yes.
 12 Q. And down toward the bottom right of
 13 that page there is an indication for Number 10,
 14 dealing with the extremities. And it asks for loss
 15 or impairment of leg, foot, toe, arm, hands, finger
 16 and all sorts of things. Doctor Osbahr indicated
 17 yes on that. Is that correct?
 18 A. Yes, he did.
 19 Q. All right. And this form that
 20 Dr. Osbahr completes, this was contained in
 21 Mr. Osmanski's personnel file?
 22 A. Yes.
 23 Q. All right. This is something used and
 24 relied upon in the hiring process?
 25 A. Yes. That DOT physical is a required

8 (Pages 26 to 29)

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1 document for someone with a commercial driver's
2 license, yes.

3 Q. But the actual findings of that
4 document, this form in particular, the fact that
5 the doctor had checked yes for that Number 10, is
6 that something that is used and relied upon in the
7 hiring process?

8 A. As far as the hiring process, the DOT
9 physical is basically almost a pass/fail thing.

10 Q. Okay. But at this point there's just a
11 conditional offer of employment out there, and that
12 offer of employment is conditional upon several
13 things, one of those being this particular DOT
14 physical. Is that correct?

15 A. That's true.

16 Q. Okay. And Dr. Osbahr had made some
17 additional findings. Do you see the comment
18 section on the bottom of that page?

19 A. I do.

20 Q. And, you know, it's in doctors'
21 writing; it's own art form. I'll do the best I can
22 with it here. Number 1, very functional. Do you
23 agree that that's what it looks like it says?

24 A. Yes. It says Number 1. So that would
25 be relating up to the body system general

1 his supination. But it looks like he was able to
2 pronate okay. Is that fair to say?

3 A. Yes. Based on what I can read from the
4 doctor's handwriting, yes.

5 Q. All right. And so at the time that
6 Watkins was considering whether or not to extend
7 Mr. Osmanski's conditional job offer to a formal
8 job offer, this is one of the documents that was in
9 the possession of Watkins Trucking?

10 A. Yes.

11 Q. All right. And I have got here a
12 statement from Dr. Osbahr. And he's saying that
13 180 degrees would be normal. And Mr. Osmanski, at
14 the time he evaluated him, he had a 90-degree
15 supination. Do you know -- have you ever heard
16 that before?

17 A. No, I have not.

18 Q. Okay. After you received this
19 question -- or this evaluation note, or the DOT
20 physical note from Dr. Osbahr, what steps did
21 Watkins Trucking take to follow up on this
22 limitation involving the use of Mr. Osmanski's
23 arms? Or left arm, I'd say.

24 A. I wouldn't have any knowledge of that.

25 Q. Okay. And I misspoke. I meant to say

1 appearance.

2 Q. Okay. And then there is probably a
3 notation that he's overweight?

4 A. Yes.

5 Q. And then Number 10, does that refer
6 back to that positive indication under the body
7 system section Number 10?

8 A. Yes.

9 Q. All right. And that indicates
10 decreased supination; only 90 degrees. Do you know
11 what that is?

12 A. No, I don't. I mean, I know what
13 90 degrees is, but, you know, I don't know what the
14 normal -- normal amount of supination is.

15 Q. No. What I'm asking you here is
16 basically do you know what a doctor means when he
17 says supination or pronation?

18 A. Yes, I understand those terms.

19 Q. Those are basically the movements of
20 the arm?

21 A. Yes.

22 Q. In one direction or another?

23 A. Yes.

24 Q. And this form, correct me if I'm wrong,
25 indicates that Mr. Osmanski has some limitations in

1 right arm. Is that the same answer?

2 A. Right arm or left arm; no, I -- you
3 know, I was not present then, so I have no idea
4 what --

5 Q. Okay. I'll just ask you this in
6 general terms. Based on a review of the file and
7 information you have been provided, can you -- did
8 Watkins Trucking take any steps once they were made
9 aware by Dr. Osbahr that Mr. Osmanski had some
10 limitations in the movement of his right arm?

11 A. I do not know of any.

12 Q. Okay. And on to the other item we were
13 talking about, Claimant's Exhibit 1, the HPE test.
14 Did Mr. Osmanski successfully complete this test?

15 A. To my knowledge, yes.

16 Q. And beyond completing this test, did he
17 pass all of those items? Meaning, did he score a
18 "met" as opposed to a "not met" in each item?

19 A. To my knowledge, yes.

20 Q. Okay. And the reason this HPE test is
21 done is because if a worker or an applicant can
22 complete these critical demands, is Watkins
23 satisfied that they can complete the job for which
24 the person is applying?

25 A. I would answer yes to that.

1 Q. Okay. So at the time that Mr. Osmanski
2 was taking the HPE, submitting to the DOT physical
3 with Dr. Osbahr, was Watkins satisfied that
4 Mr. Osmanski could do the job?

5 A. You know, based on the information
6 here, yes.

7 Q. Okay. And would it seem reasonable to
8 you to assume that the reason no one followed up
9 with Dr. Osbahr about these limitations, that he
10 made Watkins Trucking aware of, was because
11 Mr. Osmanski had completed this HPE evaluation and
12 passed all of the tests designed to figure out the
13 critical demands of the job?

14 A. I would say it would be the sum total
15 between the post-job offer questionnaire, you know,
16 the DOT physical, the health history part, and then
17 the HPE. Yes. Based on those items, you know,
18 yes, it does appear that he's qualified for the
19 job.

20 Q. Okay. Did Watkins have Mr. Osmanski
21 sign any sort of a medical authorization or release
22 so that y'all would be able to receive this
23 Department of Transportation physical from
24 Dr. Osbahr?

25 A. Not to my knowledge, no.

1 Q. All right. But that certainly is
2 something he allowed you to get -- let me ask the
3 question in a different way.

4 Did Mr. Osmanski object to Dr. Osbahr
5 providing you with these items from his medical
6 file?

7 A. No.

8 Q. All right. And if y'all had any
9 questions about Mr. Osmanski or his physical
10 condition, was there anything preventing Watkins
11 Trucking from calling Dr. Osbahr or following up on
12 any of his findings?

13 A. No.

14 Q. And if you assume for me for a moment
15 that Dr. Osbahr's statement was correct that 180
16 degrees is a normal supination, and that
17 Mr. Osmanski only had 90 degrees supination, if you
18 were taking an application today and you were made
19 aware of that, and you knew that 180 degrees was
20 the max and that this person only had half of the
21 supination or movement in that arm, is that
22 something you would want to follow up on?

23 A. Yes, it is.

24 Q. Okay. With regards to the particular
25 job Mr. Osmanski was doing, he sort of described it

1 involved a whole lot more pushing and pulling than
2 it did lifting. Does that sound correct to you?

3 A. Yes.

4 Q. That most of the time that
5 these -- well, let me back up for a moment. The
6 way that the items are arranged in the truck is the
7 order in which they are to be removed from the
8 truck. Is that fair to say?

9 A. Yes.

10 Q. And the way the items are removed from
11 the truck is they are basically slid off the truck.
12 But the particular van driver, he is not required
13 to lift those items on and off of the truck. Is
14 that correct?

15 A. Yes.

16 Q. Okay. And so would it be correct, or
17 would he be correct in saying that most of the
18 physical requirements of his job is the ability to
19 push and pull? Is that fair to say?

20 A. No, I would not agree with that.

21 Q. What would be --

22 A. It's often that the freight ends up
23 stacked up.

24 Q. Uh-huh. What -- let me ask in I guess
25 a more simpler or plainer term. What would

1 Mr. Osmanski have done more? Would he have done
2 more lifting, or would he have done more pushing
3 and pulling?

4 A. I think it's correct to say more
5 pushing and pulling in that particular job.

6 Q. Okay.

7 A. But there would certainly be times that
8 he would be lifting as well. Lifting or lowering.

9 Q. Okay. All right. Give me one more
10 sec. We might be just about done.

11 MR. SMITH: All right. Mr. Grandy. I
12 think that's all the question I have for.

13 How about you, Jason?

14 MR. LOCKHART: I don't believe I have
15 any questions.

16 MR. SMITH: All right. Mr. Grandy, I
17 appreciate your time.

18 (The witness, after having been advised
19 of his right to read and sign this transcript,
20 waives that right.)

21 (The deposition concluded at 4:06 p.m.)

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1 CERTIFICATE OF REPORTER

2
3 I, Laura J. Bash, Registered
4 Professional Reporter and Notary Public for the
5 State of South Carolina at Large, do hereby
6 certify that the foregoing transcript is a true,
7 accurate, and complete record.

8 I further certify that I am neither
9 related to nor counsel for any party to the cause
10 pending or interested in the events thereof.

11 Witness my hand, I have hereunto
12 affixed my official seal this 20th day of March,
13 2010, at Charleston, Charleston County, South
14 Carolina.

15
16
17
18
19 Laura J. Bash, RPR
My Commission expires
October 5, 2015

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8 (No Information Requested)

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SOUTH CAROLINA WORKERS' COMPENSATION COMMISSION
W.C.C. FILE NO: 0818219

EMPLOYEE: JOE A. OSMANSKI.

EMPLOYER: WATKINS & SHEPARD TRUCKING, INC.

CARRIER: ZURICH NORTH AMERICA.

STATE OF FLORIDA)

COUNTY OF ALACHUA)

Deposition of LARRY CHIDGEY, M.D., taken on behalf
of the Employer/Carrier herein, pursuant to Notice of Taking
Deposition, at 3450 Hull Road, Third Floor, Gainesville,
Florida, on Monday, March 15th, 2010, at 11:00 a.m., before
STEVEN E. LeBLANC, SR., RPR, Notary Public in and for the
State of Florida at Large.

- - -

APPEARANCES:

KEVIN SMITH, ESQ., and DAVID T. PEARLMAN, ESQ., of
The Steinberg Law Firm, Post Office Box 9, Charleston, South
Carolina, 29402-0009, appeared on behalf of the
Employee/Claimant telephonically.

JASON W. LOCKHART, ESQ., of the law firm of MCANGUS,
GOUDELOCK & COURIE, L.L.C., 700 Gervais Street, Suite 300,
Columbia, South Carolina 29211-2519, appeared on behalf of the
Employer/Carrier telephonically.

COPY

LEBLANC COURT REPORTING SERVICES, INC.
P.O BOX 744, GAINESVILLE, FLORIDA 32601 (352) 373-6030

S T I P U L A T I O N

It was stipulated by and between counsel for the respective parties, and the witness, LARRY CHIDGEY, M.D., that the reading and signing of the deposition by the witness be waived.

— — —

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FOR IDENTIFICATION

None

Certificate of Reporter

35

LEBLANC COURT REPORTING SERVICES, INC.
P.O BOX 744, GAINESVILLE, FLORIDA 32601 (352) 373-6030

1 Thereupon,

2

LARRY CHIDGEY, M.D.,

3 having been produced and first duly sworn, testified as
4 follows:

5

DIRECT EXAMINATION

6

BY MR. LOCKHART:

7

Q. Dr. Chidgey, good morning again. My name is Jason
8 Lockhart. I'm a lawyer in Columbia, South Carolina. I'm
9 representing Watkins and Shepard Trucking and their workers'
10 compensation insurance carrier in a workers' compensation
11 claim filed in South Carolina by Joe Osmanski. We're
12 conducting your deposition this morning by telephone. I'm in
13 my office in Columbia. In Charleston we have Mr. Pearlman and
14 Mr. Smith both of whom are representing Joe Osmanski and we
15 have all agreed to do this deposition this morning by
16 telephone.

17 It's my understanding that you are in your office at
18 the University of Florida in Gainesville; is that correct?

19 A. True.

20 Q. Is that where you practice orthopedic medicine?

21 A. Yes.

22 Q. How long have you been an orthopedic physician?

23 A. About 20 years.

24 Q. And are you board-certified in orthopedics?

25 A. Yes.

1 Q. Any other subspecialties or certifications? Or just
2 briefly tell us about your professional background.

3 A. Well, I also am certified in hand surgery, and
4 that's about it.

5 Q. You have been practicing medicine exclusively in
6 Florida for the last 20 years, or did you practice anywhere
7 else before you settled at the University of Florida?

8 A. No. I have been a professor at the University of
9 Florida for about 20 years right after I graduated.

10 Q. Okay. Your practice is through the university's
11 medical facilities; is that correct?

12 A. True.

13 MR. LOCKHART: Kevin and David, I would offer up Dr.
14 Chidgey as an expert in orthopedic medicine.

15 MR. PEARLMAN: No objection.

16 BY MR. LOCKHART:

17 Q. All right. Dr. Chidgey, I want to briefly talk to
18 you about your early treatment of Mr. Osmanski and then we'll
19 move forward a little bit into late 2008 and early 2009. Just
20 for purposes of background, when did you begin seeing Mr.
21 Osmanski at your facility in Gainesville?

22 A. Well, it was 2000. It was in the fall of 2000.

23 Q. When you saw him initially, at that time what were
24 you treating him for? What types of injuries or problems were
25 you treating him for at that time?

1 A. He had some severe elbow injuries that involved
2 putting artificial elbow joints in his elbow.

3 Q. And that would be in his left elbow; is that
4 correct?

5 A. True.

6 Q. How many surgical procedures did you perform on him
7 as a result of, I guess, the treatment or the injuries that
8 you initially saw him for in late 2000?

9 A. Well, we put the artificial elbow joint in in
10 September of 2000, and I believe that's the last surgical
11 procedure that I see on him for that elbow. I will have to
12 look back through but --

13 Q. Did you also perform a procedure on the ulnar nerve
14 of his left elbow as well?

15 A. You're right. That's true.

16 Q. Any other surgeries that you can recall from
17 reviewing your notes other than those two?

18 A. That's correct. That's it.

19 Q. Doctor, do you have your chart with you on
20 Mr. Osmanski this morning?

21 A. I have the clinic chart. I don't have the actual
22 charts from the hospital.

23 Q. Okay. I wanted to take a moment, if we could, and
24 look at some of your particular notes from your examinations
25 of Mr. Osmanski. The first of which I would like to look at

1 is from January the 10th of 2001. Could you look at your
2 chart and tell me when you find your January 10, 2001 note?

3 A. It's in front of me now.

4 Q. Okay. It reflected that Mr. Osmanski was seen on
5 that date in follow up following his left elbow surgery; is
6 that correct?

7 A. True.

8 Q. I would like to look down, the report is divided up
9 into several sections, chief complaint, history of present
10 illness, physical examination, x-rays, impression and plan. I
11 would like to look at the section labeled plan. And in that
12 section of your report is there any discussion at all about
13 weight limitations or lifting restrictions with regards to his
14 left elbow or left arm?

15 A. Yes.

16 Q. What were your, I guess, your conclusions at least
17 as of January 10th, 2001 regarding any restrictions that he
18 had on his left upper extremity or left arm?

19 A. Well, we recommended that he try to avoid anything
20 over about 15 pounds or so.

21 Q. Is it fair to state that your record reflects that
22 he will always have a 15 pound weight limit restriction for
23 the left upper extremity?

24 A. Well, that's a general statement on these. I can't
25 say that that's an absolute on every patient. That is a

1 general statement.

2 Q. Okay. And at least in this note it would be
3 reasonable to conclude that at that time you put a 15 pound
4 weight limit on him?

5 A. Yes.

6 Q. And you also indicated that he should also avoid
7 situations where he might fall or excessively stretch his left
8 arm; is that correct?

9 A. Well, in general, after any surgery, we advise them
10 to try to avoid falling on the arm as they are recovering from
11 surgery, yes.

12 Q. Your report also says that you stressed this
13 multiple times today and that the patient stated he
14 understands?

15 A. True.

16 Q. All right. So is it reasonable to conclude that you
17 informed him of these restrictions and at least according to
18 your diagnostic report he understood what those restrictions
19 were?

20 A. True.

21 Q. This particular restriction, the 15 pound
22 restriction, is that directly tied to the fact that he had a
23 prosthetic in his left elbow? Is that why you would have
24 placed that type of restriction upon him?

25 A. Well, plus he was just three and a half months after

1 surgery so he was also in the recovery phase, yes.

2 Q. I would like to look, if we could, at another note
3 about a year later. This is February 11th of 2002. Let me
4 know when you have identified or located that note in your
5 chart.

6 A. I have it.

7 Q. This note reflects that Mr. Osmanski returned today
8 for evaluation status post ulnar nerve neurolyses on 11/1/01,
9 so would that have been the second surgery, I presume, you
10 performed on his left arm?

11 A. True.

12 Q. For purpose of clarification, what type of surgery
13 is that? What is that designed to accomplish?

14 A. Well, the nerve that goes past the elbow a lot of
15 lay people would call your funny bone nerve when you hit your
16 funny bone, that nerve was caught up in some scar tissue, and
17 so you basically go in and just scrape the scar tissue away
18 from the nerve to relieve some pressure from the nerve.

19 Q. Looking down at the section of your report labeled
20 plan, it appears that you recommended that he have a
21 functional capacity evaluation; is that correct?

22 A. True.

23 Q. Is it also true that your report indicates that he
24 will be at a ten pound lifting restriction indefinitely for
25 his left upper extremity due to his total elbow arthroplasty

1 on that side?

2 A. That's what it says, yes.

3 Q. So at least as of February 11th, 2002 is it
4 reasonable to conclude that you placed a permanent ten pound
5 lifting restriction on his left arm?

6 A. True.

7 Q. And again, it appears based on your report that that
8 restriction is directly related to his elbow arthroplasty?

9 A. True.

10 Q. The next note I would like to look at with you is
11 dated March the 22nd of 2002. Let me know when you have
12 located that note.

13 A. I have it.

14 Q. And this note reflects that Mr. Osmanski was seen in
15 your clinic on March 22nd of 2002 and this evaluation appears
16 to have taken place after he underwent a functional capacity
17 evaluation; is that correct?

18 A. True.

19 Q. Under the section of your report labeled interval
20 history, tell us what it says with regards to his lifting
21 restrictions if he received any at that time?

22 A. 10 to 15 pounds was the lifting restriction.

23 Q. Okay. Does your report also state that you
24 emphasized that Mr. Osmanski cannot lift more than 10 or 15
25 pounds with his left arm due to his total elbow

1 arthroplasty?

2 A. That's what it says, yes.

3 Q. Do you have any reason to doubt that that limitation
4 or restriction was not conveyed to him during your visit with
5 him on March 22nd of 2002?

6 A. I assume that we talked about it.

7 Q. You also provided him with an impairment rating at
8 that time?

9 A. True.

10 Q. According to your note did you assign him a 14
11 percent impairment rating to the upper extremity for or as a
12 result of the elbow arthroplasty?

13 A. Correct.

14 Q. What edition of the AMA Guides would have been
15 utilized back in 2002 to provide impairment ratings to the
16 upper extremities, do you know?

17 A. I would have to go back and look that up and see
18 what we used then.

19 Q. Let me ask you a hypothetical. If you had performed
20 a similar surgery on Mr. Osmanski in 2010, would you be
21 utilizing the Sixth Edition of the AMA Guides to provide an
22 impairment rating to his upper extremity?

23 A. Well, it would depend on what state was covering
24 him. Florida has their own impairment guides and for patients
25 in Florida we use the Florida Impairment Guide which is very

1 similar to the AMA but it's slightly different.

2 Q. You are familiar with the Sixth Edition of the AMA
3 Guides to Permanent Impairment?

4 A. Yes.

5 Q. What would be a generally accepted range of
6 impairment for a total elbow arthroplasty under the Sixth
7 Edition of the AMA Guides?

8 A. I would have to compare the 2002 version versus the
9 newer version, but I don't think that has changed at all.

10 Q. So it's your understanding that the ratings, at
11 least the guides as of 2002 are very similar to those in 2010
12 as far as rating the upper extremity for an elbow
13 replacement?

14 A. True.

15 Q. Did you release Mr. Osmanski from your care as of
16 March 22nd of 2002, or do you have any records that reflect
17 that he was seen after that time but prior to 2009?

18 A. I don't see an interval note between '09 and then.

19 Q. So is it a reasonable statement that you placed him
20 at maximum medical improvement on March 22nd, 2002 and
21 assigned him a total impairment rating of 20 percent to the
22 left upper extremity?

23 A. True.

24 Q. All right. Is it a reasonable statement that when
25 you released him from your care on March 22nd of 2002, that he

1 had a permanent lifting restriction of no lifting over 10 or
2 15 pounds with his left arm due to his total elbow
3 arthroplasty?

4 A. That's the restriction in 2002 that we placed.

5 Q. Okay. And that was a permanent restriction?

6 A. Unless things changed.

7 Q. Do you have any records to reflect that anything
8 changed in his medical care or the state of his upper
9 extremity between March 22nd of 2002 and around January 12th
10 of 2009?

11 A. I don't have anything one way or the other to know
12 if it changed.

13 Q. So again, it's a reasonable statement that when you
14 released him from your care on March 22nd of 2002 he had a
15 restriction of no lifting in excess of 10 or 15 pounds with
16 his left arm?

17 A. In 2002 that's his restriction, yes.

18 Q. But that was a permanent restriction?

19 A. Unless things changed.

20 Q. And we have no records to indicate that anything
21 changed with his upper extremity?

22 A. I don't have a record one way or the other. I
23 haven't seen him so I don't know.

24 Q. Okay. What type of problems would hyperextension of
25 the elbow pose for someone who has an arthroplasty of the left

1 elbow?

2 A. We are talking about an acute injury?

3 Q. Well, I'm just talking about hyperextension in
4 general and/or an acute injury that is a hyperextension type
5 injury. What type of problems would those cause for someone
6 who has an artificial elbow?

7 A. Well, by definition what I mean by hyperextension is
8 that the elbow is forced further than it normally wants to go.
9 We call extension when you extend the elbow and then it quits
10 normally just because that's as far as it wants to go. If you
11 hyperextend it, you're forcing it beyond so that implies an
12 acute injury. And certainly that can put a lot of stress on
13 an artificial elbow joint or it can damage the surrounding
14 soft tissues as well.

15 Q. Is someone that has an artificial elbow more
16 susceptible to a hyperextension injury than someone who has a
17 normal functional, I guess, natural elbow joint?

18 A. Well, the artificial elbow component itself is
19 susceptible to that injury, but the surrounding soft tissues
20 are probably as susceptible as a normal elbow.

21 Q. If Mr. Osmanski has testified in his deposition that
22 he was required to engage in lifting of objects that weighed
23 in excess of one hundred pounds while working for Watkins and
24 Shepard Trucking, would you agree that that activity would be
25 outside the permanent restriction that you placed upon him on

1 March 22nd of 2002?

2 MR. PEARLMAN: Object to the form of the question.

3 BY MR. LOCKHART:

4 Q. You can answer the question, doctor.

5 A. Well, that would be beyond the 2002 restriction.

6 Q. And again, that restriction was a permanent
7 restriction, correct?

8 A. Unless things changed.

9 Q. Okay. And again, I think we -- at least you have
10 indicated you have no records to indicate that anything
11 changed?

12 A. I haven't seen the patient so I don't know if
13 anything changed one way or the other.

14 Q. When did you next see Mr. Osmanski? If you last saw
15 him March 22nd of 2002, when was the next time he was seen in
16 your office?

17 A. The next note I have is 1/12/09.

18 Q. What complaints was he providing to you during this
19 January 12th, 2009 examination?

20 A. He had elbow pain and also he had weakness in
21 flexion.

22 Q. Did he provide you with a history of a work related
23 accident?

24 A. I have a history of a work related accident, but I
25 don't see it on that particular note so it looks like it may

1 have been later.

2 Q. When did he initially provide you with a history of
3 having injured his elbow at work?

4 A. I'm going to have to read the other notes here.

5 Q. Okay.

6 A. It looks like I just have that provided on April
7 3rd, '09, I see a note here provided that there was a work
8 related injury.

9 Q. Was that information provided by his attorney or was
10 it provided by Mr. Osmanski to you directly?

11 A. Well, I see it in an attorney note. I don't recall
12 one way or the other if the patient had talked about it.

13 Q. Okay. With you?

14 A. True.

15 Q. What was your diagnosis of Mr. Osmanski's condition
16 following your examination on January 12th?

17 A. Well, we originally wanted to make sure that no
18 infection had shown up in the elbow joint which that's one of
19 the things that can cause pain, so we had done some lab
20 studies to rule that out and it did not look like any
21 infection was a problem. We were concerned that the elbow
22 joint may be loosening up, but we were also concerned about a
23 tearing of his biceps tendon. That's the muscle that flexes
24 your elbow joint.

25 Q. Did you have him undergo an x-ray of his left elbow

1 on January 12th of 2009?

2 A. Yes.

3 Q. What is the significance -- I'm looking at a
4 radiology department report from Shands Hospital dated January
5 12th of 2009. What were the findings of the radiologist
6 following an x-ray of his elbow?

7 A. Well, there was concern that there could be some
8 loosening or there was -- that can also be caused by
9 infection. That's why we wanted to get those lab studies to
10 rule that out.

11 Q. Do you have a copy of the radiologist's report from
12 January 12th for your review?

13 A. I'll have to look through that. I don't see it
14 here in this particular chart, no.

15 Q. If you will indulge me for a moment, I'll just read
16 the report to you.

17 A. Okay.

18 Q. And certify that I'm reading directly from the
19 January 12th, '09 report from Shands Hospital. It says four
20 views of the left elbow were obtained. A left total elbow
21 arthroplasty is noted. The cemented acrylic component appears
22 uncomplicated; however, there is a very prominent lucency
23 surrounding the cemented humeral component consistent with
24 loosening. There's also suggestion of a healing fracture of
25 the distal humerus. The radial head has been resected.

1 Reactive bone is noted throughout the soft tissues of the
2 elbow. Two humeral K wires are noted. One of which appears
3 to be penetrating soft tissue.

4 Impression number one, loosening suggested within
5 the humeral component of a total elbow arthroplasty.

6 Two, healing humeral fracture.

7 Three, humeral K wire with distal component in soft
8 tissues.

9 What do you take away from those impressions in the
10 x-ray report from January 12th of '09? In other words, what
11 in your opinion is the state of his elbow based on those
12 radiological findings?

13 A. Well, as I mentioned, I agree that there is some
14 concern that the implant possibly could be loosening.
15 Sometimes the shadows you see on an x-ray may or may not mean
16 loosening but it's of concern, yes.

17 Q. Would those findings suggest that there was damage
18 to the prosthetic?

19 A. Well, once again, all it does is suggest that we
20 need to explore what's going on, so things such as infection,
21 loosening, all of those can cause similar x-ray findings, so
22 we wanted to rule out the infection, but loosening also can
23 occur.

24 Q. So did you eventually rule out infection as a cause
25 of his pain complaint?

- 1 A. Yes.
- 2 Q. When was the next time that you saw him?
- 3 A. 2/23/09.
- 4 Q. Okay. I believe at that point that's when you were
- 5 recommending that he had infection studies performed in order
- 6 to assess if that was the cause of his complaint?
- 7 A. That was my concern as one of the causes, but also
- 8 very concerned about the tendon or biceps.
- 9 Q. When was the next time you saw him after that?
- 10 A. 4/1/09.
- 11 Q. What was your diagnosis and plan following that
- 12 examination?
- 13 A. Well, concerned about a loose prosthesis as well as
- 14 the biceps tendon rupture.
- 15 Q. Did you ever perform a MRI of his elbow or his left
- 16 arm prior to 4/1/09?
- 17 A. No. We had not.
- 18 Q. Were you ever in a position based on your
- 19 examinations or diagnostic testing to confirm whether or not
- 20 there was any damage to his biceps tendon?
- 21 A. Well, examination revealed that.
- 22 Q. Would you have confirmed that through diagnostic
- 23 testing?
- 24 A. Well, with an artificial elbow joint and MRI the
- 25 metal greatly distorts it so I think you would have a very

1 poor image with an MRI. But the fact that he could actively
2 not flex the elbow and we could passively move it, we couldn't
3 feel a biceps there, that it changed so that's pretty much
4 diagnostic of a rupture.

5 Q. Have you seen him at all since April 1 of 2009?

6 A. I have no notes, no.

7 Q. Okay. Are you aware that he has undergone left
8 elbow surgery in Charleston, South Carolina?

9 A. No.

10 Q. Are you aware that he underwent a removal of the
11 humeral component of his left elbow prosthesis on or about
12 July the 8th, 2009?

13 A. No.

14 Q. What was your recommendation after your most recent
15 visit with him on April 1 of 2009?

16 A. Well, we talked to him about possible surgery.

17 Q. What type of surgical procedure were you
18 recommending for him as of April 1 of 2009?

19 A. Well, we were going to look at the elbow
20 arthroplasty itself, but also look at the tendons to see if
21 he, indeed, had ruptured his biceps.

22 Q. When you performed the original arthroplasty on his
23 left elbow, was it likely that he would have needed a
24 replacement at some point in the future or was it your opinion
25 that that would be the only prosthesis that he would have ever

1 need for that elbow?

2 A. No. It's possible that these wear out.

3 Q. Just sort of out of curiosity, were you one of the
4 few physicians that actually were qualified to perform that
5 type of procedure back in 2000 or was that a fairly wide
6 spread surgical procedure, an elbow arthroplasty?

7 A. No. That was common.

8 Q. Okay. We just don't see them very much here in
9 South Carolina and certainly weren't seeing them very
10 frequently back then so just curious.

11 If again, as I mentioned to you a few moments ago,
12 if he had undergone a removal of the humeral component of his
13 prosthesis, would that procedure itself result in any
14 additional impairment to his upper extremity?

15 A. It would depend on the results of the surgery.

16 Q. Explain that for me. If he had a favorable result
17 with no residual complications, would he have any impairment
18 as a result of that procedure?

19 A. Well, it might not worsen his impairment. He had
20 impairment as we dictated back in 2002. It would be a
21 question on whether or not it would worsen it or not, so the
22 potential is that it could worsen. Or if he had a very good
23 result from surgery, it might not.

24 Q. Doctor, earlier when I was asking you about your
25 March 22nd, 2002 visit with Mr. Osmanski, you mentioned that

1 he underwent a functional capacity evaluation prior to that
2 visit; is that correct?

3 A. True.

4 Q. Do you have a copy of that functional capacity
5 evaluation in your chart?

6 A. It would be in the therapy chart. I would have to
7 go get that.

8 Q. Would that be something that Mr. Smith and I could
9 request from you if we provided you with a written request for
10 it?

11 A. Sure.

12 Q. I know you have been kind enough to provide us with
13 most of your notes. I just don't recall actually seeing the
14 functional capacity evaluation.

15 A. We can get that.

16 Q. Okay. Thank you very much. I just have a few more
17 questions and I'll be finished. I know Mr. Smith probably has
18 some for you.

19 Going back for just a brief moment to your last two
20 visits with Mr. Osmanski in February of 2002 and March of
21 2002, is there anything in your reports to suggest that
22 Mr. Osmanski did not understand or fully comprehend the
23 permanent restrictions that you were placing upon him with
24 regards to the use of his left arm?

25 A. Once again, I'm talking about 2002 and not since

1 then, but as of 2002 I believe he understood that we wanted
2 him to hold off on the heavier lifting.

3 MR. LOCKHART: Those are all the questions I have.

4 Thank you. Please answer any questions that Mr. Smith or
5 Mr. Pearlman may have for you.

6 CROSS EXAMINATION

7 BY MR. SMITH:

8 Q. Doctor, good morning. I'm Kevin Smith here for
9 Mr. Osmanski, and David Pearlman is here with me as well.
10 Thank you for time this morning, doctor. We have a few
11 questions in follow up for you.

12 As far as I can tell from your records, it looks
13 like the last time that you had seen Mr. Osmanski before this
14 accident in 2008 was back in March of 2002; is that correct?

15 A. True.

16 Q. And the records that we were going over earlier
17 starting in January of 2001 leading up to March 22nd, 2002 is
18 it fair to say that those records represented sort of his, I'm
19 using your words here, his recovery phase, follow ups after
20 surgery, things like that?

21 A. True.

22 Q. And so any opinions that you have regarding going
23 forward, those would be represented in that March 22nd note as
24 compared to the earlier notes we were discussing?

25 A. Yes.

1 Q. All right. Doctor, in a general sense do you tell
2 your patients to increase their activities as tolerated over
3 time?

4 A. Well, that depends. I mean, you know, I mean, we
5 want them to use reasonable judgement, pain as a guide, the
6 type of surgery they have carries some restrictions so, you
7 know, that's a general statement.

8 Q. Would that be true of Mr. Osmanski's case, that you
9 would have had some discussions with him about being able to
10 increase his activities over time using the pain as a guide
11 keeping in mind the type of surgery he had, any messages his
12 body may be giving him, but if he's feeling okay, to increase
13 those activities keeping those things in mind?

14 A. Well, we talk about the arthroplasty as well. I
15 mean, if you want to try and gain life out of the
16 arthroplasty, you keep your weight to a lower level. If you
17 increase that, you may get away with it. There is a risk
18 involved in increasing loads across arthroplasty so.

19 Q. Would patients who have had procedures like these or
20 surgeries really of any kind involving their upper
21 extremities, is it a good rule of thumb to try to increase at
22 least your activities or use of the arm over time?

23 A. Well, we don't want them to be completely immobile.
24 We want them to use the arm.

25 Q. Would you want them -- I guess what I'm trying to

1 get at here, there is a certain level of movement and activity
2 that you would expect of someone soon after surgery. Would it
3 be fair to say that that would be a very limited movement and
4 use of the arm?

5 A. Yes. It's a progressive thing.

6 Q. And then as they progress further out from surgery
7 and do other things, is it fair to say that you want the
8 person to be increasing their use and activity and involvement
9 of that particular arm?

10 A. As a general statement, yes.

11 Q. Okay. Now, are you aware that Mr. Osmanski didn't
12 see any doctors for any sort of specific problems regarding
13 his left arm from the time he last saw you in March of 2002
14 all the way up through the accident in this case in November
15 of 2008?

16 A. I didn't know one way or the other.

17 Q. Okay. And you said in your notes, and I think it
18 was, well, you had referenced this functional capacity
19 evaluation in March of 2002, and I believe that you had
20 indicated that -- hold on a second here. I'm sorry. Yes.
21 That note March 22nd, 2002 you referenced the functional
22 capacity evaluation, teaching techniques to promote good
23 biomechanics. Right there where it says teaching techniques
24 to promote good biomechanics, would it be fair to say that the
25 people that performed the functional capacity evaluation also

1 gave Mr. Osmanski some instructions on how to lift properly
2 considering his left arm injury?

3 A. True.

4 Q. And what was this conditioning program? Do you have
5 any idea what that was referencing?

6 A. Strengthening would be essentially the same thing.

7 Q. Okay. Would those be basically home exercise
8 techniques and things like that to gradually and over time
9 increase the strength in his left arm?

10 A. Well, but also in the other arm. I mean, the idea
11 is the stronger you get the other arm, the less load you would
12 tend to have to put on the left arm.

13 Q. Doctor, before Mr. Osmanski was going to progress to
14 a new job after the surgery, let's give him a good 4, 5, 6
15 years of recovery since he had seen you, he moves onto another
16 job, would you want Mr. Osmanski to undergo a lift test prior
17 to working anyplace that required lifting and use of the left
18 arm?

19 A. Well, I mean, I don't know exactly what that means.
20 I mean, it would be more than just testing. I mean, if he was
21 going to have to do some lifting, it would be going back to
22 that biomechanics and conditioning so that the right arm was
23 carrying as much load as possible trying to limit the amount
24 of any load on the left arm that you could, so it wouldn't be
25 just a straight test. If I were going to do it, that's what I

1 would be more looking at.

2 Q. All right. Are you familiar with the different
3 things that are done and tests that are performed in a
4 Department of Transportation, a DOT physical for truck
5 drivers?

6 A. I don't know the specifics.

7 Q. I want to go back to real briefly when you were
8 talking about your March 2001, or 2002, I'm sorry, note, you
9 had indicated about his restrictions at that time and his
10 permanent impairment. You indicated that back in 2002 he
11 would have restrictions not allowing him to lift more than 15
12 pounds unless things changed. Do you recall that testimony?

13 A. Yes.

14 Q. Doctor, regarding things that are changing, would it
15 be possible to increase Mr. Osmanski's recommended lifting
16 weight if he had gone five or six years without seeing any
17 doctors if he had been tested by other physicians for his
18 movement in his left arm, the weights he could lift with his
19 left arm if he had been certified by other doctors as having
20 essentially no restrictions during that time frame, would that
21 be something that could change in your mind in terms of
22 possibly increasing the amount of weight that he could lift
23 given his prior procedure?

24 A. Well, once again, I'll go back to the former
25 statement about biomechanics and conditioning. In general a

1 person with an artificial elbow joint we recommend that they
2 try and do as much shifting of weight over to the opposite
3 side. I have patients who have had arm amputations and can
4 still lift 50 pounds with the other arm. They build it up and
5 learn biomechanics techniques to kind of do lifting with that
6 arm so you can shift things over. So that's how we approach
7 it, and so you can do more lifting. It's not specifically
8 lifting more with that left arm, it's lifting in general.

9 Q. Okay. I think I understand what you're saying. So
10 let me just pose this hypothetical, if I could sort of flesh
11 out what I think you're getting at here. Mr. Osmanski, he had
12 conditioning therapy strength work and things like that on
13 both arms; is that correct?

14 A. Yes.

15 Q. And over the course of time if Mr. Osmanski
16 continued to improve and continued to gain strength and
17 actually learned to put more of that weight on his right arm
18 he would not be limited to lifting 10 to 15 pounds overall
19 with both arms, is that what you're getting at?

20 A. True. That was specific. I mean, we tell patients
21 that if they are lifting more than 10 to 15 pounds across that
22 elbow joint that's had the arthroplasty, they increase the
23 risk of troubles down the road so that's why we shift to try
24 to load the other side, try to limit the load. They
25 occasionally will lift more on the arthroplasty side, but we

1 try to avoid that as much as we can by shifting loads to the
2 other side.

3 Q. So in a patient like Mr. Osmanski, the restrictions
4 that were imposed back in 2002, those restrictions would not
5 prevent him from lifting something that was 50 pounds if he,
6 in fact, employed those techniques to shift most of the weight
7 over to the stronger arm?

8 A. Once again, I have patients with no left arm who
9 lift 50 pounds so they are doing it not with the left arm at
10 all.

11 Q. Just to get a good clean answer, I guess, to that
12 question, doctor, I'll just pose it again for you.

13 Keeping in mind the restrictions that you imposed
14 back in 2002, would there be anything wrong with Mr. Osmanski
15 lifting weights in excess of 50 pounds if he is shifting most
16 of that weight to his right healthier arm? Would that be
17 outside of or in violation of the restrictions that you
18 imposed back in 2002?

19 A. I'll give a specific answer. I have a 10 to 15
20 pound weight restriction on the left arm. I have no weight
21 restriction on the right arm.

22 Q. And, doctor, I want to also go back to another point
23 that you all had touched upon briefly. You had seen
24 Mr. Osmanski after his November 2008 accident, correct?

25 A. Well, I saw him in January of '09.

1 Q. Okay. And you were asked some questions by
2 Mr. Lockhart as to how exactly you found out whether or not
3 this was a work related accident. Do you recall those
4 questions?

5 A. Yes.

6 Q. I have in here a questionnaire, and I think it's
7 titled current problems and it has some questions up top. It
8 has a diagram of the human body front and back on the bottom
9 right hand side. Do you have a copy of that in your file?

10 A. I have found that now, yes.

11 Q. And it just says here that the reason for today's
12 visit indicates elbow pain. Is that the form you're
13 holding?

14 A. True.

15 Q. And then it says is the visit due to accident or
16 injury. And he indicates yes; is that correct?

17 A. True.

18 Q. Then it says, how did it happen. What was the
19 response there?

20 A. At work.

21 Q. So is that sufficient in your mind to tell you that
22 the reason you found out this happened at work is because
23 Mr. Osmanski told you and not some other lawyer later on down
24 the road?

25 A. Looking at this form he did inform us of that,

1 true.

2 Q. In a general sense, doctor, do you recall
3 Mr. Osmanski, was he a fellow that was motivated to return to
4 work?

5 A. If I can remember, he was, yes.

6 Q. Did he do everything that you had asked him to do?
7 Was he a cooperative patient?

8 A. As I recall.

9 Q. Were there any times during the course of your
10 treatment of Mr. Osmanski that you were doubting or calling
11 into question things he was saying or did it ever cross your
12 mind this guy is just not telling me the truth?

13 A. Nothing that comes to mind, no.

14 Q. The specific injuries here, doctor, I think we just
15 went over this a moment ago, but you were read some
16 information off of the radiologist's report and things like
17 that. And the way I understand it here, doctor, we are
18 talking about really three different things as far as his
19 injury. I want you to correct me if I'm wrong here. There
20 was a rupture in the biceps tendon; there was a fracture of
21 the humerus bone; and there may or may not have been some
22 actual damage to the actual prosthesis; is that your
23 understanding?

24 A. Well, I question the fracture. That was a radiology
25 report. I have reviewed the x-rays personally, and I think

1 they may have been over reading something there. There was
2 just some debris that was left over from the original surgery.
3 I concur with them that there was concern about loosening of
4 the implant. The biceps rupture possibility was a clinical
5 finding not confirmed at surgery, obviously, since I did not
6 not operate on him, but it was of enough concern that I wanted
7 it addressed

8 Q. Okay. So if we just leave that down to loosening of
9 the prosthesis and biceps tendon rupture, doctor, do you have
10 an opinion either way as to the cause of this particular
11 problem Mr. Osmanski had in November of 2008? What I'm
12 getting at here, was this because of the lifting that he did
13 or was this because of the way that this item actually fell on
14 to his arm?

15 A. Well, thinking about the potential, certainly
16 artificial elbow joint can loosen just on its own, with no
17 excessive loads across it. Just time alone can do that. An
18 acute injury can loosen it. That's another possibility. If,
19 indeed, there was a biceps tendon rupture, that's an acute
20 injury problem so that would take an extreme load, something
21 falling on the arm. So there was a component of the exam that
22 I felt was more definite than acute deal. And then there was
23 also a portion that was potentially a more chronic deal.

24 Q. And, doctor, let me just ask you this question: If
25 Mr. Osmanski never had the prosthesis, never had the prior

1 surgery he had with you, could he have ruptured his biceps had
2 he been working for the same trucking company in November 2008
3 and had all of that the same, could he still have done that?

4 A. Well, that's typically how we see biceps ruptures is
5 something heavy falls, the patient tries to hold it and it
6 pulls the arm out into hyperextension and the biceps
7 ruptures.

8 Q. Doctor, from your understanding of how this accident
9 happened and from the review of the records that you see, is
10 there anything that suggests that the biceps tendon rupture
11 had anything to do with the prosthesis or the prior injury?

12 A. Well, once again, I do not know that the biceps
13 tendon is ruptured. I was concerned significantly about it on
14 that visit and enough so that I thought it was worth exploring
15 surgically, but that I would attribute more to an acute thing
16 as opposed to, I think there are two separate issues here, the
17 implant and the biceps.

18 Q. Okay. And so any, obviously any damage to the
19 implant itself that would be the result of the accident that
20 had happened keeping in mind his prior surgery. But I think
21 what I understand you saying is we have two separate issues
22 here. We have damage to the prosthesis, we have got a
23 ruptured biceps tendon. The ruptured biceps tendon could have
24 happened to Mr. Osmanski with or without this prosthesis in
25 his arm, is that fair to say?

1 A. True.

2 Q. Doctor, based upon, I guess, the information that's
3 been presented to you in the medical records that you have had
4 a chance to review, if we look at the last time he saw you
5 which was March of 2002 and the next time he appeared to see
6 you I think was January of 2009, could we read from that,
7 doctor, that because Mr. Osmanski was never returning to you
8 or any other doctors before his accident in November of 2008,
9 could we take from that that he probably wasn't having any
10 problems with that arm during that time frame?

11 A. I can only guess.

12 Q. Well, I mean, after he had this accident, he
13 returned to see you for elbow pain, correct?

14 A. Yes.

15 Q. Would you suspect that if he was having elbow pain
16 from March 2002 to any time prior to November 2008, that he
17 would have returned to you for elbow pain or examination or at
18 least get your thoughts on what was going on?

19 A. Well, I would think he would, but I don't know that,
20 yes.

21 They have scheduled this for an hour. They are
22 telling me I have got commitments here; that they are pulling
23 me away here pretty soon.

24 MR. SMITH: That's all the questions I have for
25 you.

REDIRECT EXAMINATION

BY MR. LOCKHART:

Q. Doctor, just one question. You are not able to confirm or deny the presence of the biceps tendon rupture without a surgical confirmation, correct?

A. Well, short of trying to get an MRI, but it would be a very poor study so it was a clinical diagnosis that's unconfirmed by anything else.

MR. LOCKHART: Thank you, doctor. Thank you for your time today.

THE WITNESS: Waive.

(Witness excused.)

(Whereupon, at 12:05 o'clock p.m. the taking of the deposition was concluded.)

1 DEPOSITION CERTIFICATE

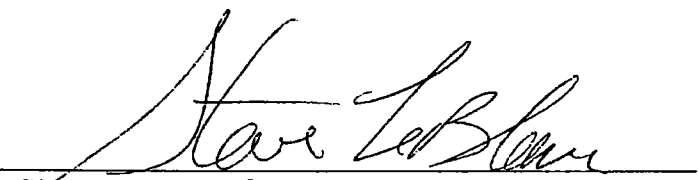
2 STATE OF FLORIDA)

3 COUNTY OF ALACHUA)
4

5 I, STEVEN E. LeBLANC, SR., R.P.R., and Notary Public
6 in and for the State of Florida at Large, do hereby certify
7 that pursuant to Notice of Taking Deposition, I sat at the
8 place and at the time as hereinabove shown; that I was
9 attended by counsel as hereinabove shown, and the witness,
10 LARRY CHIDGEY, M.D., who was first duly sworn and then
11 testified as is hereinabove shown, and that the testimony of
12 the said witness was reduced to typewriting under my personal
13 supervision and that a review of the transcript was not
14 requested.

15 I further certify that I am neither of counsel nor
16 attorney to either of the parties in said cause, nor
17 interested in the event of said cause.

18 Witness my hand and official seal in the City of
19 Gainesville, Alachua County, Florida this 19th day of March,
20 2010.

21 
22
23 Steven E. LeBlanc, SR., R.P.R.
24 Notary Public in and for the
25 State of Florida at Large.



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SOUTH CAROLINA WORKERS' COMPENSATION COMMISSION
 W.C.C. FILE NO. 0818219

JOE A. OSMANSKI,)
)
 Employee/Plaintiff,)
)
 -vs-)
)
 WATKINS & SHEPARD)
 TRUCKING, INC.,)
)
 Employer,)
)
 and)
)
 ZURICH NORTH AMERICA,)
)
 Carrier/Defendants.)
 _____)

3:25 P.M.
 April 8, 2010
 Hickory, North Carolina

DEPOSITION

OF

ALBERT JAMES OSBAHR, M.D.

 COPY

2 (Pages 2 to 5)

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This is the transcript of the deposition of ALBERT JAMES OSBAHR, M.D., being taken by consent of counsel for the parties and in accordance with the South Carolina Workers' Compensation Commission Rules of Procedure before Kimberly S. Crosby, Certified Verbatim Reporter and Notary Public, at Catawba Valley Medical Center, AHEC Building Room 105, 810 Fairgrove Church Road, Southeast, Hickory, North Carolina, on the 8th day of April, 2010, beginning at 3:25 P.M.

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ALBERT JAMES OSBAHR, M.D., being first duly sworn,
was examined and testified as follows:
EXAMINATION (By Mr. Lockhart):
Q. Dr. Osbahr, good afternoon. My name is Jason Lockhart;
I'm a lawyer in Columbia, South Carolina. I represent
Watkins and Shepard Trucking and their workers'
compensation insurance carrier, Zurich North America, in
a workers' compensation claim that's been filed by Joe
Osmanski against Watkins and Shepard for a work-related
accident that he was involved in on November 1, 2008.
I am taking your deposition this afternoon
telephonically. It is my understanding that you are in
your office in Hickory, North Carolina; is that correct?
A. Correct.
Q. Okay. And I am in Columbia and on the telephone we have
Mr. Pearlman and Mr. Smith, who are representing Mr.
Osmanski. They are located, I believe, in their offices
in Charleston. We are taking your deposition this
afternoon in anticipation of an upcoming hearing we have
in Mr. Osmanski's case. I want to talk to you in a
moment about your examination of Mr. Osmanski that
occurred in October of 2006, but before I get to that,
I wanted to ask you just some very brief background
questions. It's my understanding that you're currently
practicing medicine in Hickory, North Carolina; is that

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correct?
A. Yes.
Q. Okay. And you are licensed to practice medicine in the
state of North Carolina; is that correct?
A. Yes.
Q. Are you licensed in any other states besides North
Carolina?
A. No.
Q. What is your area of practice?
A. I practice occupational medicine. I am also board
certified in family medicine, as well as in preventive
medicine and public health.
Q. Where do you currently practice?
A. I practice at Catawba Valley Medical Center in Hickory,
North Carolina.
Q. How long -- I'm sorry. How long have you practiced at
Catawba Valley Medical Center?
A. I've been here approximately five and a half years.
Q. Do you practice alone there or do you have other
physicians who are in your practice?
A. I'm the only physician that's in the practice. I have
a physician assistant who works with me and I supervise.
Q. Okay.
MR. LOCKHART: David, I would offer Dr. Osbahr up
as an expert in -- in the area of

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1 occupational medicine. 2 MR. PEARLMAN: No objection. 3 MR. LOCKHART: Okay. 4 Q. Dr. Osbahr, when did you have -- first have an occasion 5 to see a Joe Osmanski? 6 A. My records indicate that I saw him for a D.O.T. 7 examination, it appears, as a new hire for Watkins, 8 Shepard Trucking on 10/30, 2006. 9 Q. Okay. We have obtained, both, I believe, Mr. Pearlman 10 and I, a -- a copy of something called a "Medical 11 Examination Report for Commercial Driver Fitness 12 Determination" dated October 30th of 2006. Would that 13 have been a report you would have completed as part of 14 your examination of Mr. Osmanski? 15 A. That's correct. 16 Q. Okay. 17 MR. LOCKHART: David, I am looking at pages 18 fourteen -- page fifteen of your APA 19 submissions. 20 Q. Doctor, I would like to take you for -- or -- or take a 21 moment and go through this -- this form with you. The 22 first page of the form appears to have a couple of 23 sections, one noted as "Driver's Information," another 24 as "Health History." Would those portions of that 25 document have been completed by you or by Mr. Osmanski?	1 show that this man underwent a surgery. 2 Q. Okay. Looking at the first page of the medical 3 examination report under the section labeled "Health 4 History," is there a question asking the patient if they 5 had a missing or impaired hand, arm, foot, leg, finger 6 or toe? 7 A. There is. 8 Q. And did Mr. Osmanski provide an answer to that question? 9 A. He did. 10 Q. Okay. His answer was? 11 A. No. 12 Q. Based on a review of your records and your personal 13 recollection, if any, from your examination of Mr. 14 Osmanski, were you ever informed that he had been 15 assigned a fourteen-percent impairment rating to the 16 left arm by an orthopaedic physician in Gainesville, 17 Florida, named Dr. Chidgey? 18 A. No. 19 Q. Okay. Do your records reflect or do you have any 20 personal recollection of Mr. Osmanski informing you that 21 he had been assigned a lifting restriction by Dr. 22 Chidgey in March of 2002, no lifting in excess of ten to 23 fifteen pounds? 24 A. No. 25 Q. All right. Would that information have been important
Page 7	Page 9
1 A. Mr. Osmanski is required under D.O.T. to fill out 2 section one, "Driver's Information," and "Health 3 History," which is section two, and then to sign under 4 driver's signature after completing the health history 5 form and date it, which he did indeed do. I am then 6 obligated under D.O.T. to fill in any information on 7 "Comments of the Medical Examiner" based on his health 8 history information. 9 Q. When you examined Mr. Osmanski on October 30th of 2006, 10 do your records reflect or do you have any personal 11 recollection of him telling you he had been involved in 12 a work-related accident in 1987? 13 (WHEREUPON, the witness reviewed the referenced 14 documents) 15 A. My records don't indicate the specifics of any accident. 16 He did not put that into his health history. I would 17 only have limited knowledge of this, based on my 18 examination information, which shows some limitations, 19 but on my record, I don't have that he had an accident 20 then. 21 Q. Okay. Do you have any information in your records or 22 any personal recollection, following your examination of 23 Mr. Osmanski, that he had informed you about having 24 undergone a left elbow replacement? 25 A. I did not have anything in my record, nor my examination	1 to you in your evaluating Mr. Osmanski's determination 2 of whether or not he was fit to work as a -- as a -- a 3 driver for Watkins and Shepard? 4 A. It would have been important. 5 Q. All right. Could you take us through your examination 6 of -- of -- of Mr. Osmanski and what your findings were? 7 A. I, on my physical examination information, reviewed his 8 visual, his side-to-side vision, his color vision -- 9 these were considered within normal -- his blood 10 pressure, pulse, and he had audiometric findings that 11 were within expected for D.O.T. qualification. He had 12 a urinalysis done, which was done by urine dipstick, 13 which showed no blood, sugar or protein. He had obesity 14 noted on the exam, with a weight of three hundred pounds 15 and a five, eleven frame, and on my examination, I 16 remarked that even though he was overweight or obese, I 17 found him to be very functional and mobile with his 18 weight. As noted on the report that I have there, I 19 found no abnormalities in his eyes, ears, mouth, throat, 20 heart, lungs. He had no problems with his abdomen or 21 viscera. Vascular exam, genital urine exam were normal. 22 He was also fine in terms of spine and neurological 23 exam. However, on the extremity examination, I did find 24 a (sic) impairment issue. He had diminished supination 25 of his left arm, getting only to about ninety degrees of

4 (Pages 10 to 13)

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1 supination there. He was able to pronate down to 2 normal. He had good functional compensation from the 3 standpoint of these limits and impairment for the 4 standpoint of driving a truck, from information that I 5 had. I then placed down that he should stop smoking and 6 reduce weight as preventive issues for his medical 7 history but, based on all the information, then 8 certified him as meeting standards for D.O.T. 9 Q. Okay. What is the -- I guess, the relevance to your 10 finding that he had limited supination of his left arm? 11 A. Well, since he was coming to work, it's important to 12 assess his baseline activities and also to note whether 13 he had any impairments, which is what the D.O.T. asked 14 for, and even though this man did not tell me on his 15 health history that he had an impairment, by the time 16 that I got to the examination, it was clear that he did 17 have an impairment and that's what I observed and noted. 18 Q. Would someone with supination limited to only ninety 19 degrees, would such a limitation impact the ability of 20 an individual like Mr. Osmanski to engage in -- in 21 activities such as lifting? 22 MR. PEARLMAN: Well, let me object. I think that's 23 calling for speculation. The employer did a 24 lift test to clear that up. I think Dr. 25 Osbahr's evaluation was strictly related to	1 Q. After you examined Mr. Osmanski, did you have any 2 conversation or do you have any record of your having 3 any conversations with Watkins and Shepard about the 4 limited supination of the left arm that you noted in the 5 examination? 6 A. I don't recall any. 7 Q. Okay. The -- the standards that are outlined in the 8 federal regulations, forty-nine CFR, 391, point, four, 9 one, would you agree that those reference the physical 10 ability of someone or -- or the lack thereof to actually 11 drive a commercial motor vehicle? Isn't that what those 12 regulations address? 13 MR. PEARLMAN: Objection for leading. 14 A. That's the requirement or -- 15 Q. Doctor, can -- can I stop here a second? 16 MR. LOCKHART: Are -- are both of y'all 17 participating in this deposition or is it 18 just -- 19 MR. SMITH: That was -- that was David. 20 MR. LOCKHART: Okay. I'm sorry. Okay. I'm sorry; 21 I'm sorry. 22 Q. Go ahead, Doctor. 23 A. That's the criteria guidelines that are given to the 24 medical examiners for qualification -- physical 25 qualification, medical qualification for truck driving
Page 11	Page 13
1 whether he was certified by the D.O.T. 2 Q. Doctor, you can answer the question. 3 A. It's possible that indeed that kind of limitation could 4 affect his lifting and it appeared, as I noted on my 5 examination, that he had good functional compensation 6 for it. 7 Q. When you examined Mr. Osmanski and indicated that he met 8 the standards, as noted on your report, did you have any 9 type of job description from Watkins and Shepard that 10 you were able to evaluate to determine if he was clear 11 to perform the essential job functions that they were to 12 ask him to perform? 13 A. I don't recall having in front of me a particular job 14 description piece from Watkins, Shepard, which usually 15 leaves me to looking at the D.O.T. requirements overall 16 for truck driving. 17 Q. Okay. That would be forty-nine CFR, 391, point, four, 18 one? Is that what you're referring to? 19 A. Yes. 20 Q. Okay. After you noted the limited supination of Mr. 21 Osmanski's left arm, at that point, do you have any 22 information to suggest that he informed you of his prior 23 left elbow or left arm injury and subsequent surgery? 24 A. Well, I don't have any documentation that indicates 25 that.	1 under D.O.T. 2 Q. All right. Thank you, Doctor. You -- would -- would -- 3 those regulations -- or do those regulations address 4 lifting, pushing, pulling, any specific physical 5 requirements? 6 A. Not specifically in the nature of poundage or push/pull 7 forces. 8 Q. So does that regulation address driving more so than 9 other physical activities? 10 MR. PEARLMAN: Well, let me note my objection. The 11 regulation speaks for itself and will be made 12 a part of this record. 13 A. In general, unless it's specifically laid out by the job 14 requirements for the company and given to us to review 15 and use, as mentioned earlier, it's the general activity 16 requirements for truck driving that the D.O.T. 17 considers. They do, I think, understand that truckers 18 are to be able to keep up maintenance of their truck, 19 have the ability to drive their truck, have the ability 20 to get in and out of their truck, possibly even climb up 21 onto areas in their truck. There may be some loading 22 and unloading requirements, but it's left in a general 23 type of setting that is not specifically codified to 24 mild or sedentary, medium, heavy work activity that you 25 might see with other jobs.

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1 Q. All right. Thank you, Doctor. When you examined Mr. 2 Osmanski on October 30th of 2006, did you have any 3 understanding of the specific lifting or pushing or 4 pulling requirements that he would have been asked to 5 perform as part of his employment with Watkins and 6 Shepard? 7 A. I was not aware of anything over and above what might be 8 necessary for D.O.T. 9 Q. Okay. Thank you. Doctor, I want to ask you for a 10 moment about a questionnaire that you completed on 11 November 5th of 2009. 12 MR. LOCKHART: David, I'm looking at page one of 13 your APA submissions. 14 MR. PEARLMAN: That's the one that he filled out 15 himself? 16 MR. LOCKHART: Yes. 17 MR. PEARLMAN: Okay. 18 Q. Doctor, did you complete a -- a -- what appears to be a 19 -- a short letter or -- on November 5th of 2009? 20 A. I did. 21 Q. Can you tell me a little bit about how you came about to 22 prepare that? 23 A. I was sent a letter from The Steinberg Law Firm. Mr. 24 Pearlman had sent me this letter. He asked me to review 25 the D.O.T. record that I had -- had on this particular	1 Q. Your one and only examination of Mr. Osmanski was on 2 October 30th; is that right? 3 A. That's correct. 4 Q. And that was at the request and behest of Watkins, 5 Shepard Trucking company? 6 A. Watkins, Shepard had their employees who are trucking 7 seeing us for D.O.T. exams. 8 Q. And so they do that routinely; they send them to you to 9 conduct an evaluation to examine them and to make sure 10 they meet D.O.T. requirements; is that right? 11 A. That's correct. 12 Q. And so Watkins is familiar with you and you're familiar 13 with them? 14 A. I'd say we were probably just starting that relationship 15 back then. 16 Q. Okay. And whatever you found with regard to Mr. 17 Osmanski as a result of your evaluation, you then 18 conveyed that information to Watkins, Shepard Trucking? 19 A. I believe we sent them the information on the card and 20 the long form; yes. 21 Q. Okay. And they would have gotten it. Did they ever 22 call you and ask for further clarification or further 23 information, that you're aware of? 24 A. Nothing in my records indicates that. 25 Q. Did they ever call you or do you recall them contacting
Page 15	Page 17
1 employee and then, if I felt comfortable with his 2 prepared letter that you see, based on my record 3 information, that I was to sign and date and send it 4 back to him. 5 Q. Okay. Did you have any other contact with The Steinberg 6 Firm other than receiving the letter from Mr. Pearlman's 7 office? 8 A. I'm not sure that I recall anything further beyond the 9 fact that this letter was coming to me and then 10 receiving it. 11 Q. Okay. Did you ever see Mr. Osmanski in your clinic 12 again after October 30th of 2006? 13 A. My records do not indicate that. 14 Q. Okay. So that would have been his only examination in 15 your office? 16 A. That's correct. 17 Q. Okay. Give me just a moment. I believe I've asked you 18 all the questions I need to. Thank you. Doctor, those 19 are all the questions I have. Thank you. 20 EXAMINATION (By Mr. Pearlman): 21 Q. Doctor, this is David Pearlman and I represent Mr. 22 Osmanski and I've just got a few questions for you. 23 Doctor, the -- you initially examined and evaluated Mr. 24 Osmanski back in October, 2006; is that correct? 25 A. That's correct.	1 you and say (sic), "Doctor, you note an impairment to 2 this gentleman's, I think, left arm; we want to ask you 3 some more about that, whether he can do this job or that 4 job"? 5 A. I don't have anything in my records that indicates that. 6 Q. But they had the opportunity to do that? I mean, if 7 they had called you, you would have certainly responded 8 to those questions; is that right? 9 A. I would have tried to clarify; yes. 10 Q. Okay. And I assume that on October 30th, 2006, you took 11 a thorough evaluation and examination of Mr. Osmanski; 12 is that fair? 13 A. As you see, yes. 14 Q. Okay. Initially he throws out this health history that 15 I'm looking at, which is section two, and one of the 16 questions that Mr. Lockhart asked you is did he tell you 17 he had an accident back in 1987 and you indicated you 18 have no record, but the question is really any illness 19 or injury in the last five years; isn't that correct? 20 A. That's one of the questions there; yes. 21 Q. Okay. And so if his injury was in 1987, that's, you 22 know, nine years before he could have truthfully 23 answered no to that question? 24 A. Yes. 25 Q. Okay. And you then proceed to conduct an evaluation of

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Page 18	Page 20
1 him, a pretty thorough evaluation. You look at his 2 vision; is that right? 3 A. That's correct. 4 Q. You look at his hearing? 5 A. Yes. 6 Q. You look at his blood pressure and pulse rate? 7 A. Correct. 8 Q. You actually do a urinalysis? 9 A. Yes. 10 Q. And then you then conduct a physical examination? 11 A. That's correct. 12 Q. And that physical examination is contained in section 13 seven of this report, which is on page fifteen of our 14 APA submissions? 15 A. Yes. 16 Q. And during that physical examination, you noted that he 17 had an impairment of his left arm; is that right? 18 A. Yes. 19 Q. And that impairment was pretty obvious to you because 20 you noted that he only had about ninety percent of 21 supination; is that correct? 22 A. He had ninety degrees of supination. 23 Q. And he had full pronation but only ninety degrees of 24 supination? 25 A. Correct.	1 arm? 2 A. Yes. 3 Q. Because he only had ninety degrees of supination? 4 A. Yes. 5 Q. And do you actually look at the arm when you're testing 6 him? 7 A. I do. 8 Q. So if he had a scar on his arm, that would have 9 represented a surgical scar, whether or not you saw a 10 surgical scar? 11 A. If it was not -- I did not remark on that, so it might 12 have not been very obvious. 13 Q. Okay. 'Cause I can represent to you that he has one, 14 but you actually look at the arm? 15 A. I do. 16 Q. Okay. So if he has a scar, it would have been -- if 17 it's obvious to anybody, it would have been obvious to 18 a doctor, I would assume; is that fair? 19 A. Yeah. Some- -- sometimes the scars are hidden pretty -- 20 pretty good, so it -- it was not showing up to me in 21 terms of the exam. 22 Q. Okay. But in terms of your exam, it wouldn't matter 23 with regard to his ability to bend and use his arm; you 24 could take those measurements, whether he had surgery or 25 not, anyway?
Page 19	Page 21
1 Q. And that, to you, represented an impairment of the arm; 2 is that right? 3 A. Yes. 4 Q. And that's information that would have been conveyed to 5 Shepard Trucking in this report? 6 A. Yes; it's possible, if they got the entire long form. 7 Q. Okay. Well, -- well, when you say in possible long 8 form, I -- I'm looking at the form that we have. Is 9 there a different form? 10 A. Some of the employers don't take the entire long form. 11 They'll only take the very bottom section -- 12 Q. Uh-huh. 13 A. -- and it really just depends on the employer. I can't 14 answer for Watkins, Shepard. Most of our employers do 15 seem to receive the long form and then hold it in 16 confidential places in terms of protecting the medical 17 information. 18 Q. Okay. So I -- I think, and maybe we can ask Mr. 19 Lockhart to stipulate, that Watkins Glen (sic) received 20 this form, but in any event, they had the op- -- they 21 asked you to do the evaluation. If they wanted the 22 information, it was available to them, whether they 23 received it or not; is that correct? 24 A. It would and could have been available to them; yes. 25 Q. And you noted, again, that he had impairment of his left	1 A. That's correct. 2 Q. And was your -- based on your evaluation of his left 3 arm, that he had what you called good functional 4 compensation? 5 A. Yes. 6 Q. What do you mean by that? 7 A. That even though he had the impairment, it appeared he 8 could use his arm for the purposes of driving a truck. 9 Q. And are you -- do you have anything to do with the lift 10 test that Watkins, Shepard there requires? 11 A. No, I don't. 12 Q. Do you know where -- I mean, do you know whether they do 13 have a lift test or not? 14 A. I'm not sure if they have a lift test or not. 15 Q. But that's not done in your office? 16 A. No. It was not made available for this exam either. 17 Q. Based on your examination and evaluation of Mr. 18 Osmanski, did you certify him to be able to perform the 19 duties of a commercial motor vehicle driver? 20 A. I did. 21 Q. And you understand that that certification is based on 22 the forty-nine CFR, section 391, point, forty-one? 23 A. Yes. 24 Q. The regulation involving what the medical requirements 25 are of a -- commercial driver are; is that right?

Page 22	Page 24
1 A. Yes. 2 Q. And in that regulation, it says that a person is 3 physically qualified to drive a commercial vehicle if 4 that person has no impairment of an arm, foot or leg 5 which interferes with the ability to perform normal 6 tasks associated with operating a commercial motor -- 7 motor vehicle; is that right? 8 A. That's correct. 9 Q. So it was your opinion, to a reasonable degree of 10 medical certainty, that Mr. Osmanski could perform all 11 the duties associated with operating a commercial motor 12 vehicle? 13 A. That was my recommendation. 14 Q. And, in fact, you filed -- that little statement that 15 Mr. Lockhart spoke about wherein I asked you about 16 whether he was certified to work, you state in this 17 report of November 5th, 2009, "I have certified his 18 ability to work," is that right? 19 A. That's correct. 20 Q. And that was your opinion and remains your opinion, to 21 a reasonable degree of medical certainty? 22 A. That's correct. 23 Q. And as we sit here today, as far as you know, this 24 information was relayed to the -- the appropriate 25 individuals at Watkins, Shepard Truck (sic) with regard	1 any other independent knowledge of Mr. Osmanski other 2 than what's contained in your written report here? 3 A. No. 4 Q. Doctor, I don't have any further questions. 5 FURTHER EXAMINATION (By Mr. Lockhart): 6 Q. Doctor, I just have a couple real quick in follow-up. 7 Mr. Pearlman asked you and you indicated that the 8 results of your examination of Mr. Osmanski would have 9 been provided to Watkins and Shepard Trucking; is that 10 correct? 11 A. We can provide it to them. I can't tell you if they 12 actually received the long form or not. 13 Q. Okay. Do your records reflect to whom this information 14 would have been provided at Watkins and Shepard, if -- 15 if it was provided at all? In other words, did you send 16 the results of your examination to a particular 17 individual? 18 A. I don't have in my records if that was case. In some 19 cases, we will fax it across; in other cases, the 20 trucker's given the long form to take back to the 21 company so they're in possession of it and can be 22 delivered to Watkins and Shepard or another employer. 23 In 2006, I'm not sure how this was handled for Watkins 24 and Shepard. 25 Q. And I believe you testified earlier that your records
Page 23	Page 25
1 to what you found with his left arm, his limitations 2 with regard to supination but his functional 3 capabilities with regard to his left arm; is that right? 4 A. I believe that's true. 5 Q. Now, you were asked a question about, in his health 6 history, whether he answered whether he had an impaired 7 arm or hand. He clearly didn't have a missing arm or 8 hand? 9 A. No. 10 Q. And so the question is whether he had an impaired arm or 11 hand and in the questionnaire, he signs -- he checks no, 12 but in your evaluation, you find that he does? 13 A. Correct. 14 Q. So there's nothing hidden with regard to his impairment 15 to his left arm contained in your evaluation? 16 A. Well, I would have expected him to have answered that as 17 a yes. Once he has marked that off as a no, that 18 section I cannot touch. 19 Q. I understand that, but if you look at your entire 20 report, the fact that he has an impairment to his left 21 arm is readily available and readily apparent because 22 you note it in your physical examination; is that 23 correct? 24 A. Yes. I noted the impairment based on my exam. 25 Q. Doctor, -- well, let me -- scratch that. Do you have	1 are inconclusive as to whether the long form was or was 2 not provided to Watkins and Shepard? 3 A. That's correct. 4 MR. PEARLMAN: Well, -- well, Jason, are you 5 contending that -- we got these from the 6 personnel file that you sent to us. Are you 7 contending that Watkins, Shepard didn't have 8 this form? 9 MR. LOCKHART: No, David; that's not my contention, 10 but I -- I'm -- I'm asking the question that 11 you asked. Is there -- is there an issue 12 with that? 13 MR. PEARLMAN: Well, there's not an issue about the 14 question, but I'd like to know whether you 15 are contending that somehow Watkins Glen 16 (sic) didn't have the personnel records which 17 they sent to us. 18 MR. LOCKHART: No; that's not my position at all. 19 I'm just following up on the question you 20 asked. Is that -- is that okay? 21 MR. PEARLMAN: I think -- well, that's fine; 22 please. 23 MR. LOCKHART: Okay; all right. All right. 24 Q. And, Doctor, just -- Mr. Pearlman asked you about your 25 certification of Mr. Osmanski pursuant to the federal

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Page 26	Page 28
1 regulations. Again, just to make sure I'm clear, do you	1 CHANGES AND SIGNATURE
2 have any information -- specific information regarding	2 WITNESS NAME: ALBERT JAMES OSBAHR, M.D., APRIL 8, 2010
3 the physical requirements of his job duties and	3 PAGE LINE CHANGE REASON
4 responsibilities with Watkins and Shepard prior to or	4
5 during your examination of Mr. Osmanski?	5
6 A. No.	6
7 Q. Okay. And so if there were lifting requirements,	7
8 pushing or pulling requirements associated with his job	8
9 with Watkins and Shepard specific to Watkins and	9
10 Shepard, did you have any knowledge of those when you	10
11 examined him and certified him as able to work?	11
12 A. I was not aware of any.	12
13 Q. All right. Thank you, Doctor.	13
14 MR. PEARLMAN: Thank you, Doctor. I don't have any	14
15 further questions.	15
16	16
17 (WHEREUPON, the deposition was concluded at	17
18 3:58 P.M.)	18
19	19
20	20
21	21
22	22
23	23
24	24
25	25

Page 27	Page 29
1 CHANGES AND SIGNATURE	1
2 WITNESS NAME: ALBERT JAMES OSBAHR, M.D., APRIL 8, 2010	2
3 PAGE LINE CHANGE REASON	3
4	4
5	5
6	6 I, ALBERT JAMES OSBAHR, M.D., have read the foregoing
7	7 deposition and hereby affix my signature that same is
8	8 true and correct, except as noted above.
9	9
10	10
11	11 ALBERT JAMES OSBAHR, M.D.
12	12
13	13
14	14 Sworn to and Subscribed before me
15	15 _____, Notary Public.
16	16 This _____ day of _____, 20 ____.
17	17 My Commission Expires:
18	18
19	19
20	20
21	21
22	22
23	23
24	24
25	25

April 8, 2010

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1 STATE OF NORTH CAROLINA)
2) CERTIFICATE
3 COUNTY OF CATAWBA)
4

5 I, Kimberly S. Crosby, Certified Verbatim Reporter
6 and Notary Public, do hereby certify that ALBERT JAMES
7 OSBAHR, M.D., was duly sworn by me prior to the taking of his
8 deposition, that said deposition was taken by me and
9 transcribed under my supervision and that the foregoing
10 thirty (30) pages constitute a verbatim transcription of the
11 testimony of the said ALBERT JAMES OSBAHR, M.D. I do further
12 certify that the persons were present as stated.

13 I do further certify that I am not of counsel for
14 or in the employment of any of the parties to this action,
15 nor do I have any interest, financial or otherwise, in the
16 result thereof.

17 IN WITNESS WHEREOF, I have hereunto subscribed my
18 name, this 12th day of April, 2010.

19

20

21 _____
22 Kimberly S. Crosby, N.P.
23 Certified Verbatim Reporter
24 N.C. Notary No. 19985310084
25

A	17:23 23:6,16	assistant	bottom	21:21 25:25
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