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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

Cynthia C. Dooley, Commissioner
Gene McCaskill, Commissioner
R. Michael Campbell, Commissioner

Appellate Case No. 2025-000026
WCC File No. 1921668

Evaristo Verdugo Morales, Claimant,

Respondent-Appellant,

v.

Insulation by Cohen's, LLC, Employer,
and Builders Premier Insurance Company, Carrier,

Appellants-Respondents.

**RECORD ON APPEAL
Volume I
Pages 1-437**

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6. The authorized treating physician is Dr. Stofko, and the Defendants will provide causally related medical treatment until such time as the Claimant has reached maximum medical improvement in the opinion of his treating doctor.

7. The Defendants will be responsible for all medical treatment causally related to the work-related injury to the back pursuant to 42-15-60.

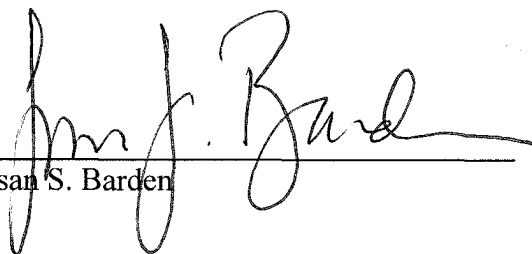
8. The Claimant is not yet at maximum medical improvement.

9. Any issues not specifically addressed herein including but not limited to extent of injuries and permanency are held in abeyance.

9. This matter is returned to general files pending further action by the parties.

Based on the foregoing, the hearing/status conference currently scheduled for April 10, 2020, is canceled and this matter returned to general files.


S.C. WORKERS' COMPENSATION COMMISSION


Susan S. Barden


Columbia, South Carolina

WE SO CONSENT:

GIBSON LAW FIRM, LLC

By: 
Don C. Gibson
Attorneys for the Claimant

YOUNG CLEMENT RIVERS, LLP

By: 
E. Courtney Gruber
Attorneys for the Defendants

CERTIFICATE OF SERVICE

This is to certify that the undersigned has on this date served a copy of this order in the above entitled action upon all parties to this case by sending an electronic copy hereof by electronic mail addressed to the attorneys for said parties; or if there is an unrepresented party(ies), by depositing a copy hereof, postage paid in the United States mail, first class, addressed to the unrepresented party(ies) and to the attorney(s) for the represented party(ies).

By Barbara Skarbek on April 14, 2020

DECISION & ORDER
BEFORE THE SOUTH CAROLINA
WORKERS' COMPENSATION COMMISSION
WCC FILE NUMBER 1921668

EVARISTO VERDUGO MORALES,

Claimant,

vs.

INSULATION BY COHEN'S & SPRAYFOAM BY
COHEN'S, LLC,

Employer,

BUILDERS PREMIER INSURANCE COMPANY,

Carrier/Defendants.

HEARING: Hearing held in Mt. Pleasant, South Carolina,
on August 13, 2020.

APPEARANCES: E. Courtney Gruber, Esquire, on behalf of the
Employer/Carrier.

Don C. Gibson, Esquire, on behalf of the
Employee/Claimant.

PURPOSE OF HEARING: To determine issues as set forth on Forms 50
and 51.

DECISION & ORDER BY: Melody L. James, Commissioner.

DATE FILED: **January 11, 2021**

STIPULATIONS

At the call of the case, the parties stipulated as follows:

1. That both the Claimant and the Defendants were subject to and bound by the terms and provisions of the South Carolina Workers' Compensation Act.
2. That jurisdiction and sufficiency of the notice of the hearing were admitted.
3. That, at the time of the injury, the average weekly wage being earned by the Claimant was the sum of \$1,302.27, resulting in a compensation rate of \$845.74.
4. That venue for this hearing was proper in Charleston County, South Carolina, pursuant to stipulation by the parties.

APA SUBMISSIONS

The following APAs were submitted on behalf of the Employee/Claimant:

<u>APA</u>	<u>Name of Provider</u>	<u>Date of Report</u>	<u>Page Nos.</u>
1.	Trident Medical Center	10/10/2019 & 12/1/2019	6-10
2.	Insulation By Cohen's	10/1/2029	11-12
3.	Trident Medical Center	10/10/2019 – 10/12/2010	13-233
4.	Douglas Stofko, MD	10/23/2019, 1/8/2020, 7/22/2020	234-238D
5.	Builders Mutual Insurance Co.	2/20/2020	239
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6.	Deposition of Claimant	3/13/2020	248-307
7.	Roper St. Francis ATI	3/16/2020 – 4/24/2020	308-343
8.	Consent Order	4/14/2020	344-345
9.	Medical Expenses & Costs of Claimant	10/10/2019 – Current	346-361

The following Exhibits were submitted on behalf of the Employee/Claimant:
None.

The following APAs were submitted on behalf of the Employer/Carrier:

<u>APA</u>	<u>Name of Provider</u>	<u>Date of Report</u>	<u>Page Nos.</u>
1.	Trident Orthopaedic Specialists	10/23/2019 - 1/8/2020	1-13
2.	Trident Health System	10/10/2019 - 10/12/2019	14-50

The following Exhibits were submitted on behalf of the Employer/Carrier:

A.	Deposition of claimant	3/13/2020	51-63
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STATEMENT OF THE CASE

The above case came on to be heard before the undersigned Commissioner in Mt. Pleasant, South Carolina, on August 13, 2020, pursuant to notice timely and properly given to all parties of record.

The Claimant sustained a compensable injury by accident on October 10, 2019, and was currently receiving authorized medical treatment and had not yet reached maximum medical improvement. He was seeking additional medical treatment with regard to his shoulders and neck. He was also seeking additional medical treatment for lumbar pain. Specifically, the Claimant was seeking a lumbar MRI and physical therapy. He also was requesting evaluations for those other body parts.

The Defendants contended that the only injury that was compensable was a compression fracture at T12. They pointed out that the Claimant was treated with a fusion, (T11 to L1) and that the Claimant had not had any complaints of pain in the cervical spine or lumbar spine or bilateral lumbar spine or bilateral radiculopathy until July 22, 2020. The Defendants further contended that there was no medical evidence of a causal connection between the Claimant's complaints of pain in the neck and upper back and bilateral shoulders, as well as low back pain with radiation to both legs.

The Claimant testified, through an interpreter, that his injury occurred on October 10, 2019, when he fell approximately four feet off of a ladder, landing on his back. He testified that he had surgical hardware in the middle of his back as a result of this injury. He testified that he was having pain on the right and left sides of his neck and that he had trouble lifting things. The Claimant also testified that he had pain in his legs and pain in his low back.

On cross-examination, the Claimant admitted that he testified in his deposition in March, 2020, that his pain was limited to where his screws were.

The medical records indicate that the Claimant was initially treated at Trident Health Systems when he had this accident. There is no mention made of any shoulder pain in the medical records until July 22, 2020, when he reported that pain to the authorized physician, Dr. Stofko. In the initial visit to Trident Hospital, he denied neck pain and extremity pain. He specifically denied neurologic symptoms, including numbness. He was noted to have reported pain in his middle thoracic spine and upper lumbar. CT scan showed that the Claimant had sustained an acute nondisplaced chance fracture at T12

vertical body. Secondary impression was acute thoracic back pain. CT of the cervical spine did not reflect any injury.

The Claimant underwent fusion from T11 to L1 on October 11, 2019. He continued to follow with Dr. Stofko, the neurosurgeon who had treated him beginning October 23, 2019. Dr. Stofko's assessments were "closed fracture of 12 thoracic vertebra with routine healing" and "acute bilateral low back pain unspecified whether sciatica was present." On January 8, 2020, Dr. Stofko noted that the Claimant complained of some mild pain on his left side when he lay down on that side but was otherwise without complaint.

Prior to July 22, 2020, there were no cervical complaints in Dr. Stofko's records. There is no medical opinion in the record that any conditions of the Claimant's shoulder, neck, or lumbar spine are causally related to this accident.

A CT scan was done of the lumbar spine when the Claimant initially went to the hospital, but it was normal. Although Dr. Stofko did recommend an MRI on July 22, 2020, he does not state the reason for the MRI and does not provide an opinion as to whether or not a causal connection exists between the complaints of the lumbar spine and the date of accident.

Based upon the stipulations of the parties, the testimony and evidence received and produced at the hearing, as well as my personal observation of the witnesses, the undersigned Commissioner finds the following facts based upon the preponderance of the evidence:

FINDINGS OF FACT

IT IS FOUND AS A FACT:

1. That all parties to this proceeding are subject to and bound by the terms and provisions of the South Carolina Workers' Compensation Act.
2. That venue and jurisdiction are proper.
3. That the compensation rate is \$845.74 based on an average weekly wage of \$1,302.27.
4. That the Claimant sustained a compensable injury by accident on October 10, 2019.
5. That the Defendants have admitted that the Claimant sustained a fracture at T12 but have denied any other injuries or body parts related to this claim.
6. That the authorized treating physician, Dr. Stofko, had made a diagnosis, both pre-operative and post-operative, of fracture to the T12 vertebra. (Defendants' APA 41; Claimant APA 140).
7. That the Claimant was requesting an evaluation for his upper shoulder and neck and an evaluation for the lumbar spine.
8. That the medical records do not reflect that the Claimant ever reported shoulder pain prior to July 22, 2020.
9. That the initial hospital records deny any pain other than the mid- and lower back. (Claimant's APAs 36 & 54).

10. That the October 10, 2019, report specifically states that the patient denied any neurologic symptoms. (Claimant's APA 54).

11. That a CT scan of the Claimant's head and cervical spine was performed during the hospital evaluation, which was normal. (Claimant's APA 150-152).

12. That the Claimant has had no treatment for his cervical spine nor did he request any treatment for the cervical spine or made any complaints about his neck until July 22, 2020.

13. That the Claimant had previously testified in his deposition that his shoulder did not hurt; it was just when he lifted his arm that it hurt his back. (Claimant's Depo. p. 37).

14. That there are no medical opinions in the record that any conditions of the Claimant's shoulder and neck are causally related to this injury by accident.

15. That the Commission cannot order medical treatment ten (10) weeks beyond the accident date without an opinion to a reasonable degree of medical certainty.

16. That the Claimant was also requesting an MRI for his lumbar spine. He initially complained of mid- and low back pain at the emergency room. Scans were performed at the thoracic and lumbar spines, and the diagnosis was ultimately fracture of T12. The surgery involved the initial part of the lumbar spine in that the fusion was T11 to L1.

17. That there is no indication that the MRI requested by Dr. Stofko on July 22, 2020, is for the evaluation of the surgical site or another part of the back.

18. That there is no medical statement as to the purpose of the requested MRI in the July 22, 2020, note.

19. That there is no medical opinion stating to a reasonable degree of medical certainty that there is a causal relationship between the accident and the lumbar spine.

20. That the Claimant has failed to meet his burden of proof to show that the shoulder, neck, and lumbar spine were injured or that those injuries were causally related to the accident.

Based upon the above Statement of the Case and the Findings of Fact, the following Conclusions of Law are made:

CONCLUSIONS OF LAW

The following sections of the South Carolina Code of Laws give the appropriate definitions and provisions of the South Carolina Workers' Compensation Act as applicable to this case:

1. S.C. Code Ann. § 42-1-160 defines injury by accident.
2. S.C. Code Ann. § 42-15-60 defines time period medical treatment and supplied are furnished and states that the employer shall provide medical treatment for a period not exceeding ten (10) weeks from the date of an injury and for additional time as, in the judgement of the Commission, will tend to lessen the period of disability as evidence by expert medical evidence stated to a reasonable degree of medical certainty.

3. *Burnette v. City of Greenville*, 401 S.C. 417, 737 S.E.2d 200 (Ct. App. 2012), requires medical opinions stated to a reasonable degree of medical certainty to establish medical causation and prohibits the Commission from issuing the equivalent of the medical opinion.

4. *Hartzell v. Palmetto Collision*, 419 S.C. 87, 796 S.E.2d 145 (Ct. App. 2016), states that the Commission cannot order medical treatment ten (10) weeks beyond the injury by accident date without an opinion to a reasonable degree of medical certainty. The Court held that the statute does require a heightened medical evidence standard in order for the Commission to award medical treatment beyond ten (10) weeks from the date of injury.

Based upon the above Statement of Case, Evidence of the Case, Findings of Fact, and Conclusions of Law, the following Order is made:

ORDER


Based on the foregoing, it is hereby:

ORDERED, ADJUDGED, AND DECREED that the Claimant's request for additional medical treatment to the lumbar spine, cervical spine, and shoulders is denied; it is further

ORDERED, ADJUDGED, AND DECREED that the Claimant's injuries related to this accident are limited to the fracture at T12; it is further

ORDERED, ADJUDGED, AND DECREED that the Claimant has not yet reached maximum medical improvement and authorized medical treatment is continuing to be provided.

No hearing costs or penalties are assessed in this matter.



Commissioner Melody L. James

CERTIFICATE OF SERVICE

This is to certify the undersigned has this date served this order in the above entitled action upon all parties to this cause by sending an electronic copy hereof by electronic mail addressed to the attorney or attorneys for said parties or by depositing a copy hereof, postage paid, in the United States certified mail addressed to any unrepresented party.
January 11, 2021

By: Tamara Morris, Administrative Assistant to Commissioner James

DECISION & ORDER
BEFORE THE SOUTH CAROLINA
WORKERS' COMPENSATION COMMISSION
WCC FILE NUMBER 1921668

EVARISTO VERDUGO MORALES,
Claimant,

vs.

INSULATION BY COHEN'S & SPRAYFOAM
BY COHEN'S, LLC,
Employer,

BUILDERS PREMIER INSURANCE
COMPANY,
Carrier/
Defendants.

HEARING: Hearing held in Walterboro, South Carolina,
on April 26, 2021.

APPEARANCES: E. Courtney Gruber, Esquire, on behalf of the
Employer/Carrier.

Preston F. McDaniel, Esquire and Don
Gibson, on behalf of the Employee/Claimant.

PURPOSE OF HEARING: To determine issues as set forth on Forms
50/51 and 21 to determine if the Employer/
Carrier may stop payment, and if so, to

determine if Claimant is entitled to any further benefits.

DECISION & ORDER BY:

Aisha Taylor, Commissioner.

DATE FILED:

March 22, 2022

STIPULATIONS

At the call of the case, the parties stipulated as follows:

1. That both the Claimant and the Defendants were subject to and bound by the terms and provisions of the South Carolina Workers' Compensation Act.
2. That jurisdiction and sufficiency of the notice of the hearing were admitted.
3. That the date of accident was October 10, 2019.
4. That, at the time of the injury, the average weekly wage being earned by the Claimant was the sum of \$1,302.27, resulting in a compensation rate of \$845.74.
5. That venue for this hearing was proper in Colleton County, South Carolina, pursuant to stipulation by the parties.
6. That the Claimant sustained an injury to his back.

APA SUBMISSIONS

The following APAs were submitted on behalf of the Employee/Claimant:

<u>APA</u>	<u>Name of Provider</u>	<u>Date of Report</u>	<u>Page Nos.</u>
1.	Grace Physical Therapy Rod Tyler, PTR/L, CHT, CSFA (FCE)	10/23/2020	1-11
2.	Southeastern Spine Institute Leonard Forrest, MD	4/1/2021	12-20
3.	Charleston Pain & Rehab. Ctr. Jeffrey Buncher, MC	1/28/2021	21-31
4.	Harriet Fowler, M.Ed., CRC	4/12/2021	32-44

Harriet Fowler VR Services

5. Consent Order 45-46

The following Exhibits were submitted on behalf of the Employee/Claimant:

None.

The following APAs were submitted on behalf of the Employer/Carrier:

<u>APA</u>	<u>Name of Provider</u>	<u>Date of Report</u>	<u>Page Nos.</u>
1.	Trident Orthopaedic Specialists	10/23/2019-1/12/2021	1-20
	Supplemental filing: Trident Orthopaedic Specialists	10/15/2020-11/18/2020	20A-D
2.	CORA Physical Therapy	12/24/2020	21-22
3.	Trident Health System	10/10/2019-10/12/2019	23-59

The following Exhibits were submitted on behalf of the Employer/Carrier:

A.	Deposition of claimant	3/13/2020	60-72
B.	Decision & Order	1/11/2021	73-82

STATEMENT OF THE CASE

The above case came on to be heard before the undersigned Commissioner in Walterboro, South Carolina, on April 26, 2021, pursuant to notice timely and properly given to all parties of record.

This matter was brought before the Commission on a Form 21 filed by the Defendants. The Defendants contended that the Claimant had reached maximum medical improvement on January 8, 2020, with no permanent physical limitations. Defendants contended that the only compensable injury was to the thoracic spine and further that other injuries alleged by the Claimant, including shoulders, neck, and lumbar spine, had

previously been denied by Order of the Commission dated January 11, 2021, and were, therefore, *res judicata*. Defendants were seeking a finding of MMI and a credit for overpayment of temporary total compensation since the date of MMI. The Defendants had also filed a motion to compel the Claimant to appear in person for a vocational evaluation. That motion was denied.

It was the position of the Claimant that the Defendants had entered into a Consent Order on April 14, 2020, in which they agreed that the Claimant had sustained a compensable injury to his back on October 10, 2019. Claimant further contended that the Consent Order essentially bound the Defendants to provide medical treatment for all parts of the back, not just the thoracic spine, and that the Consent Order filed April 14, 2020, superseded the Order filed January 11, 2021. The Claimant was seeking additional medical treatment for the lumbar spine, cervical spine, bilateral shoulders, and lumbar radiculopathy and continuation of benefits. Claimant's attorneys also filed an oral motion to postpone or leave the record open for the purpose of taking the deposition of Elaine Cole, P.A. That motion was taken under advisement at the hearing to be considered after review of all of the other evidence in the record.

EVIDENCE OF THE CASE

The medical records in the case indicate that the Claimant was injured on the date of the accident when he fell from a ladder. An MRI performed October 10, 2019, reflected that he had sustained an acute compression fracture at T12. The hospital notes indicated that he denied any pain down his legs, numbness, tingling, or weakness of his lower extremities. (Defendants APA p. 46). Claimant underwent surgery on October 11,

2019, for the fracture at T12. Specifically, the surgery involved percutaneous fusion for T12 fracture from T11 to L1. (Defendants APA p. 1). The Claimant was followed by Elaine Cole, physician's assistant for Dr. Stofko who is a neurosurgeon and the treating physician. The medical note of January 8, 2020, indicates a recommendation for physical therapy and return to work without restrictions. It was noted the Claimant did not have to wear the brace any longer unless for comfort and did not need to return to see that medical practice unless an issue arose. (Defendants APA p. 10).

The Claimant returned to the treating physician on July 22, 2020, complaining for the first time of pain in the neck and upper back into the bilateral shoulders. He was also complaining of low back pain with radiation into the bilateral lower extremities into the bottom of the feet and complaining of radiating pain in the left thigh. He denied numbness, tingling, weakness, or bladder dysfunction and complained of muscle spasms in his low back. (Defendants APA p. 14).

Dr. Stofko completed a medical questionnaire at the request of the Claimant's attorney, after the evidentiary hearing was held August 13, 2020. He stated to a reasonable degree of medical certainty that the complaints of pain in the neck and upper back into the bilateral shoulders were not causally related to the October 10, 2019, accident. He also opined that the low back pain with radiation into the bilateral lower extremities was not causally related to the work-related injury of October 10, 2019. He also opined that the lumbar radiculopathy was not causally related to the work accident. (Defendants APA p. 20a – 20e).

A 14B was completed by Elaine Cole on January 12, 2021, noting that the Claimant had 5% permanent impairment to his back and had reached MMI on January 8, 2020. (Defendants APA p. 20).

The Claimant underwent an evaluation for an impairment rating performed by CORA Physical Therapy, at which time it was opined that he had sustained 5% permanent impairment to the whole person based on the *AMA Guides* 6th Edition noting that the class was Class 1C fracture of one or more vertebral bodies with less than 25% compression – healed with surgery. (Defendants APA p. 21-22).

A review of the record reflects that an evidentiary hearing had previously been held on August 13, 2020, in response to a Form 50 filed June 16, 2020. The issues litigated were the extent of compensable injury as the Claimant at that time was seeking additional medical treatment for the low back, shoulders, and cervical spine. Defendants at that time took the position that the only compensable injury was the compression fracture at T12. The Commissioner filed an Order on January 11, 2020, finding that the Claimant's injuries related to the accident were limited to the fracture at T12 and denied the Claimant's request for additional medical treatment to the lumbar spine, cervical spine, and shoulders. The Order found that the Claimant had failed to meet his burden of proof that shoulders, neck, and lumbar spine were causally related to this accident. This Order was unappealed.

The Claimant testified that he was in a lot of pain as a result of the accident and that he did not believe he would be able to work as a result of it. He testified that he was able to drive his car for an hour-and-a-half. He had a fourth grade education but was able to calculate percentage. He also agreed that he could probably work cleaning up for

six hours a day, although he thought there would be people who could do it faster and better than he could.

Based upon the stipulations of the parties, the testimony and evidence received and produced at the hearing, as well as my personal observation of the witness, the undersigned Commissioner finds the following facts based upon the preponderance of the evidence:

FINDINGS OF FACT

IT IS FOUND AS A FACT:

1. That all parties to this proceeding are subject to and bound by the terms and provisions of the South Carolina Workers' Compensation Act.
2. That the average weekly wage is \$1,302.27, with a compensation rate of \$845.74.
3. That the date of injury was October 10, 2019, on which date the Claimant sustained a compensable injury to his thoracic spine.
4. That the Claimant reached maximum medical improvement for the injury to the thoracic spine on January 8, 2020. (Defendants APA p. 20).
5. That the issues of whether or not the Claimant sustained compensable injuries to the cervical spine, lumbar spine, and left & right shoulders had previously been litigated at an evidentiary hearing from which an Order denying compensability of those claims was filed on January 11, 2021, and was not appealed. (Defendants APA B).

6. That the unappealed Order denying compensability for injury to the cervical spine, lumbar spine, and left & right shoulders was not appealed and is the law of the case. (Defendants APA B).

7. That the unappealed Decision & Order filed January 11, 2020, is the law of the case with regard to causal connection and compensability of alleged injury to the cervical spine, lumbar spine, and left & right shoulders. (Defendants APA B).

8. That the opinion of the authorized treating physician, Dr. Stofko, obtained by Claimant's attorney would not support a finding of compensability for the cervical spine, lumbar spine, and radiculopathy. (Defendants APA pp. 20d, 20e).

9. That Dr. Stofko stated unequivocally that the Claimant's complaints of pain in his neck, shoulders, lumbar spine, and lumbar radiculopathy are not causally related to the October 10, 2019, work injury. (Defendants APA p. 20d, 20e).

10. That the previous unappealed Decision & Order dated January 11, 2021, stated specifically in Finding of Fact No. 20 that, "... Claimant has failed to meet his burden of proof to show that the shoulder, neck, and lumbar spine were injured or that those injuries were causally related to the accident." (Defendants APA p. 80).

11. To the extent that the Claimant was requesting compensability or additional medical treatment for his shoulders, neck, or lumbar spine, those issues

had been previously adjudicated by way of Commissioner James' Decision & Order dated January 11, 2021, and are *res judicata*.

12. The Defendants' motion to compel the Claimant to appear for a vocational evaluation is denied.

13. That the Claimant's oral motion to postpone or leave the record open to take the deposition of Elaine Cole, P.A., is denied. Although PA Cole did see the Claimant for follow-up medical appointments after his surgery, PA Cole's last visit with the Claimant was on July 22, 2020, and those records had properly been before Commissioner James at the August 3, 2020, hearing on compensability for which there is already an unappealed Order of the Commission. PA Cole did sign a 14B on January 12, 2021; however, that 14B is given little to no weight when viewing the evidence as a whole as this is a Commission form that requires the signature of a physician as opposed to a PA. Additionally, PA Cole's supervising physician, Dr. Stofko, completed a medical questionnaire and an identical impairment rating was issued by CORA for physical therapy in their report. (Defendants APA p. 20d, 20e; Defendants APA p. 22); (R. 67-612(E) referencing the Hearing Commissioner's "discretionary authority...to accept reports, depositions or other evidence at the conclusion of the scheduled hearing..."); (See also Holcombe v. Dan River Mills/Woodside Div., 286 SC 223, 333 SE2d 338 (Ct. App 1985), "The single Commissioner did not abuse his discretion in refusing to allow the deposition of a particular doctor to be taken and admitted into evidence.")

14. The Claimant did send a Form 27 Subpoena to PA Cole for her attendance at the hearing; however, counsel did not make personal service upon PA Cole

and could not confirm that PA Cole resided within the 50 mile requirement to enforce the subpoena. (Hr. Tr. P. 21, ll. 1-10).

15. That the greater weight or preponderance of the evidence supports a finding that the Claimant reached MMI on January 8, 2020, that no additional medical treatment for the only compensable injury, *to wit*: the thoracic spine, would be likely to decrease the Claimant's disability, and that the Claimant sustained permanent impairment to the back of 5%. This finding is supported by the 14B as well as the impairment rating issued by CORA Physical Therapy.

16. The Claimant was released at MMI for his work-related injury to the thoracic spine on January 8, 2020, when he was released by the authorized treating physician and cleared to return to work without restriction. (Defendants APA p. 10).

17. That the Claimant did continue to treat with PA Cole after January 8, 2020, which treatment was for the other alleged injuries not related to the work injury as per the previous Order of the Commission. (Defendants APA B; p. 20d, 20e).

18. That the Claimant sustained 20% permanent partial disability to his back as a result of the injury to the thoracic spine, specifically the compression fracture at T12. This finding is based on the greater weight or preponderance of the evidence as a whole, including the permanent impairment rating issued by CORA Physical Therapy and Dr. Stofko's medical opinion that the Claimant's additional complaints to the cervical spine and lumbar spine are not causally related to his work injury, as well as the Claimant's testimony regarding overall disability resulting from his injury.

19. That the opinions stated by the authorized treating physician are given greater weight than those of doctors providing independent medical evaluations in preparation for litigation.

20. That the Claimant is entitled to receive his award in a lump sum.

21. That the Claimant is not entitled to any additional medical treatment as none has been recommended as causally related and tending to lessen the Claimant's period of disability relative to the fracture at T12.

22. That the Defendants are entitled to terminate temporary total disability benefits immediately and are entitled to a credit for overpayment of all benefits paid beyond the date of MMI, which was January 8, 2020.

Based upon the above Statement of the Case, Evidence of the Case, and the Findings of Fact, the following Conclusions of Law are made:

CONCLUSIONS OF LAW

The following sections of the South Carolina Code of Laws give the appropriate definitions and provisions of the South Carolina Workers' Compensation Act as applicable to this case:

1. S.C. Code Ann. § 42-1-160 defines injury by accident;
2. S.C. Code Ann. § 42-9-260 defines when payments can be terminated.
3. S.C. Code Ann. § 42-15-60 provides time when medical treatment shall be provided.
4. S.C. Code Ann. § 42-9-30 defines scheduled injuries.
5. S.C. Code Ann. § 42-17-40 defines conduct of hearing.

6. S.C. Code Ann. § 42-17-50 defines review and re-hearing by Commission.

7. S.C. Code Ann. § 42-17-60 defines conclusiveness of an award of the Commission if not reviewed in due time as conclusive and binding on all questions of fact.

8. S.C. Code § 42-9-210 defines deduction from compensation of payments made by employer when not due and payable.

Based upon the above Statement of Case, Evidence of the Case, Findings of Fact, and Conclusions of Law, the following Order is made:

ORDER

Based on the foregoing, it is hereby:

ORDERED, ADJUDGED, AND DECREED that the Defendants are entitled to terminate temporary total compensation effective immediately; it is further

ORDERED, ADJUDGED, AND DECREED that Defendants are entitled to a credit for overpayment of weekly benefits paid at the rate of \$845.74 since January 8, 2020, the date of maximum medical improvement for the thoracic spine; it is further

ORDERED, ADJUDGED, AND DECREED that the Claimant has sustained 20% permanent partial disability to his back as a result of his work-related injury and payment is to be made in lump sum, subject to the Defendants' credit for weekly benefits paid since January 8, 2020; it is further

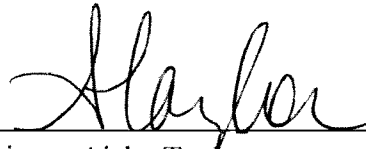
ORDERED, ADJUDGED, AND DECREED that the Claimant's award of 20% permanent partial disability to his back (60 weeks x \$845.74) is subject to the

Defendants' credit for overpayment of weekly benefits paid since January 8, 2020; it is further

ORDERED, ADJUDGED, AND DECREED that the Claimant did not meet his burden of proof to show that he is entitled to any additional medical treatment for the thoracic spine.

No hearing costs or penalties are assessed in this matter.

SOUTH CAROLINA WORKERS'
COMPENSATION COMMISSION



Commissioner Aisha Taylor

CERTIFICATE OF SERVICE

This is to certify the undersigned has this date served this order in the above entitled action upon all parties to this cause by sending an electronic copy hereof by electronic mail addressed to the attorney or attorneys for said parties or by depositing a copy hereof, postage paid, in the United States certified mail addressed to any unrepresented party.
March 22, 2022

By: Renee Smith, Administrative Assistant to Commissioner Taylor

Order Served via Email 3-22-22:

E. Courtney Gruber cgruber@ycrlaw.com

Don C. Gibson dgibson@dgibsonlaw.com

Preston F. McDaniel preston@pfmcdlaw.com

BEFORE THE
SOUTH CAROLINA WORKERS' COMPENSATION COMMISSION
W.C.C. 1921668

Evaristo Verdugo Morales,	EMPLOYEE,)	
)	
	CLAIMANT,)	
VS.)	
)	
Insulation by Cohen, LLC,)	
	EMPLOYER,)	
)	ADMINISTRATIVE ORDER
AND)	
)	
Builders Premier Insurance Co.)	
	CARRIER,)	
)	
	DEFENDANTS,)	

A Motion regarding the following issue(s) has been received:

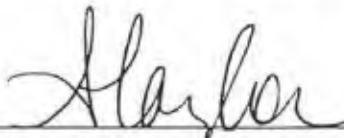
X Claimant's Motion for Reconsideration

The following dispositions have been made:

The undersigned has reviewed Claimant's Motion for Reconsideration filed pursuant to R. 67-215. In the Motion, Claimant reargues the merits of the claim which is prohibited by Regulation. Claimant's Motion for reconsideration is DENIED.

Columbia, SC

October 3, 2022



Commissioner Aisha Taylor

CERTIFICATE OF SERVICE

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

October 3, 2022

State of South Carolina
Workers' Compensation Commission

APPELLATE PANEL DECISION AND ORDER

COMMISSION PANEL: McCaskill, Dooley, Campbell; Chair

SCWCC File No.: 1921668

Evaristo Verdugo Morales,

Claimant,

v.

Insulation by Cohen's, LLC & Sprayfoam by Cohen's, LLC,

Employer,

and

Builders Premier Insurance Company,

Carrier,

Defendants.

VACATED

Hearing held via Zoom on February 13, 2023

Per notice timely and properly served upon all Parties of Interest.

Appearances: Preston F. McDaniel, of McDaniel Law Firm, appeared on behalf of Claimant/Appellant.

E. Courtney Gruber, of Clement Rivers Law Firm, appeared on behalf of Defendants/Respondents.

Court Reporter: Amber Scarborough, Creel Court Reporting, 1230 Richland Street, Columbia, SC 29201, (803) 252-3445
contact@creelreporting.com

Filed: April 4, 2023

I. STATEMENT OF THE CASE

The above case came on to be heard before the Single Commissioner in Walterboro, South Carolina, on April 26, 2021, pursuant to notice timely and properly given to all parties of record.

This matter was brought before the Commission on Forms 50/51 and Form 21 to determine if the carrier could stop payments. The Defendants contended that the Claimant had reached maximum medical improvement on January 8, 2020, with no permanent physical limitations. Defendants contended that the only compensable injury was to the thoracic spine and further that other injuries alleged by the Claimant, including shoulders, neck, and lumbar spine, had previously been denied by Order of the Commission dated January 11, 2021, and were, therefore, *res judicata*. Defendants were seeking a finding of MMI and a credit for overpayment of temporary total compensation since the date of MMI. The Defendants had also filed a motion to compel the Claimant to appear in person for a vocational evaluation. That motion was denied.

It was the position of the Claimant that the Defendants had entered into a Consent Order on April 14, 2020, in which they agreed that the Claimant had sustained a compensable injury to his back on October 10, 2019. Claimant further contended that the Consent Order essentially bound the Defendants to provide medical treatment for all parts of the back, not just the thoracic spine, and that the Consent Order filed April 14, 2020, superseded the Order filed January 11, 2021. The Claimant was seeking additional medical treatment for the lumbar spine, cervical spine, bilateral shoulders, and lumbar radiculopathy and continuation of benefits. Claimant's attorneys also filed an oral motion to postpone or leave the record open for the purpose of taking the deposition of Elaine Cole, P.A. That motion was denied.

EVIDENCE OF THE CASE

The medical records in the case indicate that the Claimant was injured on the date of the accident when he fell from a ladder. An MRI performed October 10, 2019, reflected that he had sustained an acute compression fracture at T12. The hospital notes indicated that he denied any pain down his legs, numbness, tingling, or weakness of his lower extremities. (Defendants APA p. 46). Claimant underwent surgery on October 11, 2019, for the fracture at T12. Specifically, the surgery involved percutaneous fusion for T12 fracture from T11 to L1. (Defendants APA p. 1). The Claimant was followed by Elaine Cole, physician's assistant for Dr. Stofko who is a neurosurgeon and the treating physician. The medical note of January 8, 2020 indicates a recommendation for physical therapy and return to work without restrictions. It was noted the Claimant did not have to wear the brace any longer unless for comfort and did not need to return to see that medical practice unless an issue arose. (Defendants APA p. 10).

The Claimant returned to the treating physician on July 22, 2020, complaining for the first time of pain in the neck and upper back into the bilateral shoulders. He was also complaining of low back pain with radiation into the bilateral lower extremities into the bottom of the feet and complaining of radiating pain in the left thigh. He denied numbness, tingling, weakness, or bladder dysfunction and complained of muscle spasms in his low back. (Defendants APA p. 14).

Dr. Stofko completed a medical questionnaire at the request of the Claimant's attorney, after the evidentiary hearing was held August 13, 2020. He stated to a reasonable degree of medical certainty that the complaints of pain in the neck and upper back into the bilateral shoulders were not causally related to

the October 10, 2019, accident. He also opined that the low back pain with radiation into the bilateral lower extremities was not causally related to the work-related injury of October 10, 2019. He also opined that the lumbar radiculopathy was not causally related to the work accident. (Defendants APA p. 20a – 20e).

A 14B was completed by Elaine Cole on January 12, 2021, noting that the Claimant had 5% permanent impairment to his back and had reached MMI on January 8, 2020. (Defendants APA p. 20). The Claimant underwent an evaluation for an impairment rating performed by CORA Physical Therapy, at which time it was opined that he had sustained 5% permanent impairment to the whole person based on the AMA *Guides* 6th Edition noting that the class was Class 1C fracture of one or more vertebral bodies with less than 25% compression – healed with surgery. (Defendants APA p. 21-22).

A review of the record reflects that an evidentiary hearing had previously been held on August 13, 2020, in response to a Form 50 filed June 16, 2020. The issues litigated were the extent of compensable injury as the Claimant at that time was seeking additional medical treatment for the low back, shoulders, and cervical spine. Defendants at that time took the position that the only compensable injury was the compression fracture at T12. The Commissioner filed an Order on January 11, 2020, finding that the Claimant's injuries related to the accident were limited to the fracture at T12 and denied the Claimant's request for additional medical treatment to the lumbar spine, cervical spine, and shoulders. The Order found that the Claimant had failed to meet his burden of proof that shoulders, neck, and lumbar spine were causally related to this accident. This Order was unappealed.

The Claimant testified that he was in a lot of pain as a result of the accident and that he did not believe he would be able to work as a result of it. He testified that he was able to drive his car for an hour-and-a-half. He had a fourth grade education but was able to calculate percentage. He also agreed that he could probably work cleaning up for six hours a day, although he thought there would be people who could do it faster and better than he could.

II. SINGLE COMMISSIONER FINDINGS OF FACT AND CONCLUSIONS OF LAW

Based upon the stipulations of the parties, the testimony and evidence received and produced at the hearing, as well as my personal observation of the witness, the undersigned Commissioner finds the following facts based upon the preponderance of the evidence:

1. That all parties to this proceeding are subject to and bound by the terms and provisions of the South Carolina Workers' Compensation Act.
2. That the average weekly wage is \$1,302.27, with a compensation rate of \$845.74.
3. That the date of injury was October 10, 2019, on which date the Claimant sustained a compensable injury to his thoracic spine.
4. That the Claimant reached maximum medical improvement for the injury to the thoracic spine on January 8, 2020. (Defendants APA p. 20).
5. That the issues of whether or not the Claimant sustained compensable injuries to the cervical spine, lumbar spine, and left & right shoulders had previously been litigated at an

- evidentiary hearing from which an Order denying compensability of those claims was filed on January 11, 2021, and was not appealed. (Defendants APA B).
6. That the unappealed Order denying compensability for injury to the cervical spine, lumbar spine, and left & right shoulders was not appealed and is the law of the case. (Defendants APA B).
 7. That the unappealed Decision & Order filed January 11, 2020, is the law of the case with regard to causal connection and compensability of alleged injury to the cervical spine, lumbar spine, and left & right shoulders. (Defendants APA B).
 8. That the opinion of the authorized treating physician, Dr. Stofko, obtained by Claimant's attorney would not support a finding of compensability for the cervical spine, lumbar spine, and radiculopathy. (Defendants APA pp. 20d, 20e).
 9. That Dr. Stofko stated unequivocally that the Claimant's complaints of pain in his neck, shoulders, lumbar spine, and lumbar radiculopathy are not causally related to the October 10, 2019, work injury. (Defendants APA p. 20d, 20e).
 10. That the previous unappealed Decision & Order dated January 11, 2021, stated specifically in Finding of Fact No. 20 that, "... Claimant has failed to meet his burden of proof to show that the shoulder, neck, and lumbar spine were injured or that those injuries were causally related to the accident." (Defendants APA p. 80).
 11. To the extent that the Claimant was requesting compensability or additional medical treatment for his shoulders, neck, or lumbar spine, those issues had been previously adjudicated by way of Commissioner James' Decision & Order dated January 11, 2021, and are *res judicata*.
 12. The Defendants' motion to compel the Claimant to appear for a vocational evaluation is denied.
 13. That the Claimant's oral motion to postpone or leave the record open to take the deposition of Elaine Cole, P.A., is denied. Although PA Cole did see the Claimant for follow-up medical appointments after his surgery, PA Cole's last visit with the Claimant was on July 22, 2020, and those records had properly been before Commissioner James at the August 3, 2020, hearing on compensability for which there is already an unappealed Order of the Commission. PA Cole did sign a 14B on January 12, 2021; however, that 14B is given little to no weight when viewing the evidence as a whole as this is a Commission form that requires the signature of a physician as opposed to a PA. Additionally, PA Cole's supervising physician, Dr. Stofko, completed a medical questionnaire and an identical impairment rating was issued by CORA for physical therapy in their report. (Defendants APA p. 20d, 20e; Defendants APA p. 22), (R. 67-612(E)) referencing the Hearing Commissioner's "discretionary authority ... to accept reports, depositions or other evidence at the conclusion of the scheduled hearing ..."; (See also Holcombe v. Dan River Mills/Woodside Div., 286 SC 223, 333 SE2d 338 (Ct. App. 1985), "The single Commissioner did not abuse his discretion in refusing to allow the deposition of a particular doctor to be taken and admitted into evidence.")
 14. The Claimant did send a Form 27 Subpoena to PA Cole for her attendance at the hearing; however, counsel did not make personal service upon PA Cole and could not confirm that PA Cole resided within the 50 mile requirement to enforce the subpoena. (Hr. Tr. p. 21, ll. 1-10).
 15. That the greater weight or preponderance of the evidence supports a finding that the Claimant reached MMI on January 8, 2020, that no additional medical treatment for the only compensable injury, *to wit*: the thoracic spine, would be likely to decrease the

Claimant's disability, and that the Claimant sustained permanent impairment to the back of 5%. This finding is supported by the 14B as well as the impairment rating issued by CORA Physical Therapy.

16. The Claimant was released at MMI for his work-related injury to the thoracic spine on January 8, 2020, when he was released by the authorized treating physician and cleared to return to work without restriction. (Defendants APA p. 10).
17. That the Claimant did continue to treat with PA Cole after January 8, 2020, which treatment was for the other alleged injuries not related to the work injury as per the previous Order of the Commission. (Defendants APA B; p. 20d, 20e).
18. That the Claimant sustained 20% permanent partial disability to his back as a result of the injury to the thoracic spine, specifically the compression fracture at T12. This finding is based on the greater weight or preponderance of the evidence as a whole, including the permanent impairment rating issued by CORA Physical Therapy and Dr. Stofko's medical opinion that the Claimant's additional complaints to the cervical spine and lumbar spine are not causally related to his work injury, as well as the Claimant's testimony regarding overall disability resulting from his injury.
19. That the opinions stated by the authorized treating physician are given greater weight than those of doctors providing independent medical evaluations in preparation for litigation.
20. That the Claimant is entitled to receive his award in a lump sum.
21. That the Claimant is not entitled to any additional medical treatment as none has been recommended as causally related and tending to lessen the Claimant's period of disability relative to the fracture at T12.
22. That the Defendants are entitled to terminate temporary total disability benefits immediately and are entitled to a credit for overpayment of all benefits paid beyond the date of MMI, which was January 8, 2020.

Based upon the above Statement of the Case, Evidence of the Case, and the Findings of Fact, the following Conclusions of Law are made:

CONCLUSIONS OF LAW

The following sections of the South Carolina Code of Laws give the appropriate definitions and provisions of the South Carolina Workers' Compensation Act as applicable to this case:

1. S.C. Code Ann. § 42-1-160 defines injury by accident;
2. S.C. Code Ann. § 42-9-260 defines when payments can be terminated.
3. S.C. Code Ann. § 42-15-60 provides time when medical treatment shall be provided.
4. S.C. Code Ann. § 42-9-30 defines scheduled injuries.
5. S.C. Code Ann. § 42-17-40 defines conduct of hearing.
6. S.C. Code Ann. § 42-17-50 defines review and re-hearing by Commission.
7. S.C. Code Ann. § 42-17-60 defines conclusiveness of an award of the Commission if not reviewed in due time as conclusive and binding on all questions of fact.
8. S.C. Code § 42-9-210 defines deduction from compensation of payments made by employer when not due and payable.

Based upon the above Statement of Case, Evidence of the Case, Findings of Fact, and Conclusions of Law, the following Order is made:

ORDER

Based on the foregoing, it is hereby:

ORDERED, ADJUDGED, AND DECREED that the Defendants are entitled to terminate temporary total compensation effective immediately; it is further

ORDERED, ADJUDGED, AND DECREED that Defendants are entitled to a credit for overpayment of weekly benefits paid at the rate of \$845.74 since January 8, 2020, the date of maximum medical improvement for the thoracic spine; it is further

ORDERED, ADJUDGED, AND DECREED that the Claimant has sustained 20% permanent partial disability to his back as a result of his work-related injury and payment is to be made in lump sum, subject to the Defendants' credit for weekly benefits paid since January 8, 2020; it is further

ORDERED, ADJUDGED, AND DECREED that the Claimant's award of 20% permanent partial disability to his back (60 weeks x \$845.74) is subject to the Defendants' credit for overpayment of weekly benefits paid since January 8, 2020; it is further

ORDERED, ADJUDGED, AND DECREED that the Claimant did not meet his burden of proof to show that he is entitled to any additional medical treatment for the thoracic spine.

No hearing costs or penalties are assessed in this matter.

III. ISSUES ON APPEAL

1. That pursuant to S.C. Code of Laws §42-17-50, the Claimant requests a review of all of the Findings of Fact, the Conclusions of Law, the Order and Award and of all rulings and decisions made by the Commissioner at the hearing, as contained in the Record or as made at any unrecorded pre-hearing conference, and in any communications concerning the claim, Order, Award and Decision rendered by the Hearing Commissioner in this matter.

2. That where in an accepted case the Claimant in his Form 50 and Form 21 response alleged that he was totally and permanently disabled both under SC Code §42-9-10 and 42-9-30(21), did the Commissioner err in hearing the case and failing to order mandatory mediation pursuant to the Commission Regulations. In addition, where the parties have signed a Consent Order to mediate the case which had been filed with the Commission for signature, but the Commissioner had delayed in signing it, did the Commissioner err by allowing the Defendants to withdraw from a signed Consent Agreement and scheduling the case for a hearing and scheduling that hearing within one (1) month.

3. Should the Commission, based on a review of the evidence on the essential issue for decision concerning the loss of use of the Claimant's back, where not only does a preponderance of the evidence but the only evidence in the Record on that essential issue for decision establishes that the

Claimant has lost 50% or more of the functional use of his back to do work requiring the use of his back, award permanent and total disability. That evidence includes:

A. The Functional capacity evaluation performed at the request of Dr. Stofko by Grace Physical Therapy establishes that the Claimant only demonstrated the ability to perform light duty work and recommended that he should not return to his prior work of installing insulation and noted that he exhibited moderate to high pain and that that was without exaggerated or inorganic pain behavior being present.

B. Dr. Leonard Forrest opined that the Claimant has lost 50% or more of the functional use of his back to do work requiring the use of his back.

C. Dr. Jeffrey Buncher opined that the Claimant had lost 50% or more of the functional use of his back to do work requiring the use of his back.

D. Mr. Morales testified that in his opinion he had lost 50% or more of the functional use of his back and in fact testified that he had lost 80% of the use of his back.

Note, there is no other evidence in the Record of the loss of use of the back and Dr. Stofko does not even mention the functional capacity evaluation that he ordered.

4. Should the Commission based on a review of the evidence concerning the loss of earning capacity, award the Claimant under SC Code §42-9-10 total and permanent disability for having sustained a total loss of his earning capacity based on the criteria for total and permanent disability under the Act, which is that where based on the age, education, background and experience, and the physical facts of the injury, the jobs which the Claimant can perform on a residual basis are so limited in quality, quantity, or dependability that a reasonably stable job market for them does not exist. In reference to loss of earning capacity, the evidence establishes that:

A. The Claimant does not speak English and has only a limited 4th grade education.

B. He has always performed jobs in the medium to heavy duty physical demand classification.

C. Dr. Leonard Forrest opined that the Claimant, from a physical demand standpoint, is not gainfully employable due to the condition of his back including having to alternate positions in reference to his thoracic spine fusion.

D. Dr. Buncher concurred and concurs based on a review of all of the evidence available that from a medical standpoint the Claimant is physically incapable of performing work within his capacity.

E. The vocational expert, Ms. Harriet Fowler, opined that the Claimant from a vocational standpoint is not capable of gainful employment.

F. There is no evidence in the Record that the Defendants have complied with SC Code §42-9-190 in that there is no evidence that they have either offered or procured work within the residual capacity to do work, which the Defendants claim the Claimant is capable of doing.

G. There is no evidence that the Claimant has been able to work or has worked in any capacity since this accident.

The Supreme Court has held that where a Claimant is not capable of any other employment other than physical manual labor the inability to do physical manual labor is total and permanent disability under the Act.

5. Where an Order is issued, such as in this case on January 11, 2021, which Order is based upon a hearing held on August 13, 2020 based on a Form 50 filed on June 16th of 2020 requesting additional medical care and where after the evidence that was presented at that August hearing, the Defendants had a functional capacity evaluation performed on October 23, 2020 at the request of Dr. Douglas Stofko which documented problems with range of motion and pain, limitations in both the cervical and thoracic lumbar areas of the back, and thus the Claimant continued to receive treatment and evaluation by the Defendants post-hearing and where the claim is thus in an ongoing capacity is a claimant foreclosed from requesting medical care based on additional medical evaluation during the pendency of the claim? Also, did the Commissioner err by not considering the variation between the Hearing Commissioner's notes for drafting the January 11th Order and the specific Order that was drafted by the Defendants and submitted to the Commissioner for signature?; particularly wherein the Defendants attempt to rely on that additional wording added by the Defendants to the original Findings and directions of the Hearing Commissioner to deny the Claimant medical care.

6. Since the Commission is committed to swift and sure benefits to an injured worker as part of its policy under the provisions of the Workers' Compensation Act, did the Hearing Commissioner err by not issuing a ruling until approximately eleven (11) months after the original hearing and then ordering a credit all the way back to the original date Defendants requested as being maximum medical improvement?

7. Where a Subpoena had been issued and served upon PA Alana Cole for attendance at the hearing and where she did not appear at the time of the hearing after being called in the hall to make sure she had not appeared, did the Commission err by not ordering and allowing the Claimant to take the deposition of Alana Cole prior to a decision in this case? In addition, did the Commissioner err by not ruling on that request to take the deposition until entering a Finding on that issue in her final Order Instructions for an Order that was issued eleven (11) months after the hearing? Does this deny the Claimant due process of law and was it an error to deny the Claimant the right to take the deposition of PA Cole?

8. Whereas specifically noted that PA Cole was the provider that was providing treating throughout the entire course of treatment and where the evidence establishes that there was no qualified and certified interpreter present at any of the treatment events prior to July 22, 2020, and where the only translation for the Claimant who does not speak English was through two (2) adolescent cousins, age approximately 12 and 14 years old, was it error for the Commission to even consider whether or not and what the Claimant was reporting given this lack of a certified translator?

9. Where in the last authorized treatment visit of July 22, 2020 PA Alana Cole ordered an MRI of the lumbar spine and prescribed a Medrol dose pack to help with lower extremity radiation and ordered medications and made a reference to physical therapy with potential trigger point injections and ordered a follow-up visit for two (2) weeks and where in the Form 14B which was issued on January 12, 2021 stating a date of maximum medical improvement of January 8, 2020 and wherein there is no record that the Claimant was seen or treated any date since July 22, 2020 and wherein on the Form 14B completed by PA Alana Cole on the date indicated that the Claimant would need further medical care in reference to an MRI of the lumbar spine ordered for assessment and the Form 14B states that this medical care is needed,

“as a result of the injury for an additional time that will tend to lessen the period of disability or maintain the current level of function”.

The Hearing Commissioner erred by concluding and finding as a fact that the Claimant reached maximum medical improvement on January 8, 2020 where there is absolutely no substantial evidence, medical or otherwise, of maximum medical improvement on that date. The medical treatment record of January 8th reflects that the patient was to do three (3) more weeks of physical therapy and was released to attempt to return to work on January 27th and there is no statement that the Claimant had reached maximum medical improvement stated to a reasonable degree of medical certainty on January 8th. Further he was to return if further complaints and contains a diagnoses of both acute bilateral low back pain, unspecified and closed fracture of the 12th thoracic vertebrae which he did as authorized on July 22nd. (Def. APA, pp. 10, 12).

10. That the Hearing Commissioner erred as a matter of law and fact by making Findings of Fact #6 and #7 which are contrary to the first Order of the Commission and contrary to the evidence in the Record. The Interim Order requesting additional medical care simply denied further medical care for the cervical lumbar and left and right shoulders based on the evidence at that time.

11. That the Hearing Commissioner erred in making Findings of Fact #8 and #9 based on the questionnaire that was submitted by the Defendants. Especially where after PA Alana Cole did not appear at the hearing pursuant to a Subpoena and the Claimant asked to have the Record left open for the Claimant to take her deposition, which Motion was taken under advisement and not ruled on until eleven (11) months later and where the evidence is clear that Alana Cole, not Dr. Stofko, treated the Claimant following the surgery, the Hearing Commissioner erred by taking that questionnaire into consideration.

12. That the Hearing Commissioner erred as a matter of law and fact in making Findings of Fact #10 and #11 and concluding in those facts that the Order of January 11, 2021 was a final Order of the Commission and not an Interim Order of the Commission.

13. That the Hearing Commissioner erred as a matter of law in making Finding of Fact #13 for the reasons as set out in other grounds for review, but in addition in that Finding of Fact making the following statements as a fact,

“PA Cole did sign a 14B on January 12, 2021; however, that 14B is given little to no weight when viewing the evidence as a whole as this is a Commission form that requires a signature of a physician as opposed to a PA.”

Whereas in Finding of Fact #4 the finding of maximum medical improvement is based specifically and solely on that Form 14B. (Def. APA, p. 20).

The Hearing Commissioner also erred in that Finding of Fact by making a legal argument outside of the arguments presented to her by the parties and thus outside of the Record and citing case law not presented to the Commissioner by the parties and actually giving a legal interpretation to the case law which is outside of the province of the Commission.

14. That the Hearing Commissioner erred in making Finding of Fact #14 wherein there was no argument made by either party to the effect that the hearing was not within fifty (50) miles of the PA Cole's office nor was the argument made that service was not proper on the witness. That is also a legal conclusion, not a Finding of Fact.

15. That the Hearing Commissioner erred in making Finding of Fact #15 and basing it upon the Form 14B, which she stated earlier was given little or no weight, and on an impairment rating issued by a physical therapy group.

16. That the Hearing Commissioner erred by making Findings of Fact #16 and #17 in that there is nothing in the January 8, 2020 report stating maximum medical improvement; and it clearly refers to bilateral lumbar pain as a diagnosis; and the Claimant was treated after that date for the thoracic spine. The Findings of Fact are contrary to the evidence and law.

17. That the Hearing Commissioner erred by making Findings of Fact #18 and #19 wherein there is absolutely no evidence in the Record to substantiate a 20% permanent partial disability to the Claimant's back wherein the issue before the Commissioner was loss of use and the loss of use of the back after the accident. Referenced to the thoracic spine fusion are the opinions of two (2) medical doctors, stated to a reasonable degree of medical certainty; and the Claimant's testimony is in reference to the loss of use of his back. There is absolutely no evidence that the loss of use is caused by anything other than the injury sustained in the accident. Further, the objective physical evidence from the functional capacity evaluations states that the Claimant is limited to, at best, light duty work. Under the US Department of Labor's Dictionary of Occupation Titles Physical Demand Classification System of sedentary, light duty, medium duty, heavy duty, and very heavy duty work classifications. He is thus excluded from over 60% of the jobs in the economy in reference to the condition of his back after the accident.

18. That the Hearing Commissioner erred as a matter of law by making Finding of Fact #21 which is contrary to the recommendations on the Form 14B completed by PA Cole which recommended further medical care as causally related to the Claimant's work-related injury as tending to lessen the period of disability. The Findings of Fact flip-flop between relying on the Form 14B and not relying on the Form 14B in reference to the Findings of Fact made.

19. That the Hearing Commissioner erred as a matter of law in making Finding of Fact #22 which goes outside of her authority. The current Commission has stated in numerous decisions the opinion that the Order of a Commissioner is not final until reviewed by the Full Commission; and that being the case the Hearing Commissioner has no authority to stop or terminate temporary total disability benefits. The statute and Reg. 67-506 refer to as law that temporary compensation is not to be suspended,

“until the Commission finds” that temporary benefits may be stopped. Further, there is no Finding that the disability has ended and there is no evidence to that effect.

20. That the Hearing Commissioner erred as a matter of law in her Findings of Fact #1-22 by failing to make any reference to or that confirms that there was any consideration given to any of the evidence presented by the Claimant to the Commissioner. There is specifically no reference to any of the evidence concerning the essential issue before the Commissioner for determination; that being loss of use of the back to do work requiring the use of the back.

21. That the Hearing Commissioner erred as a matter of law in her Conclusions of Law by failing to properly apply the dictates of SC Code §42-9-260, §42-15-60, and §42-9-30 in general and specifically by 1) referencing injury by accident when this is an accepted injury; and 2) by immediately terminating benefits wherein she does not have the authority to do that as only the Commission does; and 3) treating an Order based on a request for additional medical care as a final Order of the Commission in an ongoing case.

22. That the Hearing Commissioner erred as a matter of law in making Conclusion of Law #5 by failing to leave the Record open in accordance with Supreme Court decisions and in making Conclusion of Law #6 and #7 where those are irrelevant to the issues before the Commissioner for decision. Section 42-17-60 refers to a final Order of the Commission on a claim, not Interim Orders pursuant to our Appellate Court decisions.

23. That the Hearing Commissioner erred as a matter of law by making Conclusion of Law #8 wherein there is absolutely no evidence of any payments made by the employer in lieu of compensation; and wherein that was not an issue before the Commission for decision.

24. That the Hearing Commissioner erred as a matter of law in all respects in reference to the Order which is based on the Findings of Fact and Conclusions of Law and specifically by:

A. Allowing the Defendants to terminate temporary total disability benefits effective immediately where she has no authority to do that.

B. Granting an overpayment from the date of maximum medical improvement where there is evidence in the Record to sustain that date.

C. Finding that the Claimant sustained a 20% permanent partial disability to his back wherein partial disability was not the issue before the Commissioner and wherein the essential issues for decision were in reference to “disability” as defined in the Act, that being loss of earning capacity, and “loss of use” of the back to do work requiring the use of his back as a scheduled member wherein disability has absolutely nothing to do with that Award and by giving the Defendants a credit against that Award back to the date of maximum medical improvement, especially where there is no evidence that the disability to do work has ended.

D. Finding that the Claimant did not meet his burden of proof to show that he was entitled to any additional medical treatment for the thoracic spine which is contrary to the evidence presented especially whenever that evidence is not even referred to by the Hearing Commissioner, nor is there any evidence that the problems that the Claimant has does not stem from the thoracic spine fusion.

The Form 30 is contained in the Commission file.

IV. DECISION OF THE APPELLATE PANEL

This matter was heard before the SC Workers' Compensation Full Commission Appellate Panel during the last term of Review. The Commissioners considered the matter and **VACATE** the decision and order of the Single Commissioner. The hearing was premature. This is an accepted claim to the back. The claimant asserts permanent and total disability as a result of this work-related accident. As such, the claim is subject to regulation 67-1802(A) which requires mandatory mediation.

ORDER

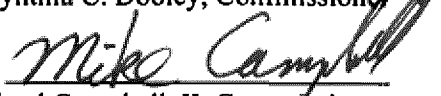
IT IS ORDERED that the Decision and Order of the Single Commissioner is hereby vacated. The Commission orders that the claim be mediated pursuant to S.C. Code Regs. 67-1802(A).

AND SO IT IS ORDERED.

Columbia, SC


Commissioner Gene McCaskill, Commissioner, Chair


Commissioner Cynthia C. Dooley, Commissioner


Commissioner R. Michael Campbell, II, Commissioner

Order Served via email:

<p>E. Courtney Gruber Young Clement cgruber@ycrlaw.com</p>	<p>Preston F. McDaniel McDaniel Law Firm preston@pfmcdlaw.com</p> <p>Don Gibson Gibson Law Firm, LLC dgibson@dgibsonlaw.com</p>
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CERTIFICATE OF SERVICE

This is to certify that the undersigned has on this date served a copy of this order in the above entitled action upon all parties to this case by sending an electronic copy hereof by electronic mail addressed to the attorneys for said parties; or if there is an unrepresented party(ies), by depositing a copy hereof, postage paid in the United States mail, first class, addressed to the unrepresented party(ies) and to the attorney(s) for the represented party(ies).

By Eugenia Hollmon on April 4, 2023

BEFORE THE SOUTH CAROLINA
WORKERS' COMPENSATION COMMISSION

WCC FILE NO. 1921668

EVARISTO VERDUGO MORALES,)	
Employee,)	
Claimant,)	
)	
vs.)	
)	
INSULATION BY COHENS, LLC AND)	ADMINISTRATIVE ORDER
SPRAY FOAM BY COHENS, LLC)	
)	
Employer,)	
and)	
)	
BUILDERS PREMIER INSURANCE)	
COMPANY)	
)	
Carrier,)	
Defendants.)	

The following disposition has been made:

This matter was set for a hearing to be held on October 24, 2023, in Moncks Corner, South Carolina. Defendants filed a form 21 seeking suspension of the Claimant's TTD benefits based on Claimant's failure to attend a medical appointment with Dr. Stofko/non-compliance with medical treatment.

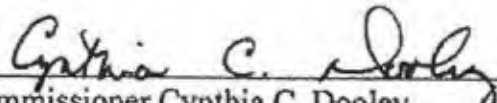
Prior to the scheduled hearing it was determined that the Defendants were not current with TTD benefits, therefore the hearing did not go forward, per Section 42-9-260(F).

It was also determined that the Claimant did not have a good reason for his failure to attend the appointment with Dr. Stofko.

NOW, THEREFORE, IT IS ORDERED that Defendants will reset the appointment with Dr. Stofko and the Claimant is ordered to attend the reset appointment.

AND IT IS SO ORDERED.

South Carolina Workers'
Compensation Commission


Commissioner Cynthia C. Dooley

Columbia, South Carolina

October 30, 2023

CERTIFICATE OF SERVICE

This is to certify that the undersigned has on this date served a copy of this order in the above entitled action upon all parties to this case by sending an electronic copy hereof by electronic mail addressed to the attorneys for said parties; or if there is an unrepresented party(ies), by depositing a copy hereof, postage paid in the United States mail, first class, addressed to the unrepresented party(ies) and to the attorney(s) for the represented party(ies).

By April Cardwell on October 30, 2023

State of South Carolina
Workers' Compensation Commission

DECISION AND ORDER

THE HONORABLE T. SCOTT BECK

SCWCC File No.: 1921668

Evaristo Verdugo Morales,
Claimant,

v.

Insulation By Cohen, LLC,
Employer,

and

Builders Premier Insurance Company,
Carrier,
Defendants.

District 3 - Calhoun

Hearing held in St. Matthews, South Carolina,
on February 29, 2024,

per notice timely and properly served upon all parties of interest.

Appearances: Preston F. McDaniel, Esquire, of McDaniel Law Firm
appeared on behalf of Claimant.

E. Courtney Gruber, Esquire, of Clement Rivers, LLP,
appeared on behalf of Defendants.

Purpose of Hearing: To determine issues as set forth on Forms 50/51 and Form 21
to determine if the Employer/Carrier may stop payment, and
if so, to determine if Claimant is entitled to any further
benefits.

Court Reporter: Cheryl Wiszowaty, ABC Reporting,
257 Summerland Avenue, Batesburg, SC 29006,
Cwiz1959@aol.com, 803-532-5255.

Filed: June 21, 2024

I. STATEMENT OF THE CASE

Claimant contended that, as a result of the work-related accident that occurred October 10, 2019, he suffered injuries to his upper, middle, and lower back, left shoulder, and right shoulder. Claimant took three alternative positions, which were: (1) that he is not at maximum medical improvement (MMI); (2) if it was found that he was at MMI, he argued that he is permanently & totally disabled; and (3) if he is not permanently & totally disabled, he argued that he is permanently partially disabled with a substantial disability rating. Claimant further contended that Defendants were not entitled to any credit for overpayment since the date of MMI, but if credit were awarded, it should date back to August 8, 2023, the date the second Form 21 was filed, at the earliest.

Defendants contended that Claimant reached MMI on 1/8/2020 and that Claimant sustained a 5% permanent impairment to his back as result of the T12 fracture based upon the opinion of the treating physician, Dr. Douglas Stofko, a board-certified neurosurgeon. Defendants further contended that they are entitled to a credit for overpayment of temporary total compensation since 1/8/2020 and that Claimant is not permanently and totally disabled. They further contended that the only compensable injury was the T12 fracture and disputed the compensability of any other body parts.

II. STIPULATIONS

At the call of the case, the parties stipulated as follows:

1. All parties were subject to and bound by the terms and provisions of the South Carolina Workers' Compensation Act.
2. Venue and jurisdiction were proper in Calhoun County, South Carolina.
3. Claimant sustained a compensable injury to the thoracic spine (a T12 fracture) on 10/10/2019.
4. Claimant's average weekly wage is \$1,302.27, with a resulting compensation rate of \$845.74.

III. APA SUBMISSIONS

The following APAs/Exhibits were submitted on behalf of the Employee/ Claimant:

<u>APA/Exhibit</u>	<u>Name of Provider</u>	<u>Date of Report</u>	<u>Page Nos.</u>
1.	Grace Physical Therapy Rod Tyler, PTR/L, CHT, CSFA (FCE)	10/23/2020	1-11
2.	Southeastern Spine Institute Leonard Forrest, MD Steven C. Poletti, MD	04/01/2021-12/11/2023	12-19a-c
3.	Charleston Pain & Rehab. Ctr. Jeffrey Buncher, MD	01/28/2021	20-30
4.	Harriet Fowler, M.Ed., CRC Harriet Fowler VR Services	04/12/2021	31-43
5.	Consent Order		44-45
6.	Trident Health Systems and Moncks Corner Medical Center	10/10/2019-10/11/2019	46-81
7.	Trident Orthopaedic Specialists Douglas Stofko, MD Alana N. Cole, PA-C Josephine L. Jeanings, PC	10/23/2019-01/10/2024	82-103a-e
8.	Roper St. Francis PT	03/16/2020-03/24/2020 03/25/2020-04/23/2020	104-110a-e
9.	Flores Contracting records	11/22/2022-01/12/2023	111-117
10.	Photographs of Claimant		118-122
11.	Deposition Transcript of Alana N. Cole, PA-C		
12.	Deposition Transcript of Douglas Stofko, MD		
13.	Order Instructions	09/10/2020	123-124

The following APAs were submitted on behalf of Defendants:

<u>APA</u>	<u>Name of Provider</u>	<u>Date of Report</u>	<u>Page Nos.</u>
1.	Trident Orthopaedic Specialists	10/23/19-1/10/24	1-57
2.	American Health Imaging	12/19/23	58-62
3.	CORA Physical Therapy	12/24/20	63-64
4.	Trident Health System	10/10/19-1/3/23	65-157
5.	Berkeley County EMS	3/26/21	158-162
6.	RSFPP Orthopaedics	7/14/22	163-164
7.	Supplemental filing: Trident Orthopaedic Specialists	8/12/20-12/16/20	364-373
8.	Supplemental filing: Trident Orthopaedic Specialists	8/12/20-4/19/21	374-375

The following Exhibits were submitted on behalf of Defendants:

Exhibits:

A. Notices of Deposition and correspondence re depositions of Dr. Stofko and Alana Cole	8/31/23-1/18/24	165-232
B. Correspondence re 9/11/23 appointment	8/24/23-9/12/23	233-235
C. Records of Flores Contracting	11/22/22-1/12/23	236-243
D. Decision & Order	1/11/21	244-253
E. Deposition of Dr. Stofko*	1/15/24	254-342
F. Deposition of claimant	3/13/20	343-355
G. Deposition of claimant	9/25/23	356-363
H. Supplemental filing: Deposition of Alana Cole	2/13/24	376-417
I. Supplemental filing: Deposition of Dr. Stofko	2/13/24	418-605

*Claimant objected to Defendants Exhibit E. After arguments of counsel, the objection was sustained but the exhibit was proffered.

Exhibits – Marked by Court Reporter

Defendant Exhibit 1	2/29/24	Photograph
Defendant Exhibit 2	2/29/24	Photograph
Defendant Exhibit 3	2/29/24	Photograph

IV. EVIDENCE OF THE CASE

The record reflects that Claimant fell from a ladder at work on 10/10/2019 and sustained a fracture to the thoracic spine at Level 12. He underwent surgical fusion from T11 to L1, performed by Dr. Douglas Stofko, a board-certified neurosurgeon. A Form 50 was filed alleging injury to the upper, middle, and lower back, left shoulder, right shoulder, fracture of T12, and concussion. This case is admitted as to the back based on the fracture at T12; however, Defendants deny that Claimant sustained any compensable injury to any other body parts.

The first hearing in this case was held on 8/13/2020, at which time Claimant was specifically seeking medical treatment for the lumbar and cervical spine as well as the left and right shoulders. In an order filed on 1/11/2021, the single commissioner found that there was no medical opinion supporting a causal connection between the accident and the lower back pain. Furthermore, the single commissioner found that there was no medical opinion supporting a causal connection between the accident and the pain radiating down Claimant's legs and both shoulders. The single commissioner also found that the only compensable injury was the T12 fracture, and that order was not appealed.

A subsequent Form 50 was filed on 1/11/2021 alleging compensability of the same injuries that the single commissioner had already found were not causally related to this accident as a matter of law. A Form 21 was filed on 2/5/2021 based upon a Form 14B dated 1/12/2021 from the authorized treating physician, Dr. Stofko, finding that Claimant had reached MMI on 1/8/2020. A

hearing was held on 4/26/2021, but order instructions were not issued until 2/23/2022. The single commissioner found in her order, filed on 3/22/2022, that Claimant reached MMI on 1/8/2020, that Defendants were entitled to credit dating back to 1/8/2020, and that Claimant had sustained 20% PPD to his back as a result of the T12 fracture. The order also found that the unappealed order from 1/11/2020 was the law of the case with regard to causal connection to the fracture at T12 and other alleged injuries to the cervical spine, lumbar spine, and both shoulders. Claimant filed a Motion to Reconsider on 3/24/2022 which was denied on 10/3/2022, resulting in additional delay of nearly six (6) months.

An appeal was filed to the Appellate Panel which found in an order filed on 4/4/2023 that the claim was subject to mandatory mediation, as permanent & total disability was one of the positions taken by Claimant and vacated the earlier order filed 3/22/2022. The merits of the order on appeal were not commented upon. Mediation was unsuccessfully attempted on 7/19/2023.

V. FINDINGS OF FACT

Based upon the above stipulations and evidence of the case, the undersigned commissioner finds the following facts based upon the preponderance of the evidence:

1. All parties are subject to and bound by the terms and provisions of the South Carolina Workers' Compensation Act.
2. Jurisdiction and venue are proper.
3. That Claimant's average weekly wage is \$1,302.27 with a resulting compensation rate of \$845.74.
4. Claimant sustained a compensable injury to the thoracic spine (T12 fracture) on 10/10/2019.
5. The only compensable injury in this case is the fracture at T12.

6. The issue of whether or not Claimant sustained compensable injuries to the cervical spine, lumbar spine, and both shoulders was already litigated at an evidentiary hearing held on 8/13/2020. The resulting order, filed on 1/11/2021, denied compensability of those other claimed body parts, and that order was not appealed.
7. With regard to the functional capacity evaluation (FCE) dated 10/23/2020 (Claimant APA 1), it is found as a fact that the evaluator stated at page 1: “The results of this evaluation cannot be considered valid.”
8. The findings in the functional capacity evaluation carry no evidentiary weight because (1) the evaluator stated that the results cannot be considered valid and (2) the deficits noted on page 3 of the FCE, which are the basis for the evaluation’s findings, concern body parts that are not compensable and, therefore, not relevant to this case.
9. Dr. Stofko stated in his deposition that paragraphs 1-4 on page 3 of the FCE were not causally related to the T-12 fracture. (Second Deposition of Dr. Stofko, Defendants’ APA p. 482, lines 18-25; p. 483, lines 1-23; p 484, lines 6-14).
10. Claimant’s vocational evaluation (Claimant APA 4) is not given any weight due to its reliance the findings of the functional capacity evaluation, which has been found to carry no evidentiary weight, as the stated limitations were based upon body parts that are not causally related to the compensable injury.
11. Furthermore, Claimant’s vocational evaluation is also excluded due to due process concerns. Defendants requested that Claimant undergo a neuropsychological evaluation and a second evaluation with a vocational expert; however, Claimant declined. Defendants filed a motion to compel, which was denied by the commission pursuant to S.C. Code Ann. § 42-15-80 because neither of the requested evaluators was a physician or surgeon. Because of

Defendants' inability to obtain expert vocational and neuropsychological evaluations in this claim, to protect Defendants' due process rights, Claimant's vocational evaluation is given no weight.

12. No weight is given to Dr. Poletti's opinion because of his inability to objectively assess claimants' impairments. In multiple different cases, Dr. Poletti has described himself on the record as an, "unashamed patient advocate"; these statements preclude him from being able to give a truly independent medical evaluation. (See the order from SC Workers' Compensation Commission case number 2205977, issued on March 15, 2024, pages 10-13.)
13. The opinions stated by Dr. Leonard Forrest (Claimant's APA 2) are outweighed by the greater weight of the relevant medical evidence in the case and are based largely on injuries that go beyond the T12 fracture and are not compensable in this case. Furthermore, Dr. Forrest's opinions were heavily based on findings from the FCE which were not relevant to the only compensable injury in this case, the T12 fracture. Therefore, Dr. Forrest's opinions in this case are afforded no evidentiary weight.
14. Dr. Jeffrey Buncher's opinions are largely based upon body parts that are found not to be compensable; therefore, Dr. Buncher's opinions in this case are also given no weight.
15. Claimant was treated in the emergency room by Dr. Douglas Stofko, a board-certified neurosurgeon who was on call the date of the accident.
16. Dr. Stofko performed a two-level fusion from T11 to L1 for the T12 fracture, which was the compensable injury resulting from this accident.
17. Dr. Stofko testified in his deposition that Physician's Assistant Alana Cole was an "extender of me. So all her orders, anything that she's doing is acting under me." (Second Deposition of Dr. Stofko, Defendants' APA p. 457, lines 1-11). However, the record does not appear to

contain an instance of Dr. Stofko specifically endorsing PA Alana Cole's opinions contained in her 14B.

18. Dr. Stofko testified that the opinions he had rendered in a questionnaire he had completed at the request of Claimant's Attorney Don Gibson on 11/18/2020 were still his opinions. (Second Deposition of Dr. Stofko, Defendants' APA p. 478, lines 1-25, p. 479, lines 1-7).
19. Claimant's radicular pain noted in the left upper and left lower extremities is not causally related to the T12 fracture. (Second Deposition of Dr. Stofko, Defendants' APA p. 479, lines 2-7).
20. The cervical complaints and medical treatment noted in Claimant's medical records were not causally related to the T12 fracture. (Second Deposition of Dr. Stofko, Defendants' APA p. 482, lines 2-12).
21. Complaints expressed by Claimant to PA Alana Cole, specifically that he was having pain at the screw sites from his previous surgery, are not supported by the greater weight of medical evidence in the record; PA Cole testified in her deposition that the area he was referencing as being painful was above the screw sites. (PA Cole deposition p. 6, 1-24).
22. Dr. Stofko further testified that he did not believe Claimant's complaints noted in the 1/10/2024 visit were due to his original accident that Dr. Stofko treated him for in October, 2019. (Second Deposition of Dr. Stofko, Defendants' APA p. 482, lines 1-12).
23. Claimant reached maximum medical improvement on 1/8/2020. (Defendants' APA 1, p. 24).
24. The MRI of the lumbar spine ordered in the 14B is no longer necessary in light of the lumbar MRI that was done 8/8/2020. (PA Cole deposition, p. 38, lines 9-24).

25. Claimant testified in his deposition that he was gainfully employed at Integrated Site Management (ISM) from around the last days of May 2022 until August 2022, earning \$15.00 an hour working 5-6 hours a day, Monday through Friday. (Morales Deposition, p. 14, lines 9-24, p. 20 lines 10-14, p.18, lines 9-20).
26. Claimant testified in his deposition that from August 2022 to November 2022, he worked at Flores Construction making \$16.00 an hour working 30, 32, 35, and sometimes 40 hours a week. (Morales deposition p.18, lines 20-25, p. 19, lines 1-16, p. 20 lines 2-9).
27. Payroll records from Flores Contracting LLC indicate Claimant received checks beginning on 11/22/2022 and continuing through 1/12/2023. (Defendant APA Exhibit C).
28. Claimant was on non-weight-bearing status for his left leg and on crutches for approximately four months as a result of a car wreck which occurred 12/31/2022, resulting in fractures to seven ribs (right at 5 & 6, left at 3-6), a sternum fracture, and a severely comminuted fracture to the tibial plateau necessitating surgery and permanent installation of orthopedic hardware. (Defendant APA 4, p. 122,123,142,143). (Claimant deposition, p. 12, lines 3-19).
29. The parties attempted to resolve the issues at mediation on 7/19/2023, but mediation was unsuccessful.
30. The greater weight of medical evidence indicates that Claimant sustained 5% impairment to his back as a result of the T12 fracture. (Defendant APA 1, p. 24).
31. Defendants are entitled to credit for overpayment of temporary total compensation since 7/19/2023 for the following reasons:
 - (a) Even though MMI was reached on 1/8/2020, Defendants' authorized provider did not submit a Form 14B stating Claimant was at MMI until 1/12/2021.

- (b) Following Defendants' filing of their Form 21 on 2/5/2023, a hearing was held on 4/26/2022, order instructions were not received until 2/23/2022, and the subsequent order was filed on 3/22/2022;
- (c) Following the single commissioner's order, the case underwent an appeal process by which the single commissioner's order was vacated for being premature, as the case needed to go to mandatory mediation before an order could be issued.
- (d) The delays in getting a final order for this matter are not attributable to the claimant; therefore, it would be fundamentally unfair to give Defendants credit dating back to the date of MMI.

VI. CONCLUSIONS OF LAW

Based upon the above stipulations, statement of the case, APA submissions, evidence of the case, findings of fact, and South Carolina law, the following conclusions of law are made:

1. S.C. Code Ann. § 42-1-160 defines injury by accident and further defines medical evidence as "an expert opinion or testimony stated to a reasonable degree of medical certainty, documents, records, or other material that is offered by a licensed healthcare provider."
2. Pursuant to *Ashe v. Swenson*, 397 U.S. 436, 443, 90 S.Ct. 1189, 1194, 25 L.Ed.2d 469 (1970), "[w]hen an issue of ultimate fact has once been determined by a valid and final judgement, that issue cannot again be litigated between the same parties in any future lawsuit."
3. Claimant is entitled to lifetime maintenance, repair, and replacement for any hardware he retains as a result of treatment of his compensable T12 vertebra injury.

4. Claimant is entitled to any ongoing treatment for his injury to his T12 vertebra as recommended by the authorized treating physician, Dr. Douglas Stofko.
5. Claimant is entitled to an award of 45% permanent partial disability to the back, which, pursuant to S.C. Code Ann. § 42-9-30 (21), equates to 135 weeks of permanent partial disability. At a compensation rate of \$845.74, 135 weeks equals \$114,174.90.
6. S.C. Code Ann. § 42-9-210 provides for deduction from compensation of payments made by employer when not due and payable.
7. Pursuant to the commission's authority under § 42-9-210, I find that Defendant is only entitled to credit dating back to 7/19/2023, the date of the failed mediation.

ORDER

Based upon the above stipulations, findings of fact, and conclusions of law,

IT IS HEREBY ORDERED that Defendants may stop payments of temporary disability.

IT IS FURTHER ORDERED that Defendants will pay Claimant permanent partial disability in accordance with his 45% disability rating to the back at a compensation rate of \$845.74, minus credit for weekly benefits paid since 7/19/2023.

IT IS FURTHER ORDERED that Claimant is entitled to any ongoing treatment for his injury to his T12 vertebra as recommended by the authorized treating physician, Dr. Douglas Stofko.

IT IS FURTHER ORDERED that Claimant is entitled to lifetime maintenance, repair, and replacement for any hardware he retains as a result of treatment of his compensable T12 vertebra injury.

IT IS FURTHER ORDERED that no hearing costs or penalties are assessed in this matter.

AND SO IT IS ORDERED.



T. Scott Beck, Commissioner

6/21/24 (date)

Columbia, SC

CERTIFICATE OF SERVICE

This is to certify that the undersigned has on this date served a copy of this order in the above entitled action upon all parties to this case by sending an electronic copy hereof by electronic mail addressed to the attorneys for said parties; or if there is an unrepresented party(ies), by depositing a copy hereof, postage paid in the United States mail, first class, addressed to the unrepresented party(ies) and to the attorney(s) for the represented party(ies).

By Shawnee Radcliff on June 21, 2024

BEFORE THE
SOUTH CAROLINA WORKERS' COMPENSATION COMMISSION

WCC FILE NO. 1921668

Evaristo Verdugo Morales,)
)
 Claimant,)
 vs.)
)
 Insulation by Cohens, LLC &)
 Spray Foam By Cohens, LLC,)
)
 Employer,)
)
 Builders Premier Insurance Company,)
)
 Carrier,)
)
 _____)

MOTION ORDER

A Motion regarding the following request has been received by the Claimant Attorney Preston F McDaniel

Motion for Reconsideration Pursuant to SC Code §1-23-380 and Reg. 67-215 (B) (2)

The following disposition has been made: _____ GRANTED Denied



T. Scott Beck, Commissioner

CERTIFICATE OF SERVICE

This is to certify that the undersigned has on this date served a copy of this order in the above entitled action upon all parties to this case by sending an electronic copy hereof by electronic mail addressed to the attorneys for said parties; or if there is an unrepresented party(ies), by depositing a copy hereof, postage paid in the United States mail, first class, addressed to the unrepresented party(ies) and to the attorney(s) for the represented party(ies).

By Shawnee Radcliff on July 18, 2024

State of South Carolina
Workers' Compensation Commission

APPELLATE PANEL DECISION AND ORDER

COMMISSION PANEL: The Honorable Cynthia C. Dooley; The Honorable Gene McCaskill
and The Honorable R. Michael Campbell.

SCWCC File No.: 1921668

Evaristo Verdugo Morales,

Claimant,

v.

Insulation by Cohen, LLC,

Employer,

and

Builders Premier Insurance Co.,

Carrier,

Defendants.

AFFIRMED

Hearing held in Richland County, South Carolina,
on October 14, 2024

Per notice timely and properly served upon all Parties of Interest.

Appearances: Preston McDaniel, of McDaniel Law Firm, appeared on behalf
of Claimant/2nd Appellant.

E. Courtney Gruber, of Clement Rivers, LLP, appeared on behalf
of Defendants/1st Appellants.

Court Reporter: Amber Scarborough, 1230 Richland St, Columbia, SC 29201,
803-252-3445, contact@creelreporting.com.

Filed:

December 3, 2024

I. STATEMENT OF THE CASE

Single Commissioner

On February 29, 2024, a hearing was held before a Single Commissioner to determine issues set forth on the parties' Forms 50, 51 and 21. Claimant sustained a compensable injury limited to his thoracic spine at T-12 on October 10, 2019, pursuant to the unappealed Single Commissioner's Decision and Order filed on January 11, 2021. Claimant maintained he was not at maximum medical improvement (MMI) for his injury and sought ongoing medical care for the same. In the alternative, Claimant sought a permanent total disability determination and future medical care. Claimant further sought a finding that Defendants were not entitled to a credit for the overpayment of temporary compensation, but if awarded, the credit should date back to Defendants' Form 21, Request for Hearing, on August 8, 2023.

Defendants maintained that Claimant reached MMI on January 8, 2020, but continued to receive temporary compensation. Defendants based this contention on the Form 14B, Physician's Statement, dated January 12, 2021. Defendants sought to stop payment of Claimant's temporary compensation. Defendants further sought a permanent partial disability determination and a credit for the overpayment of Claimant's temporary compensation from his date of MMI.

The Single Commissioner determined, *inter alia*:

[D]efendants may stop payments of temporary disability. [D]efendants will pay Claimant permanent partial disability in accordance with his 45% disability rating to the back at a compensation rate of \$845.74, minus credit for weekly benefits paid since 7/19/23. [C]laimant is entitled to any ongoing treatment for his injury to his T12 vertebra as recommended by the authorized treating physician, Dr. Douglass Stofko. [C]laimant is entitled to lifetime maintenance, repair, and replacement for any hardware he retains as a result of treatment of his compensable T12 vertebra injury.

(Single Commissioner's Decision and Order filed on June 21, 2024, p. 12.)

Full Commission

This matter is now before the South Carolina Workers' Compensation Commission's Appellate

Panel pursuant to issues raised on appeal by the parties. Within the statutory period, Claimant and Defendants each filed a Form 30, Request for Commission Review. Accordingly, the parties presented for oral arguments before the Appellate Panel on October 14, 2024.

II. SINGLE COMMISSIONER FINDINGS OF FACT AND CONCLUSIONS OF LAW

FINDINGS OF FACT

Based upon the above stipulations and evidence of the case, the [Single Commissioner] finds the following facts based upon the preponderance of the evidence:

1. All parties are subject to and bound by the terms and provisions of the South Carolina Workers' Compensation Act.
2. Jurisdiction and venue are proper.
3. That Claimant's average weekly wage is \$1,302.27 with a resulting compensation rate of \$845.74.
4. Claimant sustained a compensable injury to the thoracic spine (T12 fracture) on 10/10/2019.
5. The only compensable injury in this case is the fracture at T12.
6. The issue of whether or not Claimant sustained compensable injuries to the cervical spine, lumbar spine, and both shoulders was already litigated at an evidentiary hearing held on 8/13/2020. The resulting Order, filed on 1/11/2021, denied compensability of those other claimed body parts, and that Order was not appealed.
7. With regard to the functional capacity evaluation (FCE) dated 10/23/2020 (Claimant APA 1), it is found as a fact that the evaluator stated at page 1: "The results of this evaluation cannot be considered valid."
8. The findings in the functional capacity evaluation carry no evidentiary weight because (1) the evaluator stated that the results cannot be considered valid and (2) the deficits noted on page 3

of the FCE, which are the basis for the evaluation's findings, concern body parts that are not compensable and, therefore, not relevant to this case.

9. Dr. Stofko stated in his deposition that paragraphs 1-4 on page 3 of the FCE were not causally related to the T-12 fracture. (Second Deposition of Dr. Stofko, Defendants APA p. 482, lines 18-25; p. 483, lines 1-23; p 484, lines 6-14).
10. Claimant's vocational evaluation (Claimant APA 4) is not given any weight due to its reliance (sic) the findings of the functional capacity evaluation, which has been found to carry no evidentiary weight, as the stated limitations were based upon body parts that are not causally related to the compensable injury.
11. Furthermore, Claimant's vocational evaluation is also excluded due to due process concerns. Defendants requested that Claimant undergo a neuropsychological evaluation and a second evaluation with a vocational expert; however, Claimant declined. Defendants filed a motion to compel, which was denied by the Commission, pursuant to S.C. Code Ann. § 42-15-80, because neither of the requested evaluators was a physician or surgeon. Because of Defendants' inability to obtain expert vocational and neuropsychological evaluations in this claim, to protect Defendants' due process rights, Claimant's vocational evaluation is given no weight.
12. No weight is given to Dr. Poletti's opinion because of his inability to objectively assess Claimants' impairments. In multiple different cases, Dr. Poletti has described himself on the record as an, "unashamed patient advocate"; these statements preclude him from being able to give a truly independent medical evaluation. (See the Order from SC Workers' Compensation Commission case number 2205977, issued on March 15, 2024, pages 10-13.)
13. The opinions stated by Dr. Leonard Forrest (Claimant APA 2) are outweighed by the greater weight of the relevant medical evidence in the case and are based largely on injuries that go

beyond the T12 fracture and are not compensable in this case. Furthermore, Dr. Forrest's opinions were heavily based on findings from the FCE which were not relevant to the only compensable injury in this case, the T12 fracture. Therefore, Dr. Forrest's opinions in this case are afforded no evidentiary weight.

14. Dr. Jeffrey Buncher's opinions are largely based upon body parts that are found not to be compensable; therefore, Dr. Buncher's opinions in this case are also given no weight.

15. Claimant was treated in the emergency room by Dr. Douglas Stofko, a board-certified neurosurgeon who was on call the date of the accident.

16. Dr. Stofko performed a two-level fusion from T11 to L1 for the T12 fracture, which was the compensable injury resulting from this accident.

17. Dr. Stofko testified in his deposition that Physician's Assistant Alana Cole was an "extender of me. So all her orders, anything that she's doing is acting under me." (Second Deposition of Dr. Stofko, Defendants' APA p. 457, lines 1-11). However, the record does not appear to contain an instance of Dr. Stofko specifically endorsing PA Alana Cole's opinions contained in her 14B.

18. Dr. Stofko testified that the opinions he had rendered in a questionnaire he had completed at the request of Claimant's Attorney Don Gibson on 11/18/2020 were still his opinions. (Second Deposition of Dr. Stofko, Defendants APA p. 478, lines 1-25, p. 479, lines 1-7).

19. Claimant's radicular pain noted in the left upper and left lower extremities is not causally related to the T12: fracture. (Second Deposition of Dr. Stofko, Defendants APA p. 479, lines 2-7).

20. The cervical complaints and medical treatment noted in Claimant's medical records were not causally related to the T12 fracture. (Second Deposition of Dr. Stofko, Defendants APA p. 482, lines 2-12).

21. Complaints expressed by Claimant to PA Alana Cole, specifically that he was having pain at the

screw sites from his previous surgery, are not supported by the greater weight of medical evidence in the record; PA Cole testified in her deposition that the area he was referencing as being painful was above the screw sites. (PA Cole Deposition p. 6, 1-24).

22. Dr. Stofko further testified that he did not believe Claimant's complaints noted in the 1/10/2024 visit were due to his original accident that Dr. Stofko treated him for in October, 2019. (Second Deposition of Dr. Stofko, Defendants APA p. 482, lines 1-12).
23. Claimant reached maximum medical improvement on 1/8/2020. (Defendants APA 1, p. 24).
24. The MRI of the lumbar spine ordered in the 14B is no longer necessary in light of the lumbar MRI that was done 8/8/2020. (PA Cole Deposition, p. 38, lines 9-24).
25. Claimant testified in his deposition that he was gainfully employed at Integrated Site Management (ISM) from around the last days of May 2022 until August 2022, earning \$15.00 an hour working 5-6 hours a day, Monday through Friday. (Morales Deposition, p. 14, lines 9-24, p. 20 lines 10-14, p.18, lines 9-20).
26. Claimant testified in his deposition that from August 2022 to November 2022, he worked at Flores Construction making \$16.00 an hour working 30, 32, 35, and sometimes 40 hours a week. (Morales Deposition p.18, lines 20-25, p. 19, lines 1-16, p. 20 lines 2-9).
27. Payroll records from Flores Contracting LLC indicate Claimant received checks beginning on 11/22/2022 and continuing through 1/12/2023. (Defendants APA Exhibit C).
28. Claimant was on non-weight-bearing status for his left leg and on crutches for approximately four months as a result of a car wreck which occurred 12/31/2022, resulting in fractures to seven ribs (right at 5 & 6, left at 3-6), a sternum fracture, and a severely comminuted fracture to the tibial plateau necessitating surgery and permanent installation of orthopedic hardware. (Defendants APA 4, p. 122,123,142,143). (Claimant Deposition, p. 12, lines 3-19).

29. The parties attempted to resolve the issues at mediation on 7/19/2023, but mediation was unsuccessful.

30. The greater weight of medical evidence indicates that Claimant sustained 5% impairment to his back as a result of the T12 fracture. (Defendants APA 1, p. 24).

31. Defendants are entitled to credit for overpayment of temporary total compensation since 7/19/2023 for the following reasons:

(a) Even though MMI was reached on 1/8/2020, Defendants' authorized provider did not submit a Form 14B stating Claimant was at MMI until 1/12/2021.

(b) Following Defendants' filing of their Form 21 on 2/5/2023 (sic), a hearing was held on 4/26/2022 (sic), Order instructions were not received until 2/23/2022, and the subsequent Order was filed on 3/22/2022.¹

(c) Following the Single Commissioner's Order, the case underwent an appeal process by which the Single Commissioner's Order was vacated for being premature, as the case needed to go to mandatory mediation before an Order could be issued.

(d) The delays in getting a Final Order for this matter are not attributable to Claimant; therefore, it would be fundamentally unfair to give Defendants credit dating back to the date of MMI.

CONCLUSIONS OF LAW

Based upon the above stipulations, statement of the case, APA submissions, evidence of the case, findings of fact, and South Carolina law, the following conclusions of law are made:

1. S.C. Code Ann. § 42-1-160 defines injury by accident and further defines medical evidence as "an

¹ The Single Commissioner's Decision and Order contained scrivener's errors under Finding of Fact No. 31(b). Specifically, the dates of the hearing and Defendants' Form 21 filing are incorrect. Those dates have been amended in accord with the record under the Appellate Panel's Findings of Fact, *infra*.

expert opinion or testimony stated to a reasonable degree of medical certainty, documents, records, or other material that is offered by a licensed healthcare provider."

2. Pursuant to *Ashe v. Swenson*, 397 U.S. 436, 443, 90 S.Ct. 1189, 1194, 25 L.Ed.2d 469 (1970), "[w]hen an issue of ultimate fact has once been determined by a valid and final judgement, that issue cannot again be litigated between the same parties in any future lawsuit."
3. Claimant is entitled to lifetime maintenance, repair, and replacement for any hardware he retains as a result of treatment of his compensable T12 vertebra injury.
4. Claimant is entitled to any ongoing treatment for his injury to his T12 vertebra as recommended by the authorized treating physician, Dr. Douglas Stofko.
5. Claimant is entitled to an award of 45% permanent partial disability to the back, which, pursuant to S.C. Code Ann. § 42-9-30 (21), equates to 135 weeks of permanent partial disability. At a compensation rate of \$845.74, 135 weeks equals \$114,174.90.
6. S.C. Code Ann. § 42-9-210 provides for deduction from compensation of payments made by an employer when not due and payable.
7. Pursuant to the Commission's authority under § 42-9-210, I find that Defendant (sic) is only entitled to credit dating back to 7/19/2023, the date of the failed mediation.

III. ISSUES ON APPEAL

Defendants/ 1st Appellants

1. The Single Commissioner erred in finding as a fact (paragraph 31) that Defendants are entitled to credit for overpayment of temporary total compensation only since 7/19/2023 in that the finding is not supported by the greater weight of evidence and statutory and case law.
2. The Single Commissioner erred in finding as a fact and concluding as a matter of law that Defendants are entitled to a credit for overpayment of temporary total compensation since 7/19/2023 in that Finding of Fact No. 31 (b) contains incorrect factual information and cannot be a legitimate basis for Finding of Fact No. 31. Contrary to Finding of Fact No. 31(b), Defendants filed their Form 21 on 2/5/2021, not 2/5/2023, and the hearing was held on 4/26/2021, not 4/26/2022.

3. The Single Commissioner erred in finding as a fact and concluding as a matter of law that the credit for overpayment of temporary total compensation should be limited to payments made since 7/19/2023 based upon the finding that the delays in getting a final Order for this matter are not attributable to Claimant and, therefore, it would be fundamentally unfair to give Defendants credit back to the date of MMI. The error in this matter is that the delays in getting the final Order for this matter are not attributable to either party and that Defendants have paid to Claimant a total of \$182,875.16 in indemnity since the date of MMI (\$3,578.28 TPD from 1/19/2020 to 4/1/2020; \$845.74 per week from 4/2/2020 to 2/23/2022; \$57,127.36 lump sum following remand for mediation paid 5/18/2023; and \$845.74 weekly until 4/25/2024 when Order instructions were received, for a total of 216 weeks).
4. The Single Commissioner erred in finding as a fact and concluding as a matter of law that Defendants are only entitled to a credit for overpayment of benefits since 7/19/2023 in spite of the fact that MMI was reached on 1/8/2020 in that such a finding is an abuse of discretion and not supported by current case law.
5. The Single Commissioner erred in Finding of Fact No. 31 in that the finding, to wit: that awarding credit back to the date of MMI would be fundamentally unfair to Claimant, does not take into account the fact that he has been paid a total of \$182,875.16 since 1/8/2020, the date of MMI, and is erroneously based upon a presumption that failure to pay his award in lump sum rather than weekly installments is in itself "fundamentally unfair." Further, the findings do not take into account the fact that Claimant did receive a lump-sum payment of \$57,127.36 following the Appellate Panel remand for mediation.
6. The Single Commissioner erred in finding as a fact that Defendants were only entitled to credit for weekly payments after 7/19/2023 in that the finding does not take into consideration the fact that Claimant was gainfully employed from at least May 2022 to January 2023.
7. The Single Commissioner erred in finding as a fact and concluding as a matter of law that Claimant had sustained 45% permanent partial disability to the back, the error being that the only credible medical evidence in the record is that Claimant had sustained 5% permanent partial impairment to his back and had no physical limitations resulting from this injury.

Claimant/2nd Appellant

1. That pursuant to S.C. Code of Laws §42-17-50, Claimant requests a review of all of the Findings of Fact, the Conclusions of Law, the Order and Award and of all rulings and decisions made by the Commissioner at the hearing, as contained in the record or as made at any unrecorded pre-hearing conference, and in any communications concerning the claim, Order, Award and Decision rendered by the Hearing Commissioner in this matter.
2. That Claimant requests review for all the reasons as set forth in the Motion for Reconsideration that was filed with the Commission electronically on June 26, 2024, and incorporated herein by

reference. The Decision of the Hearing Commissioner should be reversed as a matter of law and in fact based on the errors as set forth in the Motion.

3. That wherein Claimant made a request for an Award for total and permanent disability based on a total loss of earning capacity under SC Code §42-9-10 (A), the Hearing Commissioner erred as a matter of law by failing to make one single Finding of Fact or Conclusion of Law or decision on Claimant's entitlement to an Award for total and permanent disability for a total loss of earning capacity as defined in the Act. Claimant's burden is by a preponderance of the evidence, which wherein if the scales and evidence tip ever so slightly in favor of the injured worker, the Award must be made. Quoting from *Broughton v. SC Game & Fish Dept.*, 219 S.C. 50, 64 S.E.2d 152 (1951):

Claimant who asserts the right to compensation carries the burden of establishing the necessary facts to entitle him to such compensation. The evidence will ordinarily be regarded as sufficient where the circumstances shown tend to establish the ultimate facts in issue and prove a basis from which they reasonable may be inferred. An award cannot, however, be based upon mere possibilities, probabilities, surmises or conjectures.

4. The Hearing Commissioner erred by not awarding Claimant total and permanent disability for having lost 50% or more of the functional use of his back to do work requiring the use of his back. Mr. Morales testified that in his opinion he had lost 80% of the functional use of his back to do work requiring the use of his back. There is no Finding of Fact on that testimony or challenging that opinion.

Further, while the Commissioner gave no weight to the testimony of Dr. Leonard Forrest due to the contested Functional Capacity Evaluation, Dr. Forrest's impairment evaluation was based on his evaluation and was made under the AMA Guides. Dr. Forrest assigned a regional impairment to the thoracic spine injury of greater than 100% to the thoracic spine and 22% to the whole person. Dr. Steven Poletti whose opinion was not given any weight because he is a "patient's advocate", in addition Dr. Poletti also based on his evaluation assigned a 28% whole person impairment which converted to over 100% impairment to the thoracic spine as a Regional impairment. The treating physical therapist stated at the end of treatment that Claimant could return to no more than "sedentary" work. The physical therapist who conducted the contested Functional Capacity Evaluation based on the first summary page found the results to be valid based on the valid and consistent effort he gave during the evaluation and limited him to light duty work. Thus, under the decisions of the SC Supreme Court and Court of Appeals, the Commissioner should have awarded Claimant total and permanent disability for having lost 50% or more of the functional use of his back to do work requiring the use of his back based on the medical testimony, testimony of Claimant, and other evidence in the record other than the contested Functional Capacity Evaluation.

5. That the Hearing Commissioner erred by failing to set out the evidence upon which he relied in arriving at his disability award of 45% to the back.

6. That the Hearing Commissioner erred by not addressing the overall loss of use of Claimant's back regardless of whether or not the upper or lower back were compensable under the SC Supreme Court and Court of Appeals decisions. This Commission cannot ignore or change the Law and is not only duty bound to a liberal construction of the Act and to resolve every inference and ambiguity and presumption in favor of benefits to the injured worker, but the Commission is duty bound to decide cases under a preponderance of the evidence and view the evidence in the light most favorable to the injured worker. The preponderance of the evidence standard dictates that benefits should be awarded where if the scales of justice tip ever so slightly in favor of benefits to the injured worker, benefits are to be awarded.
7. That the Hearing Commissioner erred as a matter of law by failing to make Conclusions of Law or even cite Conclusions of Law in reference to SC Code §42-9-10 (A) and failing to note the SC Supreme Court and Court of Appeals decisions on total and permanent disability for a loss of earning capacity including by not following the directions to this Commission under SC Code §42-9-190. That section requires that where a Claimant claims that he is disabled and the employer and its insurance carrier do not offer or procure suitable work within his residual capacity pursuant to their claim that he is not disabled and the worker establishes a prima facie case that he is totally disabled as defined in the Act under SC Code §42-1-120 and §42-9-10 (A) and thus makes a prima facie case entitling him to an award, Defendants must put up evidence to the contrary of, which there is none in this case.
8. That the Hearing Commissioner erred as a matter of law by failing to apply the preponderance of the evidence standard to the evidence in this matter.
9. That the Hearing Commissioner erred as a matter of law by going outside of the record before him in making his decision and specifically citing case law that was not cited to the Commissioner by either party and making such Findings of Fact, as Finding #12, wherein he states and gives no weight to the opinion of Dr. Poletti based on information outside of the record. That very Finding is arbitrary and capricious and constitutes an abuse of discretion and requires a de novo hearing.
10. That having found that Dr. Douglas Stofko did not endorse the Form 14B and thus the impairment or anything else on the Form 14B, by making Finding of Fact #30. The Commissioner nowhere, and Claimant would reiterate nowhere, makes in his Notes for Decision a finding that the greater weight of the evidence indicates that Claimant sustained a 5% impairment to his back. This is simply as the defense lawyer advised the Commission, which is part of the record; her attempt to bolster the decision.
11. That the Hearing Commissioner erred in the Order by endorsing and making Findings of Fact #18, #19, #20, #21, #22, #24, #25, #26, #27, #28, and #30 whereas there is absolutely no mention of any of those Findings of Fact or about that evidence in the Commissioner's Notes for Decision. It is the Commissioner's responsibility to make Findings of Fact upon which he bases his decision and the defense lawyer admitted that these Findings of Fact are entered by her to augment/bolster the Commissioner's Decision.
12. That the Hearing Commissioner erred as a matter of law in his Notes for Decision Finding #8 and

Order Finding of Fact #11 in reference to giving no weight to the vocational evaluation based on due process concerns. Without citing any cases or statutory provisions allowing for such evaluations, the Hearing Commissioner due to Defendants' inability to obtain expert vocational and neurological evaluations in this claim and in order to, "protect Defendants' due process rights, Claimant's vocational evaluation is given no weight." Defendants have absolutely no right to a vocational evaluation under the Act requiring Claimant to submit to an evaluation by a neuropsychologist or a vocational expert, which seems to be the Commissioner's problem. Defendants have every right to take Claimant's discovery deposition and have a vocational analysis done based on that and other evidence, which they did not do in this case. Therefore Claimant did not obstruct, even assuming that Defendants had some kind of due process right by not agreeing to attend such an evaluation, the Commissioner erred in making this decision because it was not violated. The only conceivable violation that could be thought of would be that Claimant would not submit to an evaluation by their vocational expert, which is not required by law nor allowed for under the Act.

13. That the entire Hearing Commissioner's Order is the subject of bias and prejudice, and is arbitrary and capricious, an abuse of discretion in the consideration of the evidence with a bias towards denying Claimant an award for total and permanent disability either on the basis of wage loss or having lost 50% or more of the functional use of his back to do work requiring the use of his back. The Commissioner goes as far as to not making one Finding of Fact or Conclusion of Law in reference to an Award for total loss of earning capacity.
14. That the Hearing Commissioner failed in his statutory duty to make detailed Findings of Fact and Conclusions of Law under SC Code §42-9-5; §42-17-40; and §1-23-380.

IV. DECISION OF THE APPELLATE PANEL

Pursuant to S.C. Code Ann. §42-17-50, we, the Appellate Panel, have reviewed the Decision and Order of the Single Commissioner and weighed the evidence as presented at the initial hearing. We have also considered all issues raised in the respective Appellant and Respondent briefs of the parties, as well as those issues raised at the Full Commission Review Hearing.

After careful review, the Appellate Panel of the South Carolina Workers' Compensation Commission, by unanimous vote, does hereby fully **AFFIRM** the Decision and Order of the Single Commissioner filed on June 21, 2024.

Below are set out the Findings of Fact and Conclusions of Law of the Appellate Panel as to this claim.

FINDINGS OF FACT

1. All parties are subject to and bound by the terms and provisions of the South Carolina Workers' Compensation Act.
2. Jurisdiction and venue are proper.
3. That Claimant's average weekly wage is \$1,302.27 with a resulting compensation rate of \$845.74.
4. Claimant sustained a compensable injury to the thoracic spine (T12 fracture) on 10/10/2019.
5. The only compensable injury in this case is the fracture at T12.
6. The issue of whether or not Claimant sustained compensable injuries to the cervical spine, lumbar spine, and both shoulders was already litigated at an evidentiary hearing held on 8/13/2020. The resulting Order, filed on 1/11/2021, denied compensability of those other claimed body parts, and that Order was not appealed.
7. With regard to the functional capacity evaluation (FCE) dated 10/23/2020 (Claimant APA 1), it is found as a fact that the evaluator stated at page 1: "The results of this evaluation cannot be considered valid."
8. The findings in the functional capacity evaluation carry no evidentiary weight because (1) the evaluator stated that the results cannot be considered valid and (2) the deficits noted on page 3 of the FCE, which are the basis for the evaluation's findings, concern body parts that are not compensable and, therefore, not relevant to this case.
9. Dr. Stofko stated in his deposition that paragraphs 1-4 on page 3 of the FCE were not causally related to the T-12 fracture. (Second Deposition of Dr. Stofko, Defendants APA p. 482, lines 18-25; p. 483, lines 1-23; p 484, lines 6-14).
10. Claimant's vocational evaluation (Claimant APA 4) is not given any weight due to its reliance

on the findings of the functional capacity evaluation, which has been found to carry no evidentiary weight, as the stated limitations were based upon body parts that are not causally related to the compensable injury.

11. Furthermore, Claimant's vocational evaluation is also excluded due to due process concerns. Defendants requested that Claimant undergo a neuropsychological evaluation and a second evaluation with a vocational expert; however, Claimant declined. Defendants filed a motion to compel, which was denied by the Commission, pursuant to S.C. Code Ann. § 42-15-80, because neither of the requested evaluators was a physician or surgeon. Because of Defendants' inability to obtain expert vocational and neuropsychological evaluations in this claim, to protect Defendants' due process rights, Claimant's vocational evaluation is given no weight.
12. No weight is given to Dr. Poletti's opinion because of his inability to objectively assess Claimants' impairments. In multiple different cases, Dr. Poletti has described himself on the record as an, "unashamed patient advocate"; these statements preclude him from being able to give a truly independent medical evaluation. (See the Order from SC Workers' Compensation Commission case number 2205977, issued on March 15, 2024, pages 10-13.)
13. The opinions stated by Dr. Leonard Forrest (Claimant APA 2) are outweighed by the greater weight of the relevant medical evidence in the case and are based largely on injuries that go beyond the T12 fracture and are not compensable in this case. Furthermore, Dr. Forrest's opinions were heavily based on findings from the FCE which were not relevant to the only compensable injury in this case, the T12 fracture. Therefore, Dr. Forrest's opinions in this case are afforded no evidentiary weight.
14. Dr. Jeffrey Buncher's opinions are largely based upon body parts that are found not to be compensable; therefore, Dr. Buncher's opinions in this case are also given no weight.

15. Claimant was treated in the emergency room by Dr. Douglas Stofko, a board-certified neurosurgeon who was on call the date of the accident.
16. Dr. Stofko performed a two-level fusion from T11 to L1 for the T12 fracture, which was the compensable injury resulting from this accident.
17. Dr. Stofko testified in his deposition that Physician's Assistant Alana Cole was an "extender of me. So all her orders, anything that she's doing is acting under me." (Second Deposition of Dr. Stofko, Defendants' APA p. 457, lines 1-11). However, the record does not appear to contain an instance of Dr. Stofko specifically endorsing PA Alana Cole's opinions contained in her 14B.
18. Dr. Stofko testified that the opinions he had rendered in a questionnaire he had completed at the request of Claimant's Attorney Don Gibson on 11/18/2020 were still his opinions. (Second Deposition of Dr. Stofko, Defendants APA p. 478, lines 1-25, p. 479, lines 1-7).
19. Claimant's radicular pain noted in the left upper and left lower extremities is not causally related to the T12: fracture. (Second Deposition of Dr. Stofko, Defendants APA p. 479, lines 2-7).
20. The cervical complaints and medical treatment noted in Claimant's medical records were not causally related to the T12 fracture. (Second Deposition of Dr. Stofko, Defendants APA p. 482, lines 2-12).
21. Complaints expressed by Claimant to PA Alana Cole, specifically that he was having pain at the screw sites from his previous surgery, are not supported by the greater weight of medical evidence in the record; PA Cole testified in her deposition that the area he was referencing as being painful was above the screw sites. (PA Cole Deposition p. 6, 1-24).
22. Dr. Stofko further testified that he did not believe Claimant's complaints noted in the 1/10/2024 visit were due to his original accident that Dr. Stofko treated him for in October, 2019. (Second Deposition of Dr. Stofko, Defendants APA p. 482, lines 1-12).

23. Claimant reached maximum medical improvement on 1/8/2020. (Defendants APA 1, p. 24).
24. The MRI of the lumbar spine ordered in the 14B is no longer necessary in light of the lumbar MRI that was done 8/8/2020. (PA Cole Deposition, p. 38, lines 9-24).
25. Claimant testified in his deposition that he was gainfully employed at Integrated Site Management (ISM) from around the last days of May 2022 until August 2022, earning \$15.00 an hour working 5-6 hours a day, Monday through Friday. (Morales Deposition, p. 14, lines 9-24, p. 20 lines 10-14, p.18, lines 9-20).
26. Claimant testified in his deposition that from August 2022 to November 2022, he worked at Flores Construction making \$16.00 an hour working 30, 32, 35, and sometimes 40 hours a week. (Morales Deposition p.18, lines 20-25, p. 19, lines 1-16, p. 20 lines 2-9).
27. Payroll records from Flores Contracting LLC indicate Claimant received checks beginning on 11/22/2022 and continuing through 1/12/2023. (Defendants APA Exhibit C).
28. Claimant was on non-weight-bearing status for his left leg and on crutches for approximately four months as a result of a car wreck which occurred 12/31/2022, resulting in fractures to seven ribs (right at 5 & 6, left at 3-6), a sternum fracture, and a severely comminuted fracture to the tibial plateau necessitating surgery and permanent installation of orthopedic hardware. (Defendants APA 4, p. 122,123,142,143). (Claimant Deposition, p. 12, lines 3-19).
29. The parties attempted to resolve the issues at mediation on 7/19/2023, but mediation was unsuccessful.
30. The greater weight of medical evidence indicates that Claimant sustained 5% impairment to his back as a result of the T12 fracture. (Defendants APA 1, p. 24).
31. Defendants are entitled to credit for overpayment of temporary total compensation since 7/19/2023 for the following reasons:

- (a) Even though MMI was reached on 1/8/2020, Defendants' authorized provider did not submit a Form 14B stating Claimant was at MMI until 1/12/2021.
- (b) Following Defendants' filing of their Form 21 on 2/5/2021, a hearing was held on 4/26/2021, Order instructions were not received until 2/23/2022, and the subsequent Order was filed on 3/22/2022.
- (e) Following the Single Commissioner's Order, the case underwent an appeal process by which the Single Commissioner's Order was vacated for being premature, as the case needed to go to mandatory mediation before an Order could be issued.
- (f) The delays in getting a Final Order for this matter are not attributable to Claimant; therefore, it would be fundamentally unfair to give Defendants credit dating back to the date of MMI.

CONCLUSIONS OF LAW

1. S.C. Code Ann. § 42-1-160 defines injury by accident and further defines medical evidence as "an expert opinion or testimony stated to a reasonable degree of medical certainty, documents, records, or other material that is offered by a licensed healthcare provider."
2. Pursuant to *Ashe v. Swenson*, 397 U.S. 436, 443, 90 S.Ct. 1189, 1194, 25 L.Ed.2d 469 (1970), "[w]hen an issue of ultimate fact has once been determined by a valid and final judgement, that issue cannot again be litigated between the same parties in any future lawsuit."
3. Claimant is entitled to lifetime maintenance, repair, and replacement for any hardware he retains as a result of treatment of his compensable T12 vertebra injury.
4. Claimant is entitled to any ongoing treatment for his injury to his T12 vertebra as recommended by the authorized treating physician, Dr. Douglas Stofko.
5. Claimant is entitled to an award of 45% permanent partial disability to the back, which, pursuant to S.C. Code Ann. § 42-9-30 (21), equates to 135 weeks of permanent partial disability. At a

compensation rate of \$845.74, 135 weeks equals \$114,174.90.

6. S.C. Code Ann. § 42-9-210 provides for deduction from compensation of payments made by an employer when not due and payable.
7. Pursuant to the Commission's authority under § 42-9-210, We conclude that Defendants are only entitled to credit dating back to 7/19/2023, the date of the failed mediation.

ORDER

THEREFORE IT IS HEREBY ORDERED that the Decision of the Single Commissioner filed in the above-captioned matter on June 21, 2024, is hereby fully **AFFIRMED**.

ACCORDINGLY:

IT IS FURTHER ORDERED that Defendants may stop payments of temporary disability.

IT IS FURTHER ORDERED that Defendants will pay Claimant permanent partial disability in accordance with his 45% disability rating to the back at a compensation rate of \$845.74, minus credit for weekly benefits paid since 7/19/2023.


IT IS FURTHER ORDERED that Claimant is entitled to any ongoing treatment for his injury to his T12 vertebra as recommended by the authorized treating physician, Dr. Douglas Stofko.

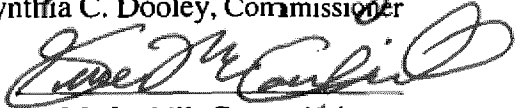
IT IS FURTHER ORDERED that Claimant is entitled to lifetime maintenance, repair, and replacement for any hardware he retains as a result of treatment of his compensable T12 vertebra injury.


IT IS FURTHER ORDERED that no hearing costs or penalties are assessed in this matter.

AND SO IT IS ORDERED.

_____ (date)
Columbia, SC


Cynthia C. Dooley, Commissioner


Gene McCaskill, Commissioner


R. Michael Campbell, Commissioner

Appellate Panel Decision and Order

<p><u>Served via E-Mail:</u></p> <p>E. Courtney Gruber, Esquire cgruber@ycrlaw.com</p> <p>Robert P. Gruber, Esquire rgruber@ycrlaw.com</p> <p>Don C. Gibson, Esquire dgibson@dgibsonlaw.com</p> <p>Preston F. McDaniel, Esquire preston@pfmcdlaw.com</p>

Brief Served via USPS:

CERTIFICATE OF SERVICE

This is to certify that the undersigned has on this date served a copy of this order in the above entitled action upon all parties to this case by sending an electronic copy hereof by electronic mail addressed to the attorneys for said parties; or if there is an unrepresented party(ies), by depositing a copy hereof, postage paid in the United States mail, first class, addressed to the unrepresented party(ies) and to the attorney(s) for the represented party(ies).

December 3, 2024

By: Valerie D. Deller, Judicial Department

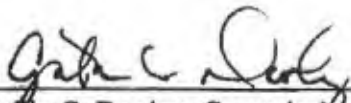
STATE OF SOUTH CAROLINA
BEFORE THE SOUTH CAROLINA WORKERS' COMPENSATION COMMISSION
WCC FILE NO. 1921668

Evaristo Verdugo Morales,)	
)	
Claimant,)	ORDER
v.)	
)	
Insulation by Cohen, LLC,)	
)	
Employer, and)	
)	
Builder's Premier Ins. Co.,)	
)	
Carrier,)	
Defendants.)	
)	

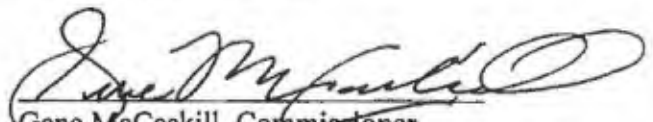
On December 3rd, 2024, Claimant/ Appellant filed a Motion to Reconsider the Decision and Order of the Appellate Panel.

After careful consideration of the Claimant's Motion for Reconsideration pursuant to R. 67-215(B), We are unable to discover that any material fact or principle of law has been either overlooked or misapprehended and hence, there is no basis for granting Claimant's Motion. Accordingly, the Motion for Reconsideration is denied.

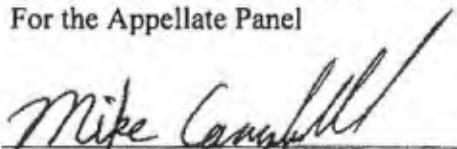
AND IT IS SO ORDERED.



Cynthia C. Dooley, Commissioner
For the Appellate Panel



Gene McCaskill, Commissioner
For the Appellate Panel



R. Michael Campbell, Commissioner
For the Appellate Panel

1921668 Evaristo Verdugo Morales v Insulation by Cohen, LLC

Judicial Conference Order

Served via E-Mail:	
E. Courtney Gruber, Esquire cgruber@ycrlaw.com	
Robert P. Gruber, Esquire rgruber@ycrlaw.com	
Don C. Gibson, Esquire dgibson@dgibsonlaw.com	
Preston F. McDaniel, Esquire preston@pfmcdlaw.com	

Served via USPS:

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January 13, 2025

By: Valerie D. Deller, Judicial Department

STATE OF SOUTH CAROLINA
BEFORE THE SOUTH CAROLINA WORKERS' COMPENSATION COMMISSION
WCC FILE NO. 1921668

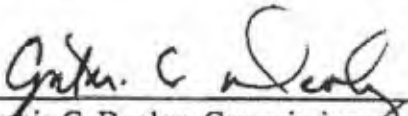
Evaristo Verdugo Morales,)
)
 Claimant,)
 v.)
)
 Insulation by Cohen, LLC,)
)
 Employer, and)
)
 Builder's Premier Ins. Co.,)
)
 Carrier,)
 Defendants.)

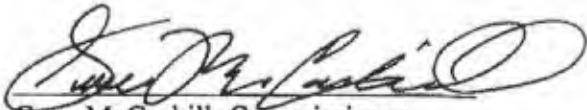
ORDER

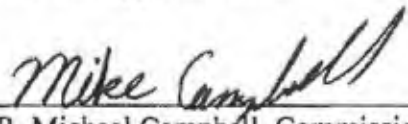
On December 12th, 2024, Defendant/ Respondent filed a Motion to Alter and Amend the Decision and Order of the Appellate Panel.

After careful consideration of the Claimant's Motion to Alter and Amend pursuant to R. 67-215(B), We are unable to discover that any material fact or principle of law has been either overlooked or misapprehended and hence, there is no basis for granting Claimant's Motion. Accordingly, the Motion to Alter and Amend the Decision is denied.

AND IT IS SO ORDERED.


Cynthia C. Dooley, Commissioner
For the Appellate Panel


Gene McCaskill, Commissioner
For the Appellate Panel


R. Michael Campbell, Commissioner
For the Appellate

1921668 Evaristo Verdugo Morales v Insulation by Cohen, LLC

Judicial Conference Order

<u>Served via E-Mail:</u>	
E. Courtney Gruber, Esquire cgruber@ycrlaw.com Robert P. Gruber, Esquire rgruber@ycrlaw.com Don C. Gibson, Esquire dgibson@dgibsonlaw.com Preston F. McDaniel, Esquire preston@pfmcdlaw.com	

Served via USPS:

CERTIFICATE OF SERVICE

This is to certify that the undersigned has on this date served a copy of this order in the above entitled action upon all parties to this case by sending an electronic copy hereof by electronic mail addressed to the attorneys for said parties; or if there is an unrepresented party(ies), by depositing a copy hereof, postage paid in the United States mail, first class, addressed to the unrepresented party(ies) and to the attorney(s) for the represented party(ies).

January 13, 2025

By: Valerie D. Deller, Judicial Department

SOUTH CAROLINA WORKERS' COMPENSATION COMMISSION
COLUMBIA, SOUTH CAROLINA
WCC FILE NO. 1921668

EMPLOYEE/CLAIMANT: EVARISTO VERDUGO MORALES

EMPLOYER: INSULATION BY COHEN'S, LLC

INSURER: BUILDERS PREMIER INSURANCE COMPANY

SOUTH CAROLINA WORKERS' COMPENSATION HEARING

PURSUANT TO NOTICE OF WORKERS' COMPENSATION
HEARING, THE WITHIN HEARING WAS TAKEN ON THE 26TH DAY OF
APRIL, 2021, COMMENCING AT THE HOUR OF 11:34 A.M., IN
WALTERBORO, SOUTH CAROLINA, BEFORE THE HONORABLE AISHA TAYLOR,
ATTENDED BY COUNSEL AS FOLLOWS:

**SHEILA SMALL
VERBATIM REPORTER**

**WHITWORTH COURT REPORTING
POST OFFICE BOX 551
ROEBUCK, S.C. 29376
(864) 494-2705**

APPEARANCES

PRESTON F. MCDANIEL, ESQUIRE, OF THE FIRM
MCDANIEL LAW FIRM
1315 ELMWOOD AVENUE
COLUMBIA, SOUTH CAROLINA 29201

ATTORNEY FOR THE CLAIMANT,

DON C. GIBSON, ESQUIRE, OF THE FIRM
GIBSON LAW FIRM, LLC
POST OFFICE BOX
NORTH CHARLESTON, SOUTH CAROLINA 29419

ATTORNEY FOR THE CLAIMANT,

E. COURTNEY GRUBER, ESQUIRE, OF THE FIRM
CLEMENT RIVERS, LLP
POST OFFICE BOX 993
CHARLESTON, SC 29402

ATTORNEY FOR THE EMPLOYER/CARRIER.

ALSO PRESENT: CYNTHIA HERNANDEZ (INTERPRETER)

I N D E X

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CERTIFICATE OF NOTARY PUBLIC.....	76

1 Pursuant to notice of hearing, the within hearing
2 was taken by the above-named court reporter, a notary
3 public for the state of South Carolina, in Walterboro,
4 South Carolina.

5 *

6 **BY COMMISSIONER TAYLOR:**

7 Today is Monday, April 26, 2021. We are here
8 in workers' compensation claim number 1921668. This
9 is the claim of Mr. Evaristo Verdugo Morales who is
10 present here today and represented by Mr. Preston
11 McDaniel and Mr. Don Gibson. The employer is
12 Insulation by Cohen's, LLC, and the carrier is
13 Builders Premier Insurance Company. Both the
14 employer and carrier are represented today by Ms. E.
15 Courtney Gruber. We are set today on the Claimant's
16 Form 50 as well as the Defendants' Form 21 Stop Pay.
17 In addition, I also have a motion to compel filed by
18 the Defendants in this matter. For purposes of the
19 record, I will address the Defendants' motion to
20 compel first. Ms. Gruber.

21 **BY MS. GRUBER:**

22 Yes, ma'am. I filed a motion. I've got the
23 kind of history of what has happened with this file.
24 We had actually filed a Form 21. There was an
25 evidentiary hearing held August 13th, 2020, in which

1 the Claimant was seeking medical treatment for
2 shoulder, cervical, and lumbar spine. Those were
3 denied, and a decision order followed January 11,
4 2021. We filed a Form 21. They filed a Form 50.
5 They basically filed the same Form 50s that they
6 filed previously, but they just changed the date of
7 filing. So they're seeking the same benefits that
8 they want, they were seeking last summer. As a
9 courtesy to Don Gibson, who has been a friend of
10 mine for a long time, and I understand he's been
11 ill, we agreed to postpone the hearing that was set
12 on the 21 and participate in voluntary mediation.
13 I'd like to point out that the Form 50 that was
14 filed in January did not check off that mediation
15 was requested -- I mean, was ordered mandatory. It
16 also didn't check off that permanent and total
17 disability was sought. But anyway, we went ahead.
18 We tried to schedule a vocational assessment, which
19 is a routine part of discovery. I had had some
20 conversations with Don, and I was aware that he, at
21 some point, was going to claim permanent and total
22 disability. And also, having participated in one or
23 two, or several mediations, in workers'
24 compensation, it's presumed that permanent and total
25 disability was going to be an issue. And as a

1 matter of course, we always get a vocational
2 evaluation, and we schedule it in person with the
3 Claimant. You know, we worked out a date that is
4 convenient for everyone. I was very surprised to
5 get a refusal back via email stating that they were
6 going to refuse to allow an in-person evaluation for
7 a vocational assessment. So we had some
8 conversations about that. I did with Don. At that
9 point, I was also getting some communication from
10 Preston McDaniel who had not yet filed an appearance
11 in the case. And we attempted to schedule the
12 vocational evaluation again, this time by Zoom, and
13 were met with the same objection. My motion to
14 compel is simply requesting that the Commission
15 order the Claimant's attorneys to have the Claimant
16 present for an in-person evaluation from a
17 vocational evaluation specialist. And we don't have
18 one today. So if this motion is denied, or if we're
19 not able to obtain a vocational evaluation, I would
20 move that the vocational evaluation that they have
21 submitted, Harriet Fowler's vocational evaluation,
22 not be admitted into evidence because we've been
23 denied due process and not allowed to obtain our own
24 vocational evaluation. And I'd have to say, I've
25 never had this issue come up before. It was an

1 unanticipated issue, or I would have certainly
2 addressed it in the consent order that we had
3 attempted to execute.

4 Anyway, that's our motion, Commissioner. I've
5 got the details of it. I've attached the curriculum
6 vitae, or I guess it would be curriculum vitae, of
7 Cassandra Townsend who we wanted to use for a
8 vocational evaluation.

9 **BY COMMISSIONER TAYLOR:**

10 Thank you. Mr. McDaniel.

11 **BY MR. MCDANIEL:**

12 Commissioner, as a little bit of a backdrop,
13 I'm trying the case today because of Don's situation
14 in reference to COVID. And as the Commission's
15 aware, Don was in and out of the hospital on three
16 different occasions. My first communications with
17 the Commission were to the effect that Don wasn't
18 even sure -- it was very hard to communicate with
19 Don. Don sometimes would call me three times on the
20 same day, because he had forgot he had called me
21 earlier. He suffered from oxygen deprivation
22 throughout his hospitalizations. Now, during the
23 course of this, all of this is occurring. My first
24 communication was in written form was with the
25 judicial director and with Commissioner Beck, and at

1 that time, all I knew was that Don had several cases
2 on the docket, and he believed one was with Courtney
3 Gruber. I actually contacted Ms. Gruber, sent her a
4 copy of it, and we then were able eventually to
5 confirm that Ms. Gruber was representing it, and it
6 was this case, was one of the cases that was pending
7 on the docket. Now, during the course of this, Don
8 was coming to the office a little bit. He was
9 communicating from the hospital, trying to keep his
10 practice, for a better term, alive. And during the
11 course of all this is when all these communications
12 came about. Prior to my involvement, as Ms. Gruber
13 appropriately stated, there was an agreement to
14 mediate the case. After that agreement to mediate
15 the case, hasn't ever been any requests for a
16 vocational evaluation. The Defendants, as you'll
17 find when you look at the evidence, they actually
18 sent this man for a functional capacity evaluation,
19 and they didn't put that in evidence. You know, in
20 addition to that, you know, there's just nothing in
21 reference to ever a request for a vocational
22 evaluation.

23 As you know, the Claimant has the burden of
24 proof. For many, many years, I have never agreed to
25 an in-person evaluation by the Claimant. There is

1 no statute that allows for the Defendants to have a
2 vocational evaluation. The way those have always
3 been done -- and the only thing that is lacking in
4 this situation would be an in-person conference.
5 And the way those have always been done -- and
6 Commissioner, in your experience, you may have done
7 these this way. You have a vocational evaluation
8 assessment done based on the medical records and the
9 Claimant's discovery deposition. So for Ms. Gruber
10 to come in here and say that she couldn't have a
11 vocational evaluation done is simply not the fact.
12 You know, in reference to the in-person evaluation,
13 there is no requirement under statute or regulation
14 for the Claimant to submit in person to an
15 evaluation by a vocational expert. There's none.
16 And they don't have a right to -- there's a reason
17 that the statute is very limited in what the
18 Defendants can do in reference to the case. First
19 off, as we all know, the Claimant has the burden of
20 proof. Number two is that the Defendants, they
21 choose the medical providers. And as a result of
22 that, the Act gives them very limited rights to any
23 types of evaluation or submission of additional
24 evidence. For example, you know, they can have an
25 independent medical evaluation by a licensed medical

1 physician or service. So we object -- I had offered
2 way back when, as Your Honor's aware, to limit this
3 hearing today so that Courtney's motion could be
4 heard, so you could make a ruling, and I agreed to
5 abide by that ruling. So for her to come in here
6 now and say that, okay, if I can't get this
7 evaluation, this in-person -- what we're talking
8 about is not a vocational evaluation. We're talking
9 about an in-person evaluation of the Claimant by the
10 vocational expert, okay. Now, so, we object to it.
11 We did object to it. We have offered to come in
12 here and limit this hearing to their motion to
13 compel. And Ms. Gruber, for whatever reason, would
14 not agree to that, would not agree to move this
15 venue to Charleston, would not agree to anything.
16 And basically, you know, whenever she found out that
17 we were objecting to an in-person interview with the
18 Claimant, she backed out. She had already signed a
19 consent to mediate the case, and it was on your
20 desk. And within two hours, when I'm not involved,
21 Don still is back in the office -- he was on 24/7
22 oxygen when all of this is occurring. And he was
23 back in his office maybe an hour or two a day. You
24 know, I wouldn't want you to ask right now for Mr.
25 Gibson to pick up that chair and walk it across the

1 room and walk it back, because I'm going to tell you
2 what you'd get. You're going to find him -- he's
3 going to have to take off his mask, and he's going
4 hardly be able to breathe, and that's why I'm here
5 today. You know, that's why I'm here today.

6 **BY COMMISSIONER TAYLOR:**

7 Okay.

8 **BY MR. MCDANIEL:**

9 And, of course, Mr. Gibson, we want to put on
10 record what's going on.

11 But anyway, Commissioner, you know, I'm sorry
12 that we've come to this, but we oppose it. You have
13 it. I've tried to do everything I could, retain our
14 objection to allow Ms. Gruber to get a decision by
15 you, and that's where we are.

16 **BY COMMISSIONER TAYLOR:**

17 Okay. All right, thank you. Interestingly,
18 there is a case directly on point, and it is *Tedder*
19 *versus Darlington County Community Action Agency*,
20 and it came out in 2019. Mr. McDaniel is correct in
21 that 42-15-80 does not give me the authority to
22 compel or require a Claimant to undergo a vocational
23 evaluation. That's kind of discussed as a footnote
24 in this particular case. But the more important
25 issue in this case is whether or not the failure of

1 the Claimant to submit to a second vocational
2 evaluation by the Defendants should preclude their
3 report from coming into evidence. In this
4 particular case, the Court -- this is the Court of
5 Appeals, noted that the hearing Commissioner, and
6 then actually the panel, was wrong for just
7 preemptively excluding the initial report because of
8 the lack of attending the second report. So it kind
9 of left us in a quagmire in that I don't know what
10 to do so that we only have one report in the record.
11 But I know that the Court of Appeals has stated
12 that, at least in this particular case, the statute
13 is clear, and then secondly, excluding the other
14 report would be improper. In this particular case,
15 they found that it did not affect the outcome of the
16 case. So they didn't remand it. But based on my
17 reading, the instructions are kind of clear in that.
18 So I'll have to deny the motion at this time.

19 **BY MS. GRUBER:**

20 All right. Commissioner, I have another
21 motion.

22 **BY COMMISSIONER TAYLOR:**

23 Okay.

24 **BY MS. GRUBER:**

25 It's my understanding that they're going to

1 pursue -- well, it appears in the medical reports
2 that they have that they're going to attempt to
3 pursue again findings of compensability for
4 additional body parts, including the lumbar spine
5 and the radicular symptoms down the legs, the
6 cervical spine, and possibly both shoulders. We had
7 an evidentiary hearing based on a Form 50 that was
8 identical to the one that was recently filed in
9 terms of the body parts that were listed, and that
10 hearing was held in August. And at that time, the
11 Claimant was seeking additional medical treatment,
12 both shoulders and cervical and lumbar spine. That
13 Commissioner specifically found that the medical
14 evidence did not support findings of compensability
15 and additional treatment for the shoulders, the
16 cervical, and the lumbar spine. And she
17 specifically limited this to the fracture at T12.
18 And I understand that they are going to raise a
19 consent order that we filed early on when this was
20 an originally denied case where we agreed to accept
21 the back. And the back is a body part, and I
22 understand that; however, we litigated this issue
23 thoroughly. And it was on the Form 50 filed by the
24 Claimant in August at that hearing, and they had an
25 opportunity then to put in all the medical records.

1 And at that time, we were successful from the
2 Defense side in obtaining an unappealed decision, an
3 order, filed January 11, 2021, specifically limiting
4 the scope of this claim to the fracture at T12, and
5 it was a compression fracture, and there was a
6 fusion done at that level. So, we would -- I would
7 object to any attempt at this point to again widen
8 the scope of this work-related injury to include
9 anything but this injury at T12.

10 And I would also point out that there was a
11 questionnaire that was obtained at the request of
12 Don Gibson from the authorized doctor, and we
13 included his letter because I wanted to make sure
14 that there was not any kind of question as to
15 whether or not we had gotten these -- sent the
16 questionnaire to the doctor, but it's in our APAs
17 page -- begin at page 18 and 19 of our APAs,
18 Commissioner. And this is November of 2020 where
19 the treating doctor, again -- well, where the
20 treating doctor actually gave opinions, which
21 ultimately supported the findings of the single
22 Commissioner. That the complaints in the neck,
23 upper back, bilateral shoulders, lumbar spine, and
24 radicular complaints down the legs were not causally
25 related to this accident, and that any additional

1 medical treatment for those body parts are not part
2 of this claim.

3 So that would be our objection, that any
4 references to these other body parts being injured,
5 or part of this claim, be stricken from the medical
6 records and not considered, and that the scope of
7 our hearing be directed towards the T12, which was
8 found as a matter of law in an unappealed order as
9 the limit in this case.

10 BY COMMISSIONER TAYLOR:

11 Okay. All right, thank you. Mr. McDaniel.

12 BY MR. MCDANIEL:

13 Well, as Your Honor is well aware, a party can
14 seek relief from any order in which is issued that
15 is based on the state of inadvertence, apprise, or
16 not contrary to the dictates of the Court. Now, I
17 say that simply to say that I brought a copy of
18 Commissioner James' notes, and what happened in that
19 January hearing, according to her notes, in which
20 the record was, is that at time in reference to the
21 cervical spine and in reference of the lumbar spine,
22 they did not have an opinion stated to a reasonable
23 degree of medical certainty, and it was after ten
24 month -- ten weeks after the original accident,
25 stating that the medical care was necessary, that

1 the doctor that had issued -- as a matter of fact,
2 the treating doctor had decided that was needed in
3 reference to the lumbar spine back in July, and from
4 Ms. Gruber's brief, let me find that, on July, prior
5 to my involvement with the case, but however, in
6 July of 2020, "I do believe that he has a
7 musculoskeletal component to his pain as he does
8 have palpable tenderness of the rectal rectus,
9 spinalis muscles; however, he does have radicular
10 component to this pain with bilateral lower
11 extremity radiation. We will likely send him for
12 physical therapy for this, as well as potential
13 trigger point injections to treat the
14 musculoskeletal pain. Once we review the MRI, we'll
15 assess the need for epidural steroid injections with
16 pain medication. In addition, I will call in a
17 Medrol dose pack to his pharmacy to see if this
18 helps with his lower extremity radiation. Patient
19 had ample opportunity for all questions to be
20 addressed."

21 **BY COMMISSIONER TAYLOR:**

22 Okay. And what's the date of that record?

23 **BY MR. MCDANIEL:**

24 That's July ---

25 **BY MS. GRUBER:**

1 Twenty-second -- twenty-second of 2020.

2 **BY MR. MCDANIEL:**

3 --- 22nd of 2020. And you can find that in Ms.
4 Gruber's APA submissions at page 14, 15, and 16.

5 **BY COMMISSIONER TAYLOR:**

6 And was that before the hearing before
7 Commissioner ---

8 **BY MR. MCDANIEL:**

9 That was before -- that was before.

10 **BY COMMISSIONER TAYLOR:**

11 And was that medical record presented to
12 Commissioner ---

13 **BY MR. MCDANIEL:**

14 It was.

15 **BY COMMISSIONER TAYLOR:**

16 At the last hearing?

17 **BY MR. MCDANIEL:**

18 Yes, it was. And my point being is, is that
19 you will notice that in the hearing, doctors -- at
20 that time, there was no expression, there was
21 nothing to say whether or not this was causally
22 related to a reasonable degree of medical certainty,
23 is my opinion. Okay, so that language from that one
24 case, which is now becoming to haunt all of us in
25 reference to that change in the law that we made

1 back in 2007, to which I objected to back then as
2 part of the negotiating committee. But however,
3 Commissioner James, this is what she found, and it
4 is in her finding of fact, and it says that "A
5 Commissioner cannot issue the equivalent medical
6 opinion." And she cited the case. "Additionally,
7 the Commission cannot order medical treatment ten
8 weeks beyond the injury by accident date without an
9 opinion to a reasonable degree of medical certainty,
10 section 42-15-60." Based on the fact that at the
11 time of that hearing there was no medical opinion
12 stated to a reasonable degree of medical certainty
13 that either one of these were related, the
14 Commissioner could not and did not order that
15 medical care.

16 **BY COMMISSIONER TAYLOR:**

17 But then when it -- from the notes to the
18 order, what does -- does the order say that it is
19 not compensable, or does the order repeat that same
20 language?

21 **BY MR. MCDANIEL:**

22 That's my point.

23 **BY COMMISSIONER TAYLOR:**

24 Okay.

25 **BY MR. MCDANIEL:**

1 And my point -- and here's what the order says.
2 That's what the notes findings say. But then in the
3 order, "After finding that the Claimant's request
4 for additional medical treatment for the lumbar
5 spine, cervical spine and shoulder is denied, it is
6 further order of the judge and decree that
7 Claimant's injuries related to this accident are
8 limited to the fracture of T12. It is further
9 ordered."

10 BY COMMISSIONER TAYLOR:

11 Okay.

12 BY MR. MCDANIEL:

13 That's not her findings, and that's not in her
14 conclusions.

15 BY COMMISSIONER TAYLOR:

16 But it's in the order paragraph?

17 BY MR. MCDANIEL:

18 It is in the second order.

19 BY COMMISSIONER TAYLOR:

20 Okay. And it was not appealed?

21 BY MR. MCDANIEL:

22 And it was not appealed.

23 BY COMMISSIONER TAYLOR:

24 Okay.

25 BY MS. GRUBER:

1 And Commissioner, I'd like to point out, since
2 we're talking about things that are not on the
3 record, which I really think is improper, I drafted
4 the proposed decision and order in October of 2020,
5 and I sent it to Don Gibson. And I don't know -- I
6 don't recall whether there were any questions, but I
7 certainly would have accommodated any requests that
8 he made to do it. And Commissioner James didn't --
9 we didn't get the order until January the 11th, and
10 it was not appealed, Commissioner. That's the law
11 of this case.

12 **BY MR. MCDANIEL:**

13 And Commissioner, I will leave it to your
14 reading, but it does not say that she's denying
15 compensability to those two body parts. She said,
16 "It's limited to the T12, directly related to the
17 injury." Now, so, that's our position, you know, on
18 that. But however, the folks are here, the case
19 today will be -- we have two doctors now that both
20 say that he needs additional medical care for the
21 lumbar spine and the cervical spine, and in their
22 opinions, it's stated to a reasonable degree of
23 medical certainty.

24 Now, along with that, in reference to what Dr.
25 Stofko's opinion is, we had issued a subpoena for

1 Ms. Alana Cole who was the PA that you will see
2 referenced all those reports. I have subpoenaed her
3 to be present. She is not here. We're right on the
4 borderline. I had written you a letter. We're
5 right on the borderline of the statutory requirement
6 for a witness to appear. I don't know specifically
7 if this was at 49 miles, or if it's at 51 miles.
8 But if it's 49, she should be here. Now, we did not
9 give personal service on her, on that subpoena, as
10 well. But as a result of that, and because of all
11 these questions and her opinions, I believe you will
12 find, whenever you review the evidence, what you
13 will find is, is that after he -- Dr. Stofko, to my
14 understanding, is a trauma surgeon. And there is
15 not one reference to him seeing Mr. Morales after
16 the original trauma surgery performed at the
17 hospital. Mr. Morales was seen at Moncks Corner.
18 He was found to have the T-burst fracture at the
19 T11-12. And he was then transferred to Trident
20 Hospital where Dr. Stofko -- and it's S-t-o-f-k-o,
21 medical reporter. I think that's right. Anyway,
22 performed the surgery, and put in the fusion. And
23 then after that, he was seen by Ms. Alana Cole who
24 is a physician's assistant. The questionnaire is
25 filled out in her handwriting, and the Form 14B is

1 filled out in her handwriting. There is no
2 indication that any of that comes from Dr. Stofko.
3 And so I would request ---

4 **BY COMMISSIONER TAYLOR:**

5 But is Dr. Stofko's signature on both of those
6 documents?

7 **BY MR. MCDANIEL:**

8 I think on the form -- I think the actual
9 questionnaire was signed -- she signed it ---

10 **BY COMMISSIONER TAYLOR:**

11 Okay.

12 **BY MR. MCDANIEL:**

13 --- in her name.

14 **BY MS. GRUBER:**

15 Commissioner, I would object to this. You
16 know, the medical records speak for themselves. We
17 don't have a handwriting expert in here. I don't
18 know who signed what. I know that we -- you know,
19 we got names on reports, and the medical records
20 speak for themselves. They could have taken some
21 depositions if they wanted to question Alana Cole or
22 Dr. Stofko or anybody else.

23 **BY MR. MCDANIEL:**

24 Commissioner, I got involved in this case to
25 help a friend of mine a few days ago, all right, and

1 she signed the Form 14B, okay, is questionable or
2 not. What I'm asking for is simply this; that the
3 record be left open for me to have the opportunity
4 to question her pursuant to *Morgan versus JPS*. Her
5 opinions are extremely important to this entire
6 case. And I will ---

7 **BY COMMISSIONER TAYLOR:**

8 Who submitted the Form 14B?

9 **BY MR. MCDANIEL:**

10 I'm sorry?

11 **BY COMMISSIONER TAYLOR:**

12 Is the Form 14B your submission or the
13 Defendants' submission?

14 **BY MS. GRUBER:**

15 It's our submission, Commissioner.

16 **BY COMMISSIONER TAYLOR:**

17 Okay.

18 **BY MR. MCDANIEL:**

19 It's their submission.

20 **BY MS. GRUBER:**

21 It's a 14B from the authorized doctor, and we
22 submitted it in support of our Form 21.

23 **BY MR. MCDANIEL:**

24 And it's from -- here's the Form 14B. It might
25 be best if we hand up APAs. The Form 14B is on Ms.

1 Gruber's. I think it's tab one on page twenty, and
2 it's signed by Alana Cole, Physician's Assistant.
3 And in that Form 14B, Commissioner, you'll note that
4 she states that the last time she saw her -- she saw
5 Mr. Morales, which is in record, July 22nd of 2020,
6 and that Form 14B was issued on January 12th of
7 2021. Commissioner James' decision was January 11th
8 according to the records I have. It was signed on
9 January 11th of 2021, and the Form 14B was signed on
10 January 12th.

11 BY COMMISSIONER TAYLOR:

12 All right. Oh, the day after the hearing or
13 the day of the hearing?

14 BY MR. MCDANIEL:

15 The day after the decision.

16 BY COMMISSIONER TAYLOR:

17 Okay. With regard to the Defendants' motion to
18 exclude, essentially, I'm going to take that motion
19 under advisement for the purposes of today's
20 hearing. With regard to the evidence, what I don't
21 want is to end up on two separate tracks in this
22 claim. So what I will allow the Claimant to do is
23 to essentially proffer all of the evidence with
24 regard to the lower back and any of those subsequent
25 medical records into the record so that we have a

1 record of it; however, I will note that the
2 Defendants' objection and the argument, based on res
3 judicata, obviously, is the basis for their Form 21,
4 but all the evidence will be submitted today but
5 will be proffered for review by a higher court if
6 necessary. The decision to ---

7 **BY MR. MCDANIEL:**

8 Take the deposition?

9 **BY COMMISSIONER TAYLOR:**

10 --- well, take the deposition, or leave the
11 record open for, I guess, an additional
12 questionnaire is also under advisement pending the
13 decision after the proffered information, if that
14 makes sense.

15 **BY MR. MCDANIEL:**

16 And, again -- I'll base it now. Today is the
17 first notice I've got of any motion to redact. I
18 assume that's what Ms. Gruber is seeking. As a
19 matter of fact, Commissioner, the thoracic spine --
20 what's unusual about this, the thoracic fusion that
21 was performed is T11, T12, L1. So the lumbar spine
22 was part of the fusion. And the lumbar spine, the
23 part of the question I'd like to ask Ms. Cole and/or
24 Dr. Stofko is in reference to the effect of the
25 fusion on the vertebrae above and below the fusion

1 site.

2 **BY COMMISSIONER TAYLOR:**

3 And I understand that. I'm going to allow the
4 proffer, but the issue that I do have is that we are
5 also here on your Form 50. And so it sounds like
6 part of it is that the Form 50 is not necessarily
7 ready to go, because we have all these ancillary
8 issues that still need to be done. So I will let
9 you choose which way you want to handle it, but
10 there's at least a ---

11 **BY MR. MCDANIEL:**

12 Well, and here's how we're actually here. So,
13 you know, it's funny how I get into these confusing
14 procedural matters. Don and Ms. Gruber agreed, Mr.
15 Gibson, Ms. Gruber agreed to mediate. They signed a
16 mediation agreement. They submitted that to you for
17 signature removing it from the docket. While that
18 was on your desk waiting your signature, Ms. Gruber
19 writes the Commission and says "No, I want the case
20 put back on the roster." There was no request from
21 our side that it be put back on the roster. And Ms.
22 Gruber can only request that her 21 be put back on
23 the roster.

24 **BY COMMISSIONER TAYLOR:**

25 Correct.

1 **BY MR. MCDANIEL:**

2 Now, I say that to say that, I'm asking now
3 that we found out that it was going to be put back
4 on, you know, we asked for a little bit of
5 additional time. It was originally set for 12th,
6 but you graciously reset it for April 26th. So now
7 we've got a situation of trying to prepare for the
8 hearing to make sure, and we've discovered that --
9 well, I think as you review the records, the APAs
10 which are before you, that Ms. Cole, or PA Cole, saw
11 this gentleman the entire time after the surgery,
12 and all these documents, upon which they're relying,
13 are from Alana Cole. I requested permission to take
14 his deposition -- her deposition. We tried to
15 subpoena her for the hearing. She did not appear.
16 I admitted that we did not get service in reference
17 to personal service. We had service by mail and by
18 fax, but she did not appear. And I'm requesting
19 permission to leave the record open to take her
20 deposition. Now, that's on one issue. Going back
21 to the issue of the motion to -- like I said, I
22 assume that's a motion to redact. I don't know any
23 other way to -- and I don't know how you redact the
24 L1 and the effects of the L1, which is part of this
25 claim, from -- you know, from the overall testimony

1 and the effects that it has on his back, because
2 part of the lumbar spine is fused, and part of the
3 lumbar spine is involved in this. So in reference
4 to the motion to redact, as I said, this is the
5 first day I've heard this motion.

6 **BY COMMISSIONER TAYLOR:**

7 And I've not heard a motion to necessarily
8 redact. I think it was just the argument of the
9 Defendants that the hearing was limited to the scope
10 of the fracture at T12. And so, presumably, any
11 medical treatment to repair that fracture at T12,
12 whatever that encompasses, is part of the claim.
13 But I don't know that it then brings in the
14 additional issues like the radiculopathy and things
15 like that. I think that's the objection that
16 Defendants have.

17 **BY MR. MCDANIEL:**

18 Okay. Well, I was going to say, if it is a
19 motion to redact, they have a responsibility under
20 *State versus Keenan*. Unfortunately, I have the --
21 was appealed. That's my case from 1981. And in
22 that case, in reference to the Administrative
23 Procedure's Act, and actually the Business Record's
24 Act, if the Defendants' objection is to lessen the
25 entire document, it is their responsibility to make

1 a specific objection to exactly what they want to so
2 that you and I are not trying to surmise as to
3 exactly what they want. Now, so, what we will do is
4 we will just testify about the effects that this T11
5 fracture had on this man's back. T11, 12 and L1
6 fracture. I just note that for the record.

7 **BY COMMISSIONER TAYLOR:**

8 All right, very good. Ms. Gruber, anything in
9 response?

10 **BY MS. GRUBER:**

11 Well, I just want to point out, we just want to
12 be -- we don't want to re-litigate the same issues
13 that we litigated in August, and it's our position
14 that we've already got a decision in order on
15 compensability of these other body parts, and you're
16 right, Commissioner, to whatever the treatment was
17 specifically geared towards the fracture at T12,
18 obviously, that's part of the case. But we don't
19 want to -- you know, I think Commissioner James
20 already ruled on these other body parts, and we just
21 don't want to retry the same issues again.

22 **BY COMMISSIONER TAYLOR:**

23 Okay. Because we are here on both the Form 50
24 and the Form 21, Mr. McDaniel, I'll allow you to
25 present your case first. I ask though that, if you

1 could try to essentially bifurcate, or separate it
2 into two different parts, and we talk about the T12
3 issue, the general back issues that are already
4 awarded pursuant to the prior order, and then kind
5 of note for the record where we're going to start
6 the proffer testimony with regard to the additional
7 body parts. If you could help me with that, I'd
8 appreciate it. And I'll try to catch it as well.

9 **BY MR. MCDANIEL:**

10 Well, actually, this will be an experience of a
11 totally speaking gentleman that speaks Spanish, so I
12 will try to do that, but my overall presentation was
13 really going to be focused on the effects of the
14 fusion in reference to his overall condition.

15 **BY COMMISSIONER TAYLOR:**

16 Okay.

17 **BY MR. MCDANIEL:**

18 I don't know anyway humanly possible to break
19 out the pain that he's having in his arms and his
20 legs as stemming from the -- and the two doctors
21 that have specifically addressed that have said that
22 -- let me say this. All doctors agree that the
23 major part of his problem is being caused by the
24 T11, T12, and L1 fusion. The rating is for -- the
25 ratings that have been given in this is in reference

1 to that. The loss-of-use statements that have been
2 given are in reference to that. In reference to the
3 lumbar and the cervical spine, I think it could be -
4 - and Ms. Gruber, she may or may not agree with me,
5 but I believe that you can best sum those up that
6 the doctors feel like that he needs additional
7 medical care for the lumbar spine and the cervical
8 spine. All three doctors have said that: Dr.
9 Forrest, Dr. Buncher, and Dr. Stofko and Alana Cole
10 all said that -- I read you what Alana Cole planned,
11 ---

12 **BY COMMISSIONER TAYLOR:**

13 Yes, uh-huh.

14 **BY MR. MCDANIEL:**

15 --- whether or not it's related or not, that he
16 needed additional medical care with those. So my
17 focus will be on, in reference to permanency, the
18 thoracic spine fusion.

19 **BY COMMISSIONER TAYLOR:**

20 Okay. All right, thank you. And we'll just
21 take it as the testimony comes out.

22 **BY MR. MCDANIEL:**

23 And I'll try to ---

24 **BY COMMISSIONER TAYLOR:**

25 And I'll make a general note for the record

1 that -- well, we'll just address it when it comes
2 up.

3 **BY MR. MCDANIEL:**

4 All right.

5 **BY COMMISSIONER TAYLOR:**

6 Are there any other general position statements
7 for the record, because I know we got kind of in to
8 the motions, and then into position statements. But
9 any other general position statements for the
10 record? Mr. McDaniel.

11 **BY MR. MCDANIEL:**

12 One other little housekeeping. Ms. Gruber
13 noted previously at other hearings, pictures of the
14 thoracic and lumbar spine fusion have been put in
15 evidence. I will use those during -- I don't know
16 how you want to -- if you want to mark them again.
17 They've already been put into evidence, along with a
18 picture of -- there's also a picture, two pictures,
19 that were previously put into evidence in reference
20 to the equipment that he had to wear, and where he
21 would do his job.

22 **BY COMMISSIONER TAYLOR:**

23 Okay.

24 **BY MR. MCDANIEL:**

25 I think Ms. Gruber would agree, these are

1 already referenced. And like I said, I don't know
2 if you want to make these as a separate exhibit
3 or...

4 **BY COMMISSIONER TAYLOR:**

5 Are there copies currently in any of the APAs?

6 **BY MR. MCDANIEL:**

7 We did not put them in, ---

8 **BY COMMISSIONER TAYLOR:**

9 Okay. For this hearing?

10 **BY MR. MCDANIEL:**

11 --- quite honestly, trying to get ready.

12 **BY COMMISSIONER TAYLOR:**

13 Okay. All right, Ms. Gruber, any objection to
14 having those photographs marked?

15 **BY MS. GRUBER:**

16 Well, they're not in the record, Commissioner.
17 And if it's a lumbar -- if it's a fusion, a picture
18 of a fusion, I think there needs to be some
19 connection showing that that's what this man has.

20 **BY COMMISSIONER TAYLOR:**

21 So, what I will do ---

22 **BY MS. GRUBER:**

23 They're not just some generic, something like
24 on the internet.

25 **BY COMMISSIONER TAYLOR:**

1 Okay.

2 **BY MR. MCDANIEL:**

3 Well, I'd ask Ms. Gruber if these are not the
4 same ones that have already been put into evidence.

5 **BY MS. GRUBER:**

6 I don't know. I don't have my other APAs. I
7 don't know if they were -- if they were in evidence
8 in the other hearing, that was the other hearing.
9 They should have been in evidence in this one.

10 **BY COMMISSIONER TAYLOR:**

11 Well, what we'll do then, if y'all ---

12 **BY MR. MCDANIEL:**

13 They're already a part of the record.

14 **BY MS. GRUBER:**

15 If they're part of the record, then they're
16 part of the record, but they should have been
17 submitted as APAs for this case.

18 **BY COMMISSIONER TAYLOR:**

19 Okay. What we'll do is, once we get into the
20 testimony, if you need to elicit some testimony
21 about it, we'll address that evidentiary issue at
22 that time and any objections at that time, okay?

23 **BY MR. MCDANIEL:**

24 All right. And then, of course, we'll make our
25 general position. It will be fairly fast from our

1 standpoint.

2 **BY COMMISSIONER TAYLOR:**

3 Okay. And you can make it at this time because
4 we're on the record.

5 **BY MR. MCDANIEL:**

6 Thank you, Commissioner. It's our position
7 that as a result of the fracture to this man's back,
8 that he should be entitled to an award of total and
9 permanent disability based on his age, education,
10 background and experience and the physical fact of
11 the injury. In addition to that -- as you'll hear
12 from the testimony on those issues, in addition to
13 that, we would submit to you that he has lost more
14 than 50-percent of the functional use of his back to
15 do work requiring the use of his back as a result of
16 this injury and is entitled to an award under 42-9-
17 30, subsection 21. The testimony concerning -- the
18 evidence before you concerning loss of use is from
19 Dr. Forrest, Dr. Leonard Forrest. He opines that
20 this gentleman has lost more than 50-percent of the
21 functional use of his back to do work requiring the
22 use of his back. The evidence before you from Dr.
23 Buncher is that the Claimant has lost more than 50-
24 percent of the functional use of his back to do work
25 requiring the use of his back. The testimony from

1 the Claimant, I would submit to you, will be along
2 the same lines. In addition to that, we have a
3 functional capacity evaluation stating that this
4 gentleman is unable to perform work in any capacity
5 due to his limited educational background, the
6 physical facts of the injury, and his background
7 experience. In addition to that, the Defendants
8 sent him for a functional capacity evaluation, and
9 that functional capacity evaluation came back in the
10 reference to his -- under the dictionary of
11 occupational title, his physical-demand
12 classification system, he is limited to no more than
13 light-duty work as a result of his T11, T12, and L1
14 fracture. You'll note from that functional capacity
15 evaluation that she specifically noted that the
16 evaluation was in reference to those injuries.
17 There is no reference whatsoever to any of the
18 problems separate and apart from the lumbar or
19 thoracic spine. That functional capacity evaluation
20 can be found at page one through eleven under tab
21 one of the Claimant's APA submission, and we would
22 submit on both of those places that he's entitled to
23 an award for total and permanent disability.

24 There is no other testimony. It's my
25 understanding, I do not believe you will have any

1 other evidence presented to you for loss of use.

2 **BY COMMISSIONER TAYLOR:**

3 Okay. All right, thank you. Ms. Gruber.

4 **BY MS. GRUBER:**

5 Yes, ma'am. Commissioner, we've already stated
6 our positions with regard to the motion to compel
7 and also the res judicata. I would point out that
8 we have the burden of rebutting the presumption of
9 more than 50-percent of the functional use, and that
10 plays into the fact that we don't have a vocational
11 evaluation. And I renew my argument as to our
12 motion to compel and also our request that their
13 vocational evaluation be excluded. And I'm not
14 making that argument again, I just wanted to bring
15 that up.

16 It's our position, maximum improvement was
17 reached with regard to the only compensable injury
18 by law in this case by 1/8/2020, that the Claimant
19 has a five-percent to the back. And again, that's
20 the authorized treating provider, Commissioner, the
21 authorized treating doctors, who has carried more
22 weight than any -- who has only seen the Claimant
23 once or twice, and for the purpose of litigation.
24 And it's our position that we are entitled to stop
25 payment of temporary total compensation, and that

1 the Claimant is not entitled to any additional
2 medical treatment for injuries causally related to
3 this accident. And I would point out at page
4 nineteen of the APAs, which was apparently signed by
5 Dr. Stofko, it's a questionnaire in response to
6 questions that Mr. Gibson sent. Number seven, the
7 question was "Is Mr. Verdugo Morales' lumbar
8 radiculopathy, to a reasonable degree of medical
9 certainty, causally related to his work accident?"
10 and the answer was "Disagree." And I can just
11 direct the Commission's attention to, again, pages
12 seventeen and eighteen, line four. The detailed
13 opinions of the authorized treating doctor.

14 **BY COMMISSIONER TAYLOR:**

15 Thank you. And we do have Mr. Morales here.
16 Madam Court Reporter, will you please first place
17 Madam ---

18 **BY MR. MCDANIEL:**

19 One other issue.

20 **BY COMMISSIONER TAYLOR:**

21 Sure.

22 **BY MR. MCDANIEL:**

23 Not issue. My understanding is that Mr.
24 Morales had a phenomenal relationship with his
25 employer from the standpoint that they kept -- and

1 the purpose of what I'm trying -- I'll make this as
2 short as I can. Simply, if Ms. Gruber can tell us
3 what the dates of temporary total are that they are
4 claiming, because there was a long period of time
5 that they actually paid him a salary, and it was not
6 paid in lieu of compensation as far as I understand.
7 I don't have the records on that, and if we could
8 just -- and we don't have to get that right now. We
9 could just get that sometime as to the date of onset
10 of temporary total disability.

11 **BY COMMISSIONER TAYLOR:**

12 Ms. Gruber, do you have that handy?

13 **BY MS. GRUBER:**

14 I don't have it handy, Commissioner.

15 **BY COMMISSIONER TAYLOR:**

16 Okay.

17 **BY MS. GRUBER:**

18 That's in another part of my file that I didn't
19 bring today. I know we did have some -- there was
20 some -- Don and I reached some sort of agreement,
21 because there was some -- I think there was some
22 salary with compensation paid, and there were some
23 dates that -- the case was originally denied, and
24 then we did some more investigation, and that's when
25 we decided that it was a compensable case. And we

1 had to fiddle around with the -- I'm sorry. We
 2 didn't fiddle around, we had to figure out what the
 3 dates were, and how much was paid, and I think he
 4 got more money. I don't remember. But anyway, we
 5 worked it out so that he was paid for the time he
 6 was out of work for this accident at the proper comp
 7 rate, whatever those numbers were, and I can check
 8 to get the actual dates on it. But we'll be seeking
 9 a credit back to 1/8/2020 from the date of maximum
 10 improvement. I understand that's a long time. We
 11 didn't get the 14B with that date on it until
 12 sometime later.

BY COMMISSIONER TAYLOR:

14 Okay. All right, thank you. Madam Court
 15 Reporter, will you please place Madam Interpreter
 16 under oath?

BY THE COURT REPORTER:

18 * * * * * * * * * * * * * * * *

19 The interpreter was sworn to give a true, accurate,
 20 and impartial interpretation to the best of her ability.

21 **CYNTHIA HERNANDEZ,**

22 * * * * * * * * * * * * * * * *

BY THE COURT REPORTER:

24 Do you mind asking him to raise his right hand?

25 * * * * * * * * * * * * * * * *

1 The witness was duly sworn to tell the truth, the
2 whole truth, and nothing but the truth concerning the
3 matter herein:

4 EVARISTO VERDUGO MORALES,

5 Being first duly sworn, testified on his oath as follows:

6 BY COMMISSIONER TAYLOR:

7 All right. Mr. McDaniel, your witness.

8 BY MR. MCDANIEL:

9 Thank you, Commissioner.

10 OFF THE RECORD DISCUSSION

11 BY COMMISSIONER TAYLOR:

12 All right, you may proceed.

13 DIRECT EXAMINATION BY MR. MCDANIEL:

14 Q. Mr. Morales, would you give us your current address?

15 A. I have it on my phone. Can I look at it?

16 Q. If I repeated it to him, would you be able to
17 remember it?

18 A. Yes.

19 Q. 606 Cedarwood Drive, Moncks Corner.

20 A. Yes.

21 Q. Mr. Morales, how old are you?

22 A. Fifty-five.

23 Q. And how far did you go in school?

24 A. Fourth grade.

25 Q. Did you finish the fourth grade?

1 A. Yes, I did.

2 Q. Now, Mr. Morales, where are you originally from?

3 A. Mexico, the state of Chiapas.

4 Q. And are you married?

5 A. Yes.

6 Q. How many children do you have?

7 A. Seven children.

8 Q. All right. And where does your wife live?

9 A. In Mexico.

10 Q. In Mexico, all right.

11 **BY MR. MCDANIEL:**

12 Now, Madam Interpreter, if you can ask it this
13 way?

14 **DIRECT EXAMINATION RESUMED BY MR. MCDANIEL:**

15 Q. Where do your children live, and how old are they?

16 A. Two are here, and five in Mexico.

17 Q. The two that are here, where do they live?

18 A. They live with me.

19 Q. They live with you. And do the children and the
20 wife that are in Mexico, are they dependent upon you
21 for support?

22 A. Yes, they do.

23 Q. And how long have you lived in the United States?

24 A. Twenty years.

25 Q. When you first came to the United States, where were

- 1 you, and where were you working, what type of work
2 did you do?
- 3 A. First, I lived in North Carolina. I worked in a
4 restaurant, and then landscaping. Then I moved to
5 Georgia, and then I was working on a golf course.
- 6 Q. So, you lived in North Carolina first and then went
7 to Georgia?
- 8 A. Yes.
- 9 Q. All right. About how many years did you live and
10 work in North Carolina?
- 11 A. When I first got here, eight months in North
12 Carolina in Charlotte. I arrived at the airport in
13 Charlotte. And I worked two shifts in the airport.
14 I worked at the airport. I was eight months there.
- 15 Q. All right. And then after that, I believe he said
16 he went to Georgia. And was that Savannah?
- 17 A. That's when I worked in the golf course in Savannah.
- 18 Q. Okay. And when you worked at the golf course, what
19 kind of work did you do at the golf course?
- 20 A. We were working on all the traps, and we were using
21 shovel. Doing shovel work.
- 22 Q. Shovels. Rakes?
- 23 A. Yes, rakes, changing out the sand with new sand.
- 24 Q. Did that job require lifting?
- 25 A. Yes, first you had to carry things, and then you had

1 to get on your knees to -- to plant the grass and
2 everything.

3 Q. So, it required stooping, squatting?

4 A. Yes, moving things around on your knees, hands and
5 knees, working with the grass.

6 Q. Bending?

7 A. All those movements.

8 Q. Physical work?

9 A. Yes, it was hard work.

10 Q. How long did you live in Georgia and work at the
11 golf course?

12 A. Four years.

13 Q. And from there, where did you move?

14 A. I went back to North Carolina then.

15 Q. And what type of work did you do there?

16 A. First, I worked in a restaurant, and then I was
17 doing weeding, weedeating around the highways and
18 roadways in Charlotte.

19 Q. What kind of equipment did he use to do that?

20 A. Weedeater. A lot of moving around with the
21 weedeater.

22 Q. Was that a gas-powered back-type weedeater, that
23 type?

24 A. Yes, gas.

25 Q. Okay. And did that job require lifting?

- 1 A. Yeah, it's hard work. We had to do a lot of high
2 grass too, mowing.
- 3 Q. And about how many years, or how long did he do that
4 in North Carolina?
- 5 A. That was approximately six years.
- 6 Q. And after that, I believe you returned to
7 Hardeeville, South Carolina?
- 8 A. That's when I went to Hardeeville, South Carolina.
- 9 Q. And what kind of work did you do in Hardeeville?
- 10 A. So, I lived for a while in South Carolina, but I was
11 working in Savannah for a while.
- 12 Q. And what kind of work was he doing?
- 13 A. As an assistant or helper in insulation
14 installation.
- 15 Q. Okay. Is that where he learned to do insulation
16 work?
- 17 A. That's where I learned.
- 18 Q. And I believe the company he worked for was Ecofoam;
is that correct?
- A. That -- I left that job, and I went to Ecofoam.
- Q. All right. And then how long were you with Ecofoam?
- A. Like three and a half years, approximately.
- Q. Was that the same type of insulation work that he
24 was doing for the employer?
- 25 A. That was at first, and then I was doing the spraying

1^s RSE

1 and the cleanup, but you have to carry all that
2 stuff, a lot of stuff.

3 Q. Tell me what all he had to physically do to do that
4 job.

5 **BY COMMISSIONER TAYLOR:**

6 Mr. McDaniel, I'm going to stop you for a
7 minute. Can you just ask the question in the first-
8 person ---

9 **BY THE INTERPRETER:**

10 Yes.

11 **BY COMMISSIONER TAYLOR:**

12 --- directly to the Claimant?

13 **BY MR. MCDANIEL:**

14 Oh, I'm sorry.

15 **BY COMMISSIONER TAYLOR:**

16 That's okay.

17 **BY THE INTERPRETER:**

18 Yeah, that helps. Thank you.

19 **BY MR. MCDANIEL:**

20 I'm sorry.

21 **BY COMMISSIONER TAYLOR:**

22 That's okay.

23 **OFF THE RECORD DISCUSSION**

24 **DIRECT EXAMINATION RESUMED BY MR. MCDANIEL:**

25 Q. Mr. Morales, what type of physical activities did it

- 1 take you to do that job?
- 2 A. You have to work fast; you have to bend over; you
3 have to stretch upwards. All that. Go up and down
4 ladders, use a machete, cut with a machete, and
5 carry the scaffolding and the ladder, 12-foot
6 ladder, and extensions to go way up high.
- 7 Q. Did you have to crawl -- Mr. Morales, did you have
8 to crawl under houses?
- 9 A. Yes, all that kind of work in the -- under the
10 floor.
- 11 Q. And then your next job -- how long did you work for
12 Ecofoam, and then what was your next job?
- 13 A. It was about three years there.
- 14 Q. Mr. Morales, where did you go after that?
- 15 A. And then I came to the company over here.
- 16 Q. And that's Insulation by Cohen's?
- 17 A. Yes, then I went in as a sprayer when I began there.
- 18 Q. Mr. Morales, tell me the difference between the
19 insulation work you were doing there and what you
20 were doing for Insulation by Cohen's.
- 21 A. It's easier, the installation, but you still have to
22 stretch upward and bend down and crouch down. It's
23 the same. It's very similar, but you have to
24 protect yourself more when you're spraying with --
25 with protection gear.

- 1 Q. Ask Mr. Morales, is this the type of gear ---
- 2 A. So, when you go underneath the houses, you had to do
- 3 that, and it was hot.
- 4 Q. Okay. Mr. Morales, how much of your work was
- 5 underneath the houses and in low areas?
- 6 A. Sometimes it would be six or seven hours.
- 7 Q. Mr. Morales, is this basically the type of area
- 8 you'd be working in when you were doing the work?
- 9 A. That's what I did, yes, spraying. And you could be
- 10 on your knees or like that.
- 11 Q. So, most of the time you were either on your knees
- 12 or on your back?
- 13 A. It depended on how low the ceiling of that
- 14 crawlspace was what -- what position I would be in.
- 15 Bigger -- tall -- taller or shorter space. It was
- 16 like that, only laying down (demonstrating). And
- 17 also, we do up -- up at the top of the houses also.
- 18 Sometimes you had to -- to be laid down for parts of
- 19 the work in the attics. Laying down, standing up,
- 20 on your knees. You have to stretch sometimes to
- 21 reach some areas.
- 22 Q. Mr. Morales, knowing the condition of your back now
- 23 after the surgery, could you go back to doing the
- 24 job on the golf course?
- 25 A. No, not anymore.

- 1 Q. Why not?
- 2 A. 'Cause I'm not the same.
- 3 Q. Specifically in reference to your injury, what kind
4 of problems would you have, and what would you not
5 be able to do?
- 6 A. I could maybe do 20-percent of it, but it would have
7 to be going real easy, and I'd have pain.
- 8 Q. Mr. Morales, if you're doing any type of activity
9 such as having to twist, or having to bend, what kind
10 of problems do you have with your back?
- 11 A. It would hurt me where I have those screws.
- 12 Q. Mr. Morales, could you do that work for very long?
- 13 A. I couldn't do it for very long and maybe last to
14 half an hour, an hour. But I would have to really
15 move slowly.
- 16 Q. So, Mr. Morales, you could not do it for a full day?
- 17 A. No. Maybe a little bit on, a little bit off. On
18 and off.
- 19 Q. Mr. Morales, the same question as to the job in
20 North Carolina on the highways, could you do that
21 job?
- 22 A. No, not anymore.
- 23 Q. And again, the same question; what, in reference to
24 your back, could you not do, what activity?
- 25 A. Maybe I could -- maybe I could just, you know, maybe

1 pick up garbage, trash.

2 Q. Could you do that for a full day -- Mr. Morales,
3 could you do that for a full day, five days a week?

4 A. Maybe I could just do a few hours, maybe up to six
5 hours a few days.

6 Q. Now, Mr. Morales, again, but in knowing what it took
7 to do that job, could you do that job?

8 **BY MS. GRUBER:**

9 Objection. Commissioner, this has been asked
10 and answered.

11 **BY MR. MCDANIEL:**

12 Why? I don't think that one has.

13 **BY COMMISSIONER TAYLOR:**

14 Which specific job are you referring to?

15 **BY MR. MCDANIEL:**

16 The job in North Carolina again.

17 **BY COMMISSIONER TAYLOR:**

18 Overruled. You can answer.

19 **BY THE INTERPRETER:**

20 And your question was, "Could you do that job"?

21 **BY MR. MCDANIEL:**

22 Knowing what it took to do that job, could he
23 do that full job?

24 **THE WITNESS ANSWERS:**

25 A. No, not anymore. I have those four screws. I wish

1 I could do that. I wish I could work. And they
2 liked me. My employers in all those jobs liked me
3 because I was a hard worker, and I was very
4 obedient. And the reason I stopped the job in North
5 Carolina, it was because that company, their work
6 was taken over by the state.

7 **DIRECT EXAMINATION RESUMED BY MR. MCDANIEL:**

8 Q. All right. Now, in reference to, Mr. Morales, the
9 job doing the insulation work in Hardeeville, could
10 you go back to doing that job?

11 A. No, not anymore.

12 Q. And again, the same question, Mr. Morales, in
13 reference to your back, why would you not be able to
14 do that job?

15 A. I just can't do the movements because of the screws.
16 I can't move that way.

17 Q. All right. Now, Mr. Morales, in reference to your
18 job that you were doing with Installations by
19 Cohen's, could you go back to doing that job?

20 A. No, not anymore.

21 Q. And again, the same question: what activities,
22 because of your back, you would not be able to do?

23 A. Just like I said before, it's -- it's heavy work.
24 It's very heavy work.

25 Q. Mr. Morales, using this picture, if you would, tell

1 us what kind of problems you would have in trying to
2 do this?

3 A. (Witness views photograph). To -- first to get down
4 there and to lay down like that, you have to kind of
5 slide under all these pipes and -- and -- and move
6 around on your back and -- and lay down. It would
7 hurt, and then also when you're up in the high parts
8 of the house, you have to move around into tight
9 spaces. I would like to work.

10 Q. Mr. Morales, this is an accepted accident, but tell
11 us what happened in the accident.

12 A. I was covering with paper a wall in a garage, or
13 plastic -- plastic, because it was a finished wall.
14 So once you finish a wall, you have to cover it real
15 well.

16 Q. And what happened?

17 A. It was windy, and I put the ladder there, and the
18 ladder fell, and I fell backwards.

19 Q. And how did you land -- Mr. Morales, how did you
20 land?

21 A. Back on my back onto pavement, concrete floor.

22 Q. Okay. Mr. Morales, a Dr. Stofko did your surgery?

23 A. Yeah, I'm -- I'm not too sure about his name.

24 Q. Mr. Morales, was it a man?

25 A. Yes. He said I might not be able to walk. I might

1 ---

2 **BY MS. GRUBER:**

3 Objection to anything the doctor said.

4 **BY COMMISSIONER TAYLOR:**

5 Sustained. Please instruct the Claimant that
6 he can't tell us what the doctor said. Just answer
7 his attorney's questions carefully.

8 **BY THE WITNESS:**

9 Okay.

10 **DIRECT EXAMINATION RESUMED BY MR. MCDANIEL:**

11 Q. What's his understanding as far as what he has in
12 his back now as a result of the surgery?

13 **BY COMMISSIONER TAYLOR:**

14 And again, Mr. McDaniel, I'll remind you to ---

15 **BY MR. MCDANIEL:**

16 Yes.

17 **BY COMMISSIONER TAYLOR:**

18 --- speak directly to him, and she'll interpret
19 it. Thank you.

20 **DIRECT EXAMINATION RESUMED BY MR. MCDANIEL:**

21 Q. Mr. Morales, please tell us your understanding of
22 what's in your back as a result of your surgery.

23 A. I think they put some screws in there to hold the --
24 the bones together.

25 **BY MR. MCDANIEL:**

1 Commissioner, again, this is already into
2 evidence. It's a picture of the T11 through L1-
3 fusion.

4 **BY COMMISSIONER TAYLOR:**

5 Thank you.

6 **DIRECT EXAMINATION RESUMED BY MR. MCDANIEL:**

7 Q. Mr. Morales, after the hospital, when you went back
8 to the doctor's office, did you see a man or a
9 woman?

10 A. A woman.

11 Q. Mr. Morales, I want to go through those medical
12 records with you briefly.

13 **BY MS. GRUBER:**

14 Commissioner, I'm going to object to this.
15 Again, this is res judicata. We went over this at
16 the hearing in August. There's been a decision, an
17 order on it. We went through all the medical
18 records then when they've been trying to get medical
19 treatment for these other body parts.

20 **BY MR. MCDANIEL:**

21 I'm not...

22 **BY COMMISSIONER TAYLOR:**

23 Well, let me ask you this; can we just not ask
24 him general questions about the treatment he
25 received as opposed to walking through each medical

1 record?

2 **BY MR. MCDANIEL:**

3 Well, the reason I want to -- mainly, I was
4 wanting to refer to the dates, but also, it goes
5 along to why I want to take Ms. Alana Cole's
6 deposition, and it's paramount to you -- I've been
7 instructed appropriately that I needed to speak to
8 Mr. Morales.

9 **BY COMMISSIONER TAYLOR:**

10 Okay.

11 **BY MR. MCDANIEL:**

12 We have a Spanish-speaking gentleman who does
13 not speak fluid English.

14 **BY COMMISSIONER TAYLOR:**

15 Which is why I think referring directly to the
16 medical records is going to present more of a
17 problem on that end, but I will note that I will
18 allow you to proffer it, but if you could
19 paraphrase. I don't think he's read the medical
20 records. So I think that would be futile. Okay.

21 **BY MR. MCDANIEL:**

22 Let me ask a few of my questions, and if
23 there's an objection, then so be it.

24 **BY COMMISSIONER TAYLOR:**

25 Yes, sir.

DIRECT EXAMINATION RESUMED BY MR. MCDANIEL:

1
2 Q. Mr. Morales, according to the medical records, after
3 the surgery on October the 11th of 2019, you saw the
4 doctor on October the 23rd of 2019 at the office?

5 A. No, when they gave me the appointment, they told me
6 the doctor would see me. When I got there, it was
7 the lady.

8 Q. You saw the lady. Mr. Morales, did you ever know
9 her name?

10 A. No, I didn't.

11 Q. According to the medical records, "The patient is
12 accompanied by a family member who is interpreting."
13 Mr. Morales, did the lady that saw you in the
14 doctor's office speak Spanish to you ever?

15 A. No.

16 Q. Mr. Morales, who was it that was there at each visit
17 and interpreted for you for the lady that you were
18 seeing?

19 A. My niece and nephew.

20 Q. Was there anybody like the lady here -- Mr. Morales,
21 today, like the lady here today that is interpreting
22 for us, was there anybody there from the doctor's
23 office, or anybody else, that interpreted for the
24 doctor?

25 A. No, just my -- my two -- my niece and nephew were

1 the only ones.

2 Q. All right. And how old is your niece?

3 A. She's 14, and he's 15.

4 Q. So, at this time -- Mr. Morales, at this time that
5 we're talking about in 2019, was she 13?

6 A. Yes, she was 13 then, 12 or 13.

7 Q. And your nephew was how old?

8 A. He was thirteen or fourteen. Thirteen going on
9 fourteen.

10 Q. Were they both born in the United States?

11 A. Yes, in North Carolina.

12 Q. All right. So, Mr. Morales, what you were telling
13 the doctor was being interpreted by a 13-year-old
14 girl, your niece, for the doctor; is that correct?

15 A. Yes.

16 Q. And the doctor -- Mr. Morales, the doctor is -- what
17 the doctor is saying to you is being interpreted by
18 a 13-year-old girl?

19 **BY MS. GRUBER:**

20 Commissioner, this is leading, and I've got the
21 same objection. I think it's getting into the same
22 territory that was already exhaustively gone through
23 before the first hearing.

24 **BY MR. MCDANIEL:**

25 Well, Commissioner, if ---

1 **BY COMMISSIONER TAYLOR:**

2 We don't need to fight about it. The issue is,
3 he's already answered. These were teenagers. The
4 record is clear. It's just me. We don't have a
5 jury. I get it. There was a teenager interpreting
6 for him at the visit. I understand.

7 **BY MR. MCDANIEL:**

8 Right. Does anybody want to put the state of
9 the law with the reference to medical treatment in
10 referencing interpretation?

11 **BY COMMISSIONER TAYLOR:**

12 I don't believe that that's necessary for this
13 workers' compensation proceeding, because the actual
14 medical appointment on October 23rd was for causally
15 related medical treatment that was paid for by the
16 Defendants. So there's really no dispute at this
17 point in time in the medical evidence.

18 **BY MR. MCDANIEL:**

19 And Commissioner, most respectfully, they are
20 relying on what this doctor recorded into the record
21 as what our Client was telling her based on
22 translation to and from a 13-year-old girl and a 15-
23 year-old boy.

24 **BY COMMISSIONER TAYLOR:**

25 It's noted for the record.

1 **BY MR. MCDANIEL:**

2 And I ask the Commission to take that into
3 consideration, and also the Commission to take into
4 consideration that that is improper in reference to
5 medical treatment in reference to a person that's
6 Spanish speaking, in reference to interpretation.

7 **BY COMMISSIONER TAYLOR:**

8 And I understand that. And I guess I'll ask
9 for the record, although, I do know the answer, was
10 this brought up at the hearing before Commissioner
11 James when these medical records were originally
12 presented to the Commission?

13 **BY MR. MCDANIEL:**

14 I'm not exactly sure I understand. Okay. All
15 right, I understand the Commission's ruling.

16 **BY COMMISSIONER TAYLOR:**

17 Okay. All right.

18 **BY MR. MCDANIEL:**

19 Then I'll very quickly go through this.

20 **BY COMMISSIONER TAYLOR:**

21 Okay, thank you.

22 **BY MR. MCDANIEL:**

23 Commissioner, for the record, on November 20th
24 of 2019, the record reflects that the patient was
25 accompanied by a family member who is interpreting.

1 On January the 8th of 2020, the record reflects that
2 patient is accompanied by a family member who is
3 interpreting.

4 **DIRECT EXAMINATION RESUMED BY MR. MCDANIEL:**

5 Q. Mr. Morales, throughout your treatment, was there
6 ever anybody other than your niece or nephew that
7 was present to interpret for you and the doctor?

8 A. Just the one in July.

9 Q. There was somebody present in July?

10 A. That's the only time -- that's the only time of my
11 treatment, yes.

12 Q. Now, Mr. Morales, is it correct that the last time
13 you saw the lady was in July of 2020?

14 A. That was the last one, yes. The lady doctor.

15 Q. Okay. Mr. Morales, is there any job that you've got
16 that you've ever done before, that you can go back
17 working doing that job full time in your opinion?

18 A. No.

19 Q. Mr. Morales, tell us about your back in reference to
20 your thoracic spine fusion. Tell us about what kind
21 of problems you have with it day to day.

22 A. Pain whenever I do lots of things.

23 Q. Mr. Morales, talk to us about activities around the
24 house.

25 A. Like I can cook some, but I don't lift anything

1 heavy. I do a little light sweeping. That's what I
2 do.

3 Q. Mr. Morales, what about just in putting on your
4 clothes, do you have any problem with that?

5 A. Yeah, it's difficult, but I find a way around it,
6 and -- and I -- I get it done.

7 Q. Mr. Morales, could you use your shoes, putting on
8 your shoes for example, that if you've able to do
9 it, but also explain to us the kind of problems you
10 have.

11 A. I have to get on my knees.

12 Q. You have to get on your knees?

13 A. I sort of bend over.

14 Q. And put them on, okay.

15 A. I don't go down all of a sudden like I used to
16 leaning over.

17 Q. And Mr. Morales, that's a good point. Tell us about
18 how you move now as to compared in how you moved
19 before the accident.

20 A. I would just lean over whenever I needed to in a
21 hurry.

22 Q. And now -- Mr. Morales, and now...?

23 A. Not anymore. I have to very calmly and -- get down,
24 figure out how to get down there.

25 Q. Mr. Morales, tell me about riding in a car; do you

1 have any pains or problems in riding in a car?

2 A. If it's for a long time, yes, if it's for a short
3 time, it's not that bad. But I still have to think
4 about how I move, like when I put on the seatbelt.

5 Q. Mr. Morales, I've noticed throughout the hearing
6 today that you've leaned forward. Can you tell us
7 why that is?

8 A. Because it hurts my back back here (indicating).

9 Q. Mr. Morales, would you stand up for me, please?

10 A. (Witness complies). It's because I've been sitting
11 for a while (demonstrating).

12 Q. Mr. Morales, can you explain what's going on right
13 now?

14 A. I -- it hurts in my low back (indicating).

15 Q. Where the fusion was?

16 A. Yes.

17 Q. Mr. Morales, would you walk over in front of the
18 Commissioner?

19 A. (Witness complies).

20 BY MR. MCDANIEL:

21 Ask him to turn.

22 BY THE INTERPRETER:

23 (Interpreter complies).

24 DIRECT EXAMINATION RESUMED BY MR. MCDANIEL:

25 Q. Mr. Morales, is this where the screws are?

- 1 A. Yes.
- 2 Q. Mr. Morales, how does that feel if I touch it?
- 3 A. It hurts.
- 4 Q. Mr. Morales, you can sit back down.
- 5 A. Thank you.
- 6 Q. Mr. Morales, prior to this accident, did you have
- 7 any problems with using your back to do work
- 8 requiring the use of your back?
- 9 A. No.
- 10 Q. On a percentage basis, after this accident and now,
- 11 Mr. Morales, what percentage of the use of your back
- 12 do you think you still have to do work with your
- 13 back?
- 14 A. Twenty percent.
- 15 Q. Same question; what percentage of loss of use of
- 16 your back do you feel like you've lost as a result
- 17 of this accident to do work requiring the use of
- 18 your back?
- 19 A. Like the 20?
- 20 Q. How much loss of use?
- 21 A. Eighty.
- 22 Q. And do you have -- Mr. Morales, do you have a lot of
- 23 problems with your shoulders in reference to
- 24 reaching with your shoulders?
- 25 A. It hurts this arm, and up here when I lean over.

1 Actually, both hurt (indicating).

2 **BY MS. GRUBER:**

3 Objection, Commissioner.

4 **BY COMMISSIONER TAYLOR:**

5 The objection is noted for the record. I'll
6 allow this portion of the testimony be proffered by
7 the Claimant.

8 **DIRECT EXAMINATION RESUMED BY MR. MCDANIEL:**

9 Q. Mr. Morales, the problems you just described with
10 your shoulders, have you had that ever since your
11 surgery?

12 A. Yes, when I lean over, and I feel pain that comes
13 from the -- in my arm from the screws (indicating).

14 Q. From the surgery?

15 A. Yes. So, it hurts where the screws are, and it
16 hurts up here (indicating).

17 Q. But am I correct -- Mr. Morales, am I correct that
18 the pain comes from your surgical site?

19 **BY MS. GRUBER:**

20 Objection, Commissioner. This is leading.

21 **BY MR. MCDANIEL:**

22 Okay. Commissioner, ---

23 **BY COMMISSIONER TAYLOR:**

24 I'm going to sustain the objection as to
25 leading, but I am allowing the proffer of the

1 testimony, but you still have to do it the proper
2 way.

3 **BY MS. GRUBER:**

4 And please note my continuing objection,
5 Commissioner.

6 **BY COMMISSIONER TAYLOR:**

7 Absolutely. Noted for the record.

8 **BY MR. MCDANIEL:**

9 Well, for purposes of the record, if Madam
10 Court Reporter could just read back his answer about
11 where his pain emanates from, that would be fine,
12 Commissioner. Because I don't think I'm foreclosed
13 from referencing pain in any part of his body that
14 emanates from the site of the injury of which it is
15 agreed upon; am I, Commissioner?

16 **BY COMMISSIONER TAYLOR:**

17 You are correct. But as opposed to having
18 Madam Court Reporter read the record back, which
19 would take some time, can we just rephrase the
20 question and ask for that testimony directly?

21 **BY MR. MCDANIEL:**

22 Okay.

23 **BY MS. GRUBER:**

24 Commissioner, ---

25 **BY COMMISSIONER TAYLOR:**

1 Noting the same objection for Defendants, and
2 then pursuant to the proffer.

3 BY MR. MCDANIEL:

4 Okay. All right. Well -- okay. All right.
5 For the record, Mr. Morales has already testified
6 that he has had this pain that he was referencing in
7 his shoulders ever since the surgery, Commissioner.

8 DIRECT EXAMINATION RESUMED BY MR. MCDANIEL:

9 Q. So, Mr. Morales, when you had this pain that you've
10 described that runs into your arms, where does it
11 come from, where does it start?

12 BY MS. GRUBER:

13 Objection, Commissioner, that this calls for a
14 medical opinion.

15 BY MR. MCDANIEL:

16 Well, Commissioner, I've never heard that kind
17 of objection.

18 BY COMMISSIONER TAYLOR:

19 Okay, I have. And the way that question is
20 asked, it does call for a medical opinion, because
21 he's already testified as to where he feels his
22 pain. So where it comes from would require a
23 medical opinion. So sustained for the record.

24 DIRECT EXAMINATION RESUMED BY MR. MCDANIEL:

25 Q. Okay. Mr. Morales, what part of your body do you

1 feel the pain start that you described that goes
2 into your shoulder?

3 A. Where the screws are (indicating).

4 Q. Where the screws are, thank you.

5 BY MR. MCDANIEL:

6 Commissioner, ---

7 BY COMMISSIONER TAYLOR:

8 Yes, sir?

9 BY MR. MCDANIEL:

10 --- we have no other questions. I think it's
11 noted in the records that Mr. Morales -- of course,
12 he has hardware in his back, but I think there's
13 also a specific medical opinion in there that he may
14 benefit from removal of the screws. I'd just note
15 that for the record.

16 BY COMMISSIONER TAYLOR:

17 Okay. Thank you, sir.

18 BY MR. MCDANIEL:

19 And with that, we have no further questions.

20 BY COMMISSIONER TAYLOR:

21 All right, thank you. All right, Ms. Gruber.

22 BY MS. GRUBER:

23 Sure.

24 CROSS-EXAMINATION BY MS. GRUBER:

25 Q. Mr. Morales, you have been in this country for 20

1 years?

2 A. Yes.

3 Q. And is it true that you have not learned to speak
4 English in those 20 years?

5 A. No, I just work everyday, and I'm around only
6 Spanish people.

7 Q. So, you do not speak any English; is that correct?

8 A. Just a few words.

9 Q. And do you have a Social Security Number?

10 A. I have ---

11 **BY MR. MCDANIEL:**

12 Objection as to relevance.

13 **THE WITNESS RESUMES ANSWER:**

14 A. --- some kind of a document that they gave me when I
15 came here. But now Social Security.

16 **BY MS. GRUBER:**

17 Commissioner, his legal status here is relevant
18 to disability for gainful employment.

19 **BY MR. MCDANIEL:**

20 Wait a minute. Whoa, whoa, whoa.

21 **BY COMMISSIONER TAYLOR:**

22 Wait a minute.

23 **BY MR. MCDANIEL:**

24 Wait a minute. I want to get this statement on
25 the record.

1 **BY COMMISSIONER TAYLOR:**

2 It's on the record. We're on the record.

3 **BY MR. MCDANIEL:**

4 I'm sorry. It was being spoken. I want to
5 hear that position, if you don't mind, restated on
6 the record as to why that is relevant.

7 **BY MS. GRUBER:**

8 Our position, Commissioner, is they have put
9 whether or not this man is capable of gainful
10 employment on the record, and whether or not he has
11 a Social Security Number and his legal status has
12 some effect on his job prospects. We're not
13 suggesting -- I'm not maligning his character, we're
14 not suggesting that this is anything nefarious.
15 It's our position that this has something to do on a
16 variety of work options that are available to him,
17 just as whether or not he speaks English.

18 **BY MR. MCDANIEL:**

19 We'll agree with that.

20 **BY COMMISSIONER TAYLOR:**

21 Okay. All right, noted for the record. Thank
22 you. So the objection is overruled for the record.

23 **CROSS-EXAMINATION RESUMED BY MS. GRUBER:**

24 Q. And Mr. Morales, would it be fair to say, or is it
25 correct to say, that you are not in this country

1 legally?

2 A. No.

3 Q. Are you here legally, or not?

4 **BY MR. MCDANIEL:**

5 That is not ---

6 **THE WITNESS ANSWERS:**

7 A. I had an -- I had an ID when I came in ---

8 **BY COMMISSIONER TAYLOR:**

9 Overruled. You can answer.

10 **THE WITNESS RESUMES ANSWER:**

11 A. --- in North Carolina. I had an ID, but then I -- I
12 lost it. I lost my wallet at my job. I had an ID.
13 I had an ID, but I lost it at my job.

14 **CROSS-EXAMINATION RESUMED BY MS. GRUBER:**

15 Q. What kind of an ID did you have?

16 A. When you could have a driver's license.

17 Q. Mr. Morales, you do not have a driver's license, do
18 you?

19 A. No. I had that ID back then, and that -- that
20 helped me out with different situations.

21 Q. Okay. But since October, ---

22 A. I have my passport.

23 Q. --- since the date of the accident, you have not had
24 a driver's license; is that correct?

25 A. No, not -- not now. I have my counselor documented

1 my passport.

2 **BY MS. GRUBER:**

3 Commissioner, would you please instruct him to
4 answer, give me a direct answer?

5 **BY COMMISSIONER TAYLOR:**

6 Okay. Mr. Morales, if you could please answer
7 each question with a "yes" or a "no" first, and then
8 you can explain.

9 **BY THE WITNESS:**

10 Okay.

11 **CROSS-EXAMINATION RESUMED BY MS. GRUBER:**

12 Q. Do you have a driver's license?

13 A. No, just my -- my counselor's document.

14 Q. And you have not looked for any work; is that
15 correct?

16 A. Not now.

17 Q. No?

18 A. No.

19 Q. And when I took your deposition a year or so ago,
20 you told me you had a car. Do you still have a car?

21 A. I have a car, yes.

22 Q. And how far do you drive your car?

23 A. Just when I have to go see the lawyer or when I have
24 to go pay some bills.

25 Q. Did you drive your car here today?

- 1 A. The lawyer brought me here today?
- 2 Q. Okay. Can you drive an hour?
- 3 A. If I'm going slow.
- 4 Q. Can you drive two hours?
- 5 A. An hour-and-a-half if it's -- if it's not too fast.
- 6 Q. Why can't you drive fast?
- 7 A. Because of my condition.
- 8 Q. What about your condition makes it so you can't
- 9 drive fast?
- 10 A. 'Cause I'm just constantly aware of the -- the
- 11 screws, and I'm careful.
- 12 Q. All right. Did you finish the fourth grade?
- 13 A. Yes.
- 14 Q. And did you learn how to do math?
- 15 A. Not too much.
- 16 Q. Okay. Do you know how to calculate percentage?
- 17 A. I know what a hundred percent is and what less than
- 18 a hundred percent is.
- 19 Q. Okay. If you have a hundred pennies, how many is
- 20 twenty percent?
- 21 A. Twenty.
- 22 Q. And when you said that you had 80-percent loss of
- 23 your back, how did you come up with that
- 24 calculation?
- 25 A. Because of 20.

1 Q. Twenty. What does that mean?

2 A. That means if I had a hundred, and I lost eighty,
3 that means I have twenty now.

4 Q. I might have asked you this, but have you looked for
5 any work?

6 A. No, I haven't.

7 Q. Okay. You said earlier that when you were working
8 for the highway department, did you do some cleanup
9 on the roads, the sides of the roads?

10 A. Yes. When it was cooler weather, we did that.

11 Q. And you testified earlier that you thought you could
12 probably clean up for about six hours a day; is that
13 right?

14 A. Well, not like I used to. Because you have to carry
15 a lot of the trash around.

16 Q. Okay. But you did testify that you could clean up
17 for six hours a day, didn't you?

18 A. I -- I'm not really sure about that.

19 **BY THE INTERPRETER:**

20 I'm going to ask for repetition.

21 **BY THE WITNESS:**

22 So, I could do it on a very light weight, but
23 there would be people who could do it faster and
24 better than me.

25 **BY MS. GRUBER:**

1 Commissioner, I'm just going to refer to the
2 record ---

3 **BY COMMISSIONER TAYLOR:**

4 Okay, thank you.

5 **BY MS. GRUBER:**

6 --- and the Claimant's testimony, and I don't
7 have any other questions.

8 **BY COMMISSIONER TAYLOR:**

9 All right, thank you. Mr. McDaniel, any re-
10 direct?

11 **BY MR. MCDANIEL:**

12 No further re-direct, Commissioner.

13 **BY COMMISSIONER TAYLOR:**

14 All right, thank you. And for the record, are
15 there any other witnesses for the Claimant?

16 **BY MR. MCDANIEL:**

17 None for the Claimant.

18 **BY COMMISSIONER TAYLOR:**

19 All right. Any witness for the Defendants?

20 **BY MS. GRUBER:**

21 No, ma'am.

22 **BY COMMISSIONER TAYLOR:**

23 And I would like to read the medical records
24 into evidence. For the Claimant, I have APA numbers
25 one through five, and pages 1 through 45. For the

1 Defendants, I have APA numbers one through three,
2 which are pages 1 through 59, and then Exhibits "A"
3 and "B," which are pages 60 through 82. During the
4 hearing, the Claimant did testify regarding certain
5 photographs. And previously, they are part of the
6 Commission's file, and the file is part of the
7 record. But I would like to mark the actual
8 photograph of the fusion with the screws. Mr.
9 McDaniel, can I go ahead and mark this copy?

10 **BY MR. MCDANIEL:**

11 Yes, Commissioner. That's for you, for the
12 record.

13 **BY COMMISSIONER TAYLOR:**

14 All right, thank you. And I'll have that
15 marked as Claimant's Hearing Exhibit "A." And that
16 will be uploaded to the Commission's eCase System.

17 Thank y'all very much. That concludes this
18 matter.

19 **(COURT REPORTER MARKS PHOTOGRAPHS CLAIMANT'S EXHIBIT "A",
20 RETAINED IN COMMISSION'S FILE).**

21 **(THERE BEING NO FURTHER QUESTIONS, THIS HEARING WAS
22 CONCLUDED AT THE HOUR OF 1:19 P.M.)**

23
24
25

CERTIFICATE OF NOTARY PUBLIC
SOUTH CAROLINA WORKERS' COMPENSATION COMMISSION
COLUMBIA, SOUTH CAROLINA
WCC FILE NO. 1921668

EMPLOYEE/CLAIMANT: EVARISTO VERDUGO MORALES

EMPLOYER: INSULATION BY COHEN'S, LLC

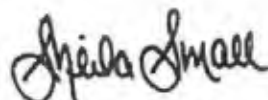
INSURER: BUILDERS PREMIER INSURANCE COMPANY

I, SHEILA SMALL, A NOTARY PUBLIC FOR THE STATE OF SOUTH CAROLINA, DULY COMMISSIONED AND QUALIFIED AS SUCH, DO HEREBY CERTIFY THAT THE FOREGOING 75 PAGES REPRESENTS A TRUE AND ACCURATE TRANSCRIPT OF THE FOREGOING HEARING OF **EVARISTO VERDUGO MORALES** TAKEN ON THE 26TH DAY OF APRIL, 2021.

THAT THE WITNESS WAS DULY PLACED UNDER OATH AND ADMONISHED TO SPEAK THE WHOLE TRUTH. THAT THE ORAL HEARING WAS DULY TAKEN AND TRANSCRIBED AS TO THE QUESTIONS PROPOUNDED AND THE ANSWERS GIVEN.

THAT ALL THE OFFERED EXHIBITS, STIPULATIONS AND OBJECTIONS, IF ANY, INVOLVED IN THIS CASE ARE DULY ATTACHED OR INCLUDED HEREIN.

IN WITNESS WHEREOF, I HAVE SET MY HAND THIS 13TH DAY OF MAY, 2021.



SHEILA SMALL
NOTARY PUBLIC FOR SOUTH CAROLINA
MY COMMISSION EXPIRES: 3-11-2029

* THIS TRANSCRIPT MAY CONTAIN QUOTED MATERIAL. SUCH MATERIAL IS REPRODUCED AS READ OR QUOTED BY THE SPEAKER.

1 State of South Carolina
2 Before the
3 South Carolina Workers' Compensation Commission

4 Evaristo Verdugo Morales,
5 Employee,
6 Claimant,

7 vs. WCC FILE NO.: 1921668

8 Insulation By Cohen, LLC,
9 Employer,
10 and

11 Builders Premier Insurance Company,
12 Carrier,
13 Defendants.

14 H E A R I N G

15 DATE: Thursday, February 29, 2024

16 TIME: 3:16 p.m.

17 LOCATION: Workers' Compensation Commission
18 Community Development Center
19 101 Courthouse Drive
20 St. Matthews, South Carolina

21 BEFORE: Commissioner T. Scott Beck

22 REPORTED BY: Jeannette M. King
23 South Carolina Court Reporter

24 _____
25 ABC REPORTING SERVICE
26 257 Summerland Avenue
27 Batesburg, South Carolina 29006
28 1-803-532-5255
29 1-803-730-3015 (cell)

1 APPEARANCES:

2

3 ATTORNEY FOR PLAINTIFF
4 EVARISTO MORALES VERDUGO:

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6 PRESTON F. MCDANIEL, ESQUIRE
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8 Columbia, South Carolina 29201

7

8 ATTORNEY FOR DEFENDANTS
9 INSULATION BY COHEN, LLC, AND
BUILDERS PREMIER INSURANCE COMPANY:

10 CLEMENT RIVERS, LLP
11 E. COURTNEY GRUBER, ESQUIRE
12 25 Calhoun Street
13 Charleston, South Carolina 29401

12

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14

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18

19 ALSO PRESENT:
Sandra Pabst, Interpreter

20

21

22 (INDEX AT REAR OF TRANSCRIPT)

23

24

25

EVARISTO MORALES VERDUGO V. INSULATION BY COHEN 2/29/2024

1 P R O C E E D I N G

2 THE COURT: Today's date is
3 February 29, 2024. This is Workers' Compensation
4 File No. 1921668.

5 Claimant in this matter is Evaristo
6 Morales Verdugo, represented today by Attorney
7 Preston McDaniel.

8 The employer is Insulation By Cohen, LLC.
9 Carrier is Builders Premier Insurance Company. They
10 are both represented by Attorney Courtney Gruber.

11 Date of accident in this matter is
12 October 10, 2019. Average weekly wage is \$1,302.27,
13 yielding a compensation rate of \$845.74.

14 We're here today on both Claimant's
15 Form 50 and Defendants' Form 21. I've received
16 submissions from both parties. Any objection to
17 APAs, jurisdiction, venue, or any other matter?

18 Mr. McDaniel?

19 MR. MCDANIEL: Commissioner, I believe
20 that Ms. Gruber put up pages, as part of her APA
21 submissions, the deposition of Dr. Stofko that was
22 taken, I believe on -- was it February 15th?

23 MS. GRUBER: January 15.

24 MR. MCDANIEL: January 15th. That
25 deposition was not properly noticed. I had

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1 scheduled depositions. Dr. Stofko had advised us --
2 I withdrew the request for deposition to be
3 scheduled at a later date, based on the report of
4 Dr. Stofko's office, that he needed further medical
5 care so -- and then that was on Friday the 13th
6 and then that deposition was taken. I did not
7 attend.

8 I advised Ms. Gruber that I had withdrawn
9 my request, which it was on my Notice of Deposition,
10 and so I did not attend the deposition, plus it was
11 going to be conducted by video, you know, by Zoom,
12 and so I was not going to be able to go forward with
13 the deposition anyway.

14 Again, that was on my Notice of
15 Deposition. Ms. Gruber did not notice the depositions.
16 You have to notice the deposition and give us proper
17 notice if you want to take the deposition of a
18 doctor.

19 She only wanted to take the deposition
20 after we received the report from Dr. Stofko's
21 office and I withdrew my -- I withdrew -- I canceled
22 the deposition that day based on that report.

23 THE COURT: Ms. Gruber, how do you go
24 forward on a deposition that he set, that he's, in
25 essence, canceled it?

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1 MS. GRUBER: Commissioner, I thought it
2 was in the interest of judicial economy. We tried to
3 set -- these depositions have been set about five
4 times.

5 THE COURT: Well, it's his deposition.
6 He's -- he's withdrawn that request for a
7 deposition. You went forward on a deposition that
8 he wasn't present at and told you he wasn't going to
9 be present at and was set by him.

10 MS. GRUBER: Commissioner, we had agreed
11 before -- the day before the report came out that we
12 were going to take the deposition on that day. We
13 agreed to a ten-day -- well in advance of ten days,
14 but it was -- it was some discussion because it
15 was -- we discovered it was on a federal holiday and
16 everybody agreed we would go forward with it.

17 My -- they didn't want to withdraw -- they
18 did not withdraw -- he didn't withdraw the
19 deposition until he got a report from Dr. Stofko
20 that we felt like addressed medical treatment for
21 causation, for conditions that were not causally
22 related to our accident. I wanted to ask Dr. Stofko
23 about that.

24 It was my feeling, based on -- based on my
25 experience in a lot of years of doing this was

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1 that we were going -- if the deposition was canceled
2 as a -- and that we were going to be pressured into
3 providing that medical treatment without having an
4 opportunity to talk to Dr. Stofko and find out --

5 THE COURT: The way you do that is you set
6 the deposition.

7 MS. GRUBER: Well, again, Commissioner, we
8 have had -- we were getting closer to a hearing. We
9 had a hard time getting to a hearing and I was
10 concerned that with the time that was -- was
11 dwindling that we weren't -- we were going to have a
12 hard time finding a time when everybody was
13 available again for this deposition.

14 I noticed it as soon as -- as soon as
15 Preston said -- well, Preston actually said he would
16 cancel the deposition if we would authorize
17 medical treatment.

18 I said, We're not authorizing medical
19 treatment. I'm going to take the deposition. And
20 so that's what I did and we got the notice out as
21 quickly as we could. I did not have ten-days' notice
22 to do it because we had a deposition --

23 THE COURT: So to that point, why should I
24 let it in if he wasn't provided sufficient notice of
25 your Notice of Deposition?

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1 MS. GRUBER: Commissioner, I don't know if
2 the rules of that apply that stringently. We were
3 trying to get this deposition done before the
4 hearing. They -- we knew -- I knew he was -- I knew
5 that everybody was available that day and, you know,
6 I went ahead and took it. I don't know that the
7 rules prohibit that. I'm certainly -- we don't
8 follow the rules of evidence that --

9 THE COURT: No, we don't, but I'm --

10 MS. GRUBER: We look -- I mean, it wasn't
11 an excuse.

12 THE COURT: I'm looking at -- I guess I'm
13 looking at it from a -- from a fundamental fairness
14 issue.

15 MS. GRUBER: Why is it not fundamentally
16 fair, Commissioner, for us to take a deposition that
17 we had already agreed that everybody would be
18 available for. Just because he canceled -- he
19 canceled --

20 THE COURT: Who paid for the deposition?

21 MS. GRUBER: I did. We did. I mean my
22 client.

23 THE COURT: Because you noticed it when he
24 canceled it, correct?

25 MS. GRUBER: That's correct. Because we

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1 had the doctor available.

2 THE COURT: And then --

3 MS. GRUBER: I knew Preston was available.
4 I mean, I knew everybody was available. We paid for
5 the deposition.

6 MR. MCDANIEL: Commissioner, we --

7 THE COURT: With no way to cross-examine
8 because he withdrew it.

9 MS. GRUBER: Preston had the right to
10 cross-examine had he attended the deposition,
11 Commissioner.

12 THE COURT: Had he attended his
13 deposition. You didn't allow sufficient notice of
14 yours. I know we're splitting hairs, but you chose
15 to go forward on a deposition that he set, but
16 because you had the players in place, you decided to
17 reset it with a day's notice.

18 MS. GRUBER: Commissioner, we actually
19 had -- I sent -- I mean, if we're going to split
20 hairs, I sent the notice out before he even canceled
21 the deposition formally, and then I said, We're going
22 to go forward with it. So, but, no, I -- my notice
23 was not sent ten days out.

24 Commissioner, this is -- is similar to my
25 talking to a doctor. I was given a -- given

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1 notice -- or healthcare provider talking of --
2 similar to the defense side talking to a healthcare
3 provider after giving notice to the opposing party
4 that they're going to do it.

5 MR. MCDANIEL: Don't you need ten-days'
6 notice, isn't that right, even on that? But,
7 Commissioner --

8 THE COURT: Hang on.

9 MR. MCDANIEL: I'm --

10 THE COURT: There's not a timeframe listed
11 in 42-15-95.

12 MR. MCDANIEL: There's not?

13 THE COURT: Any other arguments on that
14 matter?

15 MS. GRUBER: Commissioner, as far as the
16 Zoom, whether it was by Zoom or not, I mean, the
17 rules -- Rule 30 doesn't require -- consider the
18 parties for deposition to be taken via Zoom. We
19 have -- we had a stenographer, we had a Notary and
20 that's importance for the Supreme Court order
21 45-20-20. She was authorized to administer the
22 oath. I mean, there's been some objection just
23 because he didn't agree to a Zoom deposition that --
24 that it came -- I didn't seen anything in that -- in
25 Rule 30 about that.

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1 MR. MCDANIEL: Commissioner, I think
2 you're ready to make a decision. At this point,
3 briefly, one, this was scheduled on my deposition
4 notice. I advised -- she's put in some
5 correspondence. I do not know if this
6 correspondence is in there or not.

7 Because I advised -- whenever we were
8 advised of Dr. Stofko's office's opinion, I
9 immediately advised him that I was withdrawing the
10 request for deposition because I was going to
11 present that, as our position is today, we want the
12 medical care, he wants the screws removed. That
13 afternoon Courtney advised me that she wanted -- she
14 was going forward with the deposition on Monday.

15 I advised her, Courtney, this is my
16 deposition. I noticed it. You have not noticed the
17 deposition of the doctor. If you properly notice
18 the deposition of the doctor, then I'll attend that
19 deposition. However, we're not going forward
20 Monday.

21 And I also cite in there a couple of
22 things. One is the doctor advised us that week that
23 he wanted to do it by Zoom. I wasn't doing it by
24 Zoom. I was going to have to reschedule it anyway
25 because -- regardless if we could work that out or

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1 not.

2 THE COURT: With regard to the Notice of
3 the Deposition and being your deposition, I think if
4 you haven't picked up from my comments, I'm --

5 MR. MCDANIEL: I agree.

6 THE COURT: I'm sensitive to that but --
7 but the 42-15-95 argument, I'm interested in your
8 response to that because she's basically complied
9 with the requirements of 42-15-95 to have a
10 communication with that physician.

11 MR. MCDANIEL: Well, she didn't --

12 THE COURT: Notified you in advance of the
13 communication and the intended purpose of it.

14 MR. MCDANIEL: I don't think that section
15 applies because what she did was, she decided to
16 change it to take his deposition, not to have a
17 conversation with -- communication with him. It was
18 a deposition and it's not properly noticed.

19 THE COURT: Well, there's no time
20 requirement in 15-95.

21 MR. MCDANIEL: Well, I don't know --
22 you're correct. I don't think --

23 THE COURT: All it says is they have to
24 give you a heads-up that they're doing it.

25 MR. MCDANIEL: They have to notify you

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1 beforehand. Well --

2 THE COURT: They did notify you
3 beforehand.

4 MR. MCDANIEL: Reasonable notice in -- you
5 know, I don't think 42-15-95 applies; however, that
6 is your decision, you know. Did we not adopt some
7 regulations concerning 42-15-95, or have you?

8 THE COURT: I don't know that -- not with
9 regard to that issue, I don't believe.

10 MR. MCDANIEL: Okay. I was just thinking
11 somebody had told me that there was supposed to be
12 ten-days' notice. I was aware of that myself, but
13 however -- but this is in reference, again,
14 depositions are taken and she submitted it as a
15 deposition. Correct?

16 THE COURT: She did.

17 MR. MCDANIEL: Okay. Depositions --

18 THE COURT: Double communication.

19 MR. MCDANIEL: Depositions are taken
20 pursuant to circuit court rules under the Workers'
21 Compensation Act, so we are subject to the rules.
22 Those rules require you give ten-days' notice of a
23 deposition.

24 She did not give me ten-days' notice under
25 the rules of a deposition. She can't now say, Okay,

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1 wait a minute, I'm -- I'm going to really intend
2 just to have a communication with him. You can't --
3 the more specific controls the general and the
4 more specific rules which control over a deposition
5 on circuit court rules which require you to give
6 ten-days' notice of the deposition, which I did and
7 which I withdrew. I canceled that deposition, that --
8 which I appropriately did beforehand.

9 She did not give me ten-days' notice of a
10 deposition, which is required. Actually, it's 15.

11 THE COURT: Response?

12 MS. GRUBER: Commissioner, I do think this
13 is splitting hairs. We can -- I mean, if he's not
14 in a deposition, then I basically did an ex parte
15 communication with the doctor with him having
16 notice. I don't see what difference it makes
17 whether it's under the rules or not. I had a
18 recorder. I had a stenographer there recording what
19 he said. I asked him questions. It's really no
20 different than if I had spoken with him and had
21 somebody there recording his answers.

22 I -- you know, I just don't see -- just
23 because we called it his deposition to begin with
24 and I -- now -- and the objection is you just said
25 it wasn't fair. It's not fundamentally fair for me to

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1 take a deposition without the opposing party being
2 there to cross-examine.

3 Well, then it's -- it is my deposition,
4 but, I mean, I was caught off guard. I didn't have
5 the opposing counsel there. He knew I was talking
6 to him.

7 I don't think it matters whether it was an
8 innocent deposition on him or not. The objection is
9 we didn't notice the deposition sooner. Well, fine.
10 I talked to the doctor. I told Preston I was going
11 to do it. I asked him questions. I had it recorded
12 by a stenographer. I think -- I think it comes in
13 under 42-15-95.

14 MR. MCDANIEL: And I know -- and,
15 Commissioner, I don't because here, again, it's
16 listed as a deposition. She submitted it as a
17 deposition and she did not give me proper notice
18 under the regs -- on the rules. She can't change it
19 now for convenience sake to make it a 42-15-95
20 because I believe -- and I'm -- I feel sure you
21 would agree with me, that if you're going to take --
22 make a communication under 42-15-95, you need to let
23 me know that you're -- you intend to do a 42-15-95
24 communication. Then I have -- I have the decision to
25 make whether or not to attend, you know.

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1 And, also, of course, it also says when --
2 I think we had asked most of the questions she
3 wanted to ask in the --

4 THE COURT: In the February 13th.

5 MR. MCDANIEL: Yes. Anyway. But I don't
6 know. That's sort of her decision.

7 You know, for example --

8 THE COURT: Hang on. Hang on. I think
9 I've heard enough.

10 MR. MCDANIEL: Okay.

11 THE COURT: Where is it?

12 MS. GRUBER: It is on -- it's our APA E,
13 Commissioner, on Page 15.

14 THE COURT: All right. The objection is
15 sustained. It's out.

16 Do you want it proffered?

17 MS. GRUBER: Yes, sir.

18 THE COURT: Any other objections from
19 Plaintiff's counsel?

20 MR. MCDANIEL: None from the Plaintiff.

21 THE COURT: Any objections from Defense
22 counsel?

23 MS. GRUBER: No, sir.

24 THE COURT: Without further objection,
25 Commissioner file becomes part of the record with

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1 the exception of self-serving declarations and
2 unstipulated medical reports.

3 During the rather extensive pre-hearing
4 conference we had in this matter, respected
5 positions of both the parties was discussed. From
6 the standpoint of the Claimant, Mr. Verdugo asserts
7 that he is not at maximal medical improvement, that
8 he is entitled to future medical care per the
9 recommendations of Dr. Stofko.

10 However, if I find that he is at maximum
11 medical improvement, he asserts that he is
12 permanently and totally disabled and as a result
13 entitled to lifetime casually-related medical care,
14 is asking for the award to be paid in lump sum with
15 Utica language in the body of the order.

16 If I find he is not permanently and
17 totally disabled, he would assert he's entitled to a
18 significant award of PPD, future medical care per
19 the recommendations of Dr. Stofko, lifetime repair,
20 maintenance, or replacement of the causally-related
21 medical hardware and as it relates to the credit,
22 asserts that the Defendant is not entitled to a
23 credit.

24 However, if I find they are entitled to a
25 credit, the earliest date of entitlement to credit

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1 would be the filing of the second Form 21 on
2 August 8, 2023.

3 Mr. McDaniel, anything in addition to that
4 with regard to your client's position that you would
5 like to get on the record or any other matter you're
6 here to litigate today, sir?

7 MR. MCDANIEL: None, Commissioner. I
8 think you've appropriately referenced -- I -- at
9 some point referenced all of the referrals to the
10 removal of the screw hardware.

11 THE COURT: Yes, sir.

12 MR. MCDANIEL: That's our position.

13 THE COURT: With regard to the Defendants'
14 position, they assert that Mr. Verdugo is at maximum
15 medical improvement on January 8, 2020. He is
16 entitled to an award of PPD to the back only, but he
17 is not entitled to any additional future medical
18 care, that agree to the statutory provision of repair,
19 maintenance, or replacement of the hardware and seek
20 a credit for TTD paid from the date of maximum
21 medical improvement, which they are asserting to be
22 January 8, 2020, to the present.

23 Ms. Gruber, anything in addition to that
24 with regard to the Defendants' position you'd like
25 to get on the record or any other matter you wish to

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1 litigate today?

2 MS. GRUBER: Yes, sir. As far as the PPD
3 for the back, I would also like to point out that it
4 would be limited to -- to -- anything -- anything
5 causally-related to the fracture at T-12.

6 THE COURT: Okay.

7 MR. MCDANIEL: Commissioner, no further on my
8 position, but there is one very important note that
9 I need to point out to you. Dr. Leonard Forrest saw
10 Mr. Morales twice. He first saw him on July 22nd of
11 2020. At that time, he stated, In my opinion,
12 Mr. Morales is not at maximum medical improvement.

13 Subsequent to that, whenever they filed
14 the 21 and it was not scheduled for mandatory
15 mediation, we sent him back to Dr. Forrest and at
16 that point, Dr. Forrest said that assuming he's at
17 maximum medical improvement and in that he
18 recommended that report, which is at Page 18 of
19 Claimant's APA submissions, he said, Potentially, he
20 may benefit from hardware removal. A CT scan was
21 scheduled of the lumbar. Can be done to assist
22 healing. I talked to one of the parties, he said it
23 would be probably best to wait a year from fusion
24 surgery to get the CT at that time.

25 I recommend spine surgical reevaluation

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1 for possible hardware removal. It is felt that
2 there has been -- has been sufficient healing.
3 Also, felt hardware itself was causing a significant
4 component of Mr. Morales' symptoms. The hardware
5 removal can be done. Facet injections above and
6 below the hardware is another consideration whether
7 the hardware removal is done or not. If facet
8 injections work well, they may or may not need to be
9 repeated intermittently and it may or may not be
10 proved to be the best transition to rhizotomy.

11 I just note that to -- and it goes on.

12 THE COURT: All right. I believe
13 Mr. Morales is our only witness today.

14 Ms. Pabst, just a couple of questions for
15 you before we get started. Number one, are you a
16 friend, associate, or relative of a party or counsel
17 for a party in this matter?

18 THE INTERPRETER: No. No, sir.

19 THE COURT: Have you ever served in an
20 investigative capacity for any party involved in
21 this case?

22 THE INTERPRETER: No, sir.

23 THE COURT: Do you or your spouse or child
24 have any financial interest in the outcome of this
25 case?

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1 THE INTERPRETER: No, sir.

2 THE COURT: Have you been involved in the
3 choice of counsel or law firm in this matter?

4 THE INTERPRETER: No, sir.

5 THE COURT: Are you an attorney or an
6 employee of an attorney in this case?

7 THE INTERPRETER: No.

8 THE COURT: Have you previously been retained
9 for private employment by either party here today to
10 interpret in any case?

11 THE INTERPRETER: Have I -- if I've worked
12 as an interpreter for them?

13 THE COURT: Yes.

14 THE INTERPRETER: Yes.

15 THE COURT: Okay. How often have you done
16 that?

17 THE INTERPRETER: Oh, gosh.

18 THE COURT: Has the only work you've done
19 been for Mr. McDaniel, Mr. Gibson, or have you done
20 work on the other side?

21 THE INTERPRETER: I've done work for --

22 THE COURT: On both sides?

23 THE INTERPRETER: Yes. Well, a lot of
24 lawyers in Charleston.

25 THE COURT: But defense and plaintiff

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1 lawyers -- claimant lawyers?

2 THE INTERPRETER: No. I have never done
3 for him.

4 THE COURT: No. No. What I'm asking you,
5 have you been hired by both sides at different
6 points in time --

7 THE INTERPRETER: Oh, no, no.

8 THE COURT: -- to interpret or are you only
9 ever hired by the claimant's side?

10 THE INTERPRETER: Yes. I'm sorry.

11 THE COURT: Any reason why your
12 independence of judgment will be compromised in
13 providing interpretation here today?

14 THE INTERPRETER: No.

15 THE COURT: Will you raise your right
16 hand, please?

17 WHEREUPON:

18 SANDRA PABST, after being duly sworn,
19 translated English into Spanish and Spanish to
20 English to the best of her ability.

21 THE COURT: Mr. Morales, will you raise
22 your right hand?

23 EVARISTO VERDUGO MORALES, after being duly
24 sworn and cautioned to speak the truth, the whole
25 truth and nothing but the truth, testified as

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1 follows:

2 THE COURT: Please state your full name
3 for the record.

4 THE WITNESS: Evaristo Verdugo Morales.

5 THE COURT: Mr. McDaniel.

6 DIRECT EXAMINATION

7 BY MR. MCDANIEL:

8 Q. Mr. Morales, I'm going to try to work off
9 of your previous testimony and update it. But you
10 still live at -- do you still live at 606 Cedarwood
11 Drive, Moncks Corner?

12 A. Yes.

13 Q. How old are you?

14 A. 58.

15 Q. And how far did you go in school?

16 A. 4th grade.

17 Q. And where did -- Mr. Morales, where are
18 you originally from?

19 A. Mexico, Chiapas.

20 Q. Okay. Are you married?

21 A. Yes.

22 Q. How many children do you have?

23 A. Seven kids.

24 Q. And where does your wife live?

25 A. In Mexico.

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1 Q. All right. And where do your children
2 live?

3 A. Three of them live here and four of them
4 over there in Mexico.

5 Q. Do -- your children and your wife that
6 live in Mexico, are they dependent upon you for
7 support?

8 A. Yes.

9 Q. How long have you lived in the United
10 States?

11 A. 23 years.

12 Q. And where -- when did you first come to
13 the United States? Where did you first come to the
14 United States and where were you working?

15 A. I came here to North Carolina to
16 Charlotte.

17 Q. Okay. And what type of work did you do?

18 A. I worked as a dishwasher at a restaurant.

19 Q. Did you do any other type of work in
20 Charlotte?

21 A. So I worked -- I worked at a restaurant
22 and then I went to the airport at night.

23 Q. So you worked two jobs?

24 A. Yes.

25 Q. One at the restaurant and one at the

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1 airport?

2 A. Yes.

3 Q. About how many years -- or how long did
4 you work and live in North Carolina the first time?

5 A. There, I worked eight months.

6 Q. Okay. Where did you go after that?

7 A. I went to Savannah.

8 Q. Is that Savannah, Georgia?

9 A. Yes.

10 Q. When you went to Savannah, Georgia, what
11 kind of work did you do?

12 A. I worked at the -- in the golf course.

13 Q. Okay. And what type of equipment did you
14 use at the golf course and what did you do
15 specifically?

16 A. Travel and I helped people move dirt,
17 irrigation. I also laid down grass, sod in the
18 green.

19 Q. All right. Did that job require lifting?

20 A. Yes. We also work really fast. I have to
21 work also on my knees and I have to be bending.

22 Q. So bending, stooping, and squatting?

23 A. Yes.

24 Q. About how long did you live and work at
25 the golf course in Georgia?

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1 A. Five years.

2 Q. All right. Now, the jobs at the -- we're
3 going to talk about your back in a little bit.

4 A. Okay.

5 Q. And you've got plates and rods in your
6 back?

7 A. Yes.

8 Q. Knowing -- knowing the condition of your
9 back now, could you go back to work doing the job
10 either at the airport, at the restaurant, or in
11 Georgia at the --

12 A. I'm sorry, but I can't -- I can't work.

13 Q. Why could you not do those jobs?

14 A. Because of the pressure of the surgery I have
15 in my back. The screws, they just don't let me.

16 Q. Would you have problems with bending?

17 A. No.

18 Q. Lifting?

19 A. No, not nothing before.

20 Q. Not before.

21 A. Not before.

22 Q. But you do now?

23 A. Yes.

24 Q. All right. Now -- all right. When you
25 left Georgia, where did you go and what kinds of

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1 work did you do?

2 A. I went back to North Carolina.

3 Q. All right. And what kind of work did you
4 do in North Carolina?

5 A. I went back to the restaurant in the
6 afternoon and I also went back to landscaping.

7 Q. In North Carolina?

8 A. Yes.

9 Q. When you went back to North Carolina,
10 about how long did you live in North Carolina?

11 A. Around six years.

12 Q. When you were doing landscaping, tell me
13 what kinds of landscaping you were doing.

14 A. I have to do all the weedeating in the
15 side of the road.

16 Q. I think you worked for a road maintenance
17 company?

18 A. Six years.

19 MR. MCDANIEL: Commissioner, I just want
20 to note for the record, which you will find in the
21 record, Page No. 1, Mr. Morales' is at max comp rate.
22 He is making well over his -- between 13 and 15,
23 \$1,600 a week. And also you'll find in the record
24 that his company did not pay -- continue to pay him
25 after the accident because he'd be able to return.

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1 And that's in the record just so --

2 BY MR. MCDANIEL:

3 Q. Now, in reference to the jobs in the
4 restaurant in North Carolina and the jobs in road
5 maintenance and doing the weedeating, could you go
6 back doing those jobs eight hours a day, five days a
7 week?

8 A. No, I can't. I would like to, but I
9 can't.

10 Q. You want to work?

11 A. Yes. I would like to.

12 Q. Let's go ahead and talk just a minute
13 about what kind of problems -- what kind of problems
14 are you having with your back? Where are you having
15 problems with your back? Tell me where.

16 A. Here where my screws are.

17 Q. Where the screws are.

18 I noticed you're sitting up in the chair.
19 Why is that?

20 A. Because it -- the back, in the back.

21 Q. Do you have any problems like driving, for
22 instance?

23 A. Yeah. Yes. I cannot be laying on the
24 seat.

25 Q. Now, after North Carolina, you went --

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1 where did you go to work next? Where did you go?

2 A. I went -- I went back to Savannah.

3 Q. Okay. What type of work were you doing
4 there then?

5 A. I worked in insulation and also a sprayer
6 helper.

7 Q. I'm sorry?

8 A. To help -- helping spraying.

9 Q. Okay. You worked for a couple of
10 companies. One, I believe -- you testified one was
11 RC -- RSE and another was Ecofoam.

12 A. Yes.

13 Q. And after you worked for those companies,
14 you went to work for --

15 THE INTERPRETER: I'm sorry.

16 BY MR. MCDANIEL:

17 Q. Where did you go to work?

18 A. I left there, I went to Ecofoam. I worked
19 for them for two years and a half.

20 Q. And then you went to Insulation by Cohen?

21 A. And after.

22 Q. Okay. Now, is there a difference between
23 the type of work you were doing for Ecofoam, the
24 other insulation company, and Insulation by Cohen?

25 A. It's the same because it's insulation.

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1 Q. Did -- what type of equipment did you have
2 to wear for -- at that Insulation by Cohen?

3 I want to show you --

4 A. They give us a white suit and a mask.

5 MR. MCDANIEL: Mark that one 2.

6 Exhibit 1.

7 THE COURT: That will be Claimant 2. The
8 full suit will be Claimant 2. The other one is
9 Claimant 1.

10 (Claimant Exhibit No. 1, Photograph, was
11 marked for identification.)

12 (Claimant Exhibit No. 2, Photograph, was
13 marked for identification.)

14 BY MR. MCDANIEL:

15 Q. Mr. Morales, I'm going to ask if can you
16 identify that, what's been marked as Claimant's
17 Exhibit No. 2?

18 A. This one I used to work.

19 Q. That's what you would wear?

20 A. Yes. Yes, I cover with a mask.

21 Q. All right. Now, I'm going to show you
22 what's been marked as Claimant's Exhibit No. 1.

23 A. This one is insulation with the mask.
24 It's insulation and the other one is -- is the
25 spray.

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1 Q. All right. This one is for spray?

2 A. No. It says for the spray. Yes, I'm
3 under the house.

4 Q. And now where did you --

5 MS. GRUBER: Preston, can you identify the
6 pictures? I'm sorry.

7 MR. MCDANIEL: I'm sorry. This one --

8 MS. GRUBER: Are they A or B?

9 MR. MCDANIEL: This is 1 and 2.

10 THE COURT: 1 and 2. I'm sorry.

11 MR. MCDANIEL: And this was actually 1 and
12 that was actually 2.

13 MS. GRUBER: So the -- No. 1 is when he's
14 lying down, when someone -- someone is lying down?

15 MR. MCDANIEL: Yes. That's who --

16 BY MR. MCDANIEL:

17 Q. Is that --

18 A. Yes.

19 Q. Now, tell me where -- tell me about doing
20 your job putting in the insulation. Tell me about
21 where you had to go, what kind of -- did you have to
22 bend, stoop, lift? Tell me what you had to do in
23 doing that job.

24 A. It all depends because sometimes you are
25 going to go under laying on your side or you're --

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1 you're actually down also on your knees.

2 Q. Okay. And so you put in the insulation in
3 what part of the house? Underneath the house?

4 A. Yes. Yes. Sometimes it was insulation
5 and sometimes it was a spray.

6 Q. Okay. And outside underneath the house,
7 where else did you put the insulation?

8 A. Also the walls when they ask for
9 insulation in the walls and also the roof.

10 Q. And did that -- did your job require a lot
11 of bending?

12 A. Yes. A lot of movement.

13 Q. Well, a lot of places you had to work on
14 like is in that one picture, picture No. 1?

15 A. Yes.

16 Q. Did you supervise other people? Did he
17 supervise -- did you ---

18 A. No. I was the one -- I was the one that
19 was spraying. The guy that used to do the contracts
20 for them, he would be the one telling us where to do
21 it.

22 Q. Can you go back to doing that job?

23 A. No. Because I used to make good money. I
24 used to make good money, but I can't.

25 Q. Why -- why not? What kind of problems

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1 would you have trying to do that job?

2 A. Because -- because of the surgery, because
3 of the screws I have in my back.

4 Q. Mr. Morales, could you do that job for a
5 full day?

6 A. No, not anymore.

7 Q. Now, how much -- how much lifting and what
8 would you have to lift in that job?

9 A. It was -- it was in movement, but it was
10 heavy, heavy movement. So all the chemicals that's
11 used is pretty hot and that would affect me too.

12 Q. And you would -- all right. Let's -- tell
13 me what happened in your accident so the Commissioner
14 knows.

15 A. I fell from a ladder.

16 Q. About how high off the ground were you?

17 A. Six feet.

18 Q. And describe how you came down, how you
19 landed?

20 A. I was -- I was covering the -- I was
21 covering the wall where I was working. I was -- I
22 was --

23 THE INTERPRETER: The Interpreter would
24 like to make sure that he repeats what he's saying
25 because -- all right.

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1 THE WITNESS: I was covering the walls and
2 then the ladder moved, and by moving, it take me to
3 over there.

4 BY MR. MCDANIEL:

5 Q. Did you land on your butt?

6 A. It was half of my back.

7 Q. I believe, according to the records,
8 medical records, you were knocked unconscious for
9 some period of time.

10 A. Yes. I was hit with a little bit of my
11 head.

12 Q. Okay.

13 A. It was really hard. The hit was really hard.

14 Q. Now, Dr. Stofko -- they took you to the
15 hospital and Dr. Stofko did your surgery. After
16 that when you went to his office that was --

17 A. Yes.

18 Q. After the surgery when you went back to
19 his office, did you see him, or who did you see?

20 A. I didn't see him anymore. I saw -- I saw
21 a lady doctor.

22 MR. MCDANIEL: Commissioner, on Page 82,
23 Claimant's APA submissions.

24 THE COURT: Yes.

25 BY MR. MCDANIEL:

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1 Q. All right. When -- Mr. Morales, when you
2 went to the doctor's office, according to the record
3 from October 23rd, that you were accompanied by a
4 family member who interpreted for you all.

5 A. Yes. It was my niece.

6 Q. Okay. It was your niece. All right.

7 Now, again, on --

8 Commissioner, Page 86.

9 You saw her again, the same lady.

10 A. I went three times. She gave me two, but
11 then I asked for another one.

12 Q. And then when you saw her, it says that
13 patient is, again, accompanied by a family member
14 who is interpreting.

15 A. Yeah. The three times I went.

16 MR. MCDANIEL: And, again, Commissioner,
17 on Page 89.

18 BY MR. MCDANIEL:

19 Q. It says, Patient is accompanied by a
20 family member who is interpreting.

21 A. Yes.

22 Q. Okay. So the way you and the doctor were
23 communicating was through your family member?

24 A. Yes.

25 Q. They did not have an interpreter there?

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1 A. No.

2 Q. At the hospital, did they get an
3 interpreter on the phone?

4 A. No.

5 Q. You don't -- okay. At that -- all three
6 times you saw her, the lady doctor, your family
7 member interpreted?

8 A. Yes.

9 Q. And so whatever complaints you were
10 making, your family member was communicating that?

11 A. Yes.

12 Q. Now, I believe you said -- who was the
13 family member that accompanied -- went with you?

14 A. It's -- it's my niece's daughter.

15 Q. All right. And did you -- did anybody
16 else ever accompany, such as your nephew?

17 THE COURT: Mr. McDaniel, is there
18 relevance to this line of questioning?

19 MR. MCDANIEL: Well, I think there is,
20 Commissioner, yes. Yes, I would --

21 THE COURT: Regarding disability?

22 MR. MCDANIEL: I think it has an affect on
23 the disability, yes. Yes, Commissioner.

24 THE COURT: All right. Let's move it on.

25 BY MR. MCDANIEL:

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1 Q. Okay. Real fast. How old is -- how old
2 was your niece back then?

3 A. 13.

4 Q. Okay. 13.

5 Now, the last visit back in January, the
6 lady doctor, did she recommend -- send you to
7 physical therapy?

8 A. No. She gave me a sheet with names and
9 numbers where for therapy.

10 Q. And then eventually, did you go in
11 March -- that was in January. But in March, did you
12 go to physical therapy?

13 A. Yeah. The last days of March.

14 Q. Okay. All right. Did -- the people at
15 physical therapy, did they have an interpreter
16 there?

17 A. Yes. Yes, the interpreter was there.

18 Q. Do you remember the name Vanessa?

19 A. No, I can't remember.

20 MR. MCDANIEL: Commissioner, Page 109.

21 BY MR. MCDANIEL:

22 Q. Mr. Morales, how long -- since the
23 surgery, where have you had problems in your back?

24 A. In my back -- on my back.

25 Q. Where -- where specifically; do you know?

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1 A. Here where I have my four screws.

2 Q. Where you have four screws. Okay.

3 MR. MCDANIEL: Commissioner, they record
4 on March 16th, 2020, at Roper Physical Therapy, It
5 hurts where I have the screws. I cannot move too
6 much. Again, on 4-16, one month later, it says that
7 his lower back hurts all the time where he has the
8 screws.

9 BY MR. MCDANIEL:

10 Q. Mr. Morales, also, on April 23rd, it says,
11 Patient says that his lower back hurts all the time
12 where he has the screws. Does that kind of prompt
13 you to having that since that surgery?

14 A. Yes.

15 Q. Have you -- where have you told the
16 doctors you were having problems ever since that
17 surgery?

18 THE INTERPRETER: Could you repeat that
19 question again?

20 BY MR. MCDANIEL:

21 Q. Where have you been telling the doctors
22 that you were having problems ever since that
23 surgery?

24 A. My -- my back.

25 Q. Have you been telling them about the

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1 screws?

2 A. Yes.

3 Q. All right. Now, you saw the lady doctor
4 one more time later on in July.

5 A. That same year?

6 Q. No. After you went to physical therapy
7 about four months later. You don't remember seeing
8 her?

9 A. I can't remember.

10 Q. Okay. Well, it had been four years ago.
11 All right. Well, let's just move on.

12 Now, we've already talked about you
13 leaning forward in your chair. Couple of questions.
14 There was a time that they cut off -- stopped
15 your -- payment on your checks.

16 A. Yes.

17 Q. Did you try to work something during that
18 time?

19 A. Yes. I tried, but no. It wasn't the same.

20 Q. Okay. Why did -- why did you try to work?

21 A. Because I didn't have any money. I tried,
22 but I couldn't. It was different in my job.

23 Q. How did you get to the job?

24 A. Through a friend. He took me.

25 Q. And I believe you worked two -- two

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1 places.

2 A. Yes. Just not too long.

3 Q. What did they -- your friend, they knew
4 you were -- your back?

5 A. Yes.

6 Q. And they knew you needed money?

7 A. Yes.

8 Q. Okay. When they -- it looks like your
9 back -- what kind of work did they have you doing
10 when you were on those jobs?

11 A. They did the heavy work. I just had to tidy
12 up.

13 Q. Tell the Commissioner about how many
14 hours of work you actually worked when you're
15 doing those jobs?

16 A. Five, six hours. We didn't work at
17 this one place. We worked -- we went to the
18 plantations.

19 Q. Tell me from like the start so the
20 Commissioner will understand about how much you
21 worked. Tell us from the start of work to getting
22 back home.

23 A. So we arrive at work at the warehouse and
24 then we will be back to the warehouse. So we work like
25 four or five hours.

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1 Q. So you actually worked during the day
2 maybe four or five hours?

3 A. Six. But a little bit. It was not too
4 much.

5 Q. Okay. About how many months did you do
6 each of those jobs?

7 A. Like three months.

8 Q. How did your back do even doing that light
9 work?

10 A. It was -- it was really hard because of
11 the heat. It was -- it was hard.

12 Q. Why did you quit doing those jobs?

13 A. Because I was too uncomfortable. It was
14 not the same.

15 Q. When you say uncomfortable, can you tell
16 the Commissioner what you mean by that?

17 A. You just can't feel the same because of
18 the pain.

19 Q. Okay. Mr. Morales, if you would, tell us
20 about as doctors recorded about you pain, whether
21 it's improved. Can you lift up your shirt? I'd
22 like to show the Commissioner. Can you do that for
23 me?

24 THE INTERPRETER: He's asking to help with
25 the pain -- with the --

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1 MR. MCDANIEL: All right.

2 THE COURT: It looks like I see four
3 scars mid-back, two left of center, two right at
4 center.

5 MR. MCDANIEL: For the -- just so you'll
6 have it for the record. It's a picture I've taken
7 today. Actually, I've made two copies.

8 THE WITNESS: It hurts. It hurts.

9 BY MR. MCDANIEL:

10 Q. Mr. Morales, is there any job that you know
11 of that you've done in the past that you can go back
12 to work doing eight hours on a full day?

13 A. No.

14 Q. And why not? What -- what -- why not?
15 Why can't you?

16 A. I can't move from one side to another. I
17 would like to work on days because I like that job
18 and I was making good money. I was making more an
19 hour.

20 Q. You were making a lot of money an hour
21 there, weren't you?

22 A. Yes. And I would be making more.

23 Q. Would you be working now if you could?

24 A. Yes. I would be working.

25 Q. All right. Some of the doctors, in fact

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1 all of the doctors, have said you may benefit from
2 having those screws and hardware taken out of your
3 back. If the Commission would order it, do you want
4 that done?

5 A. Yes.

6 Q. Tell me -- just tell me about your
7 day-to-day life, things you can't do any longer and
8 things you have trouble doing.

9 A. Could you repeat that question?

10 Q. Yes. It's just like every day just around
11 your home and just living, what kind of problems do
12 you have pertaining with your back and surgery?

13 A. When I -- when I bend, when I take a
14 shower, when I'm going to get dressed, it hurts. I
15 have my son here. I take him to school.

16 Q. I'm sorry?

17 A. I take my son to school.

18 Q. Okay.

19 A. And he came. I -- I just go -- I go and
20 do that, but I'm trying not to do too much because
21 it hurts.

22 Q. What about sleeping?

23 A. Yes, it bothers me to sleep.

24 Q. What about doing housework around the
25 house, do you --

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EVARISTO MORALES VERDUGO V. INSULATION BY COHEN 2/29/2024

1 A. Just make my kids do.

2 Q. You make the kids do?

3 A. Yes.

4 Q. Okay. Who does the sweeping and cleaning
5 and vacuuming?

6 A. Like my kids when they come back from
7 school.

8 Q. Do you have any problems when you try to
9 do those things?

10 A. Yes.

11 Q. Where -- where does it hurt?

12 A. Because of the movement that I have to
13 make.

14 Q. What about putting on your shoes and
15 socks?

16 A. I go on my knees. I cannot bend at once.

17 Q. What about going up and down stairs?

18 A. Yes. But very slow.

19 Q. I noticed when you came in you didn't go
20 up the steps. You went up the --

21 A. Yes.

22 Q. All right. Now, Mr. Morales, you
23 testified that you can't go back to doing any of the
24 jobs that you had. One more question, do you know
25 any job for which you qualify that you can do?

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1 A. No.

2 Q. Okay. Mr. Morales, assuming -- did you
3 ever have -- prior to this accident, did you have
4 any problems using your back to do work prior
5 injuring your back?

6 A. No. I used to work six to seven days.

7 Q. Every week?

8 A. Yes.

9 Q. Now, assuming that, in your opinion, right
10 now, what percentage of using your back do you have
11 to do work requiring the use your back? What do you
12 still have percentagewise to do work requiring use
13 of your back?

14 A. 20 percent.

15 Q. Okay. Now, same question, you testified
16 about the problems you have with your back, all of
17 the problems you have just in your daily life, what
18 percentage -- what percentage of the loss of use of
19 your back to do work requiring use of your back in
20 your opinion have you lost?

21 A. I would say 80 percent.

22 Q. And I believe that's the same thing you
23 told Commissioner Taylor back in 2021.

24 A. Yes.

25 Q. And Mr. Morales, the Commissioner, before

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1 that first year when you went before that lady
2 commissioner, I never asked you that question before
3 that day, did I? Before that day for that hearing,
4 did I ever ask you your opinion on that?

5 A. No.

6 THE COURT: Anything else, Mr. McDaniel?

7 MR. MCDANIEL: I'm sorry?

8 THE COURT: Anything further?

9 MR. MCDANIEL: Nothing further,
10 Commissioner.

11 THE COURT: Do you wish to offer those two
12 as exhibits --

13 MR. MCDANIEL: Yes. Yes, please.

14 THE COURT: -- that's been marked?

15 MR. MCDANIEL: Yes, sir.

16 THE COURT: Any objection from the Defense
17 counsel?

18 MS. GRUBER: No. No, sir.

19 THE COURT: All right. Plaintiff 1 and 2
20 are admitted.

21 (Plaintiff Exhibit No. 1, Photograph, was
22 admitted into evidence.)

23 (Plaintiff's exhibit No. 2, Photograph,
24 was admitted into evidence.)

25 THE COURT: Ms. Gruber, cross-examination.

1 MS. GRUBER: Yes, sir.

2 CROSS-EXAMINATION

3 BY MS. GRUBER:

4 Q. Mr. Morales, you've been --

5 THE COURT: Hang on, Ms. Gruber.

6 MR. MCDANIEL: I was going to say, I've
7 got one here --

8 THE COURT: I've got them both. And we've
9 got this picture. Do you want that admitted?

10 MR. MCDANIEL: If -- I thought --

11 THE COURT: Objection?

12 MR. MCDANIEL: For the record, taken today.

13 MS. GRUBER: Taken by whom?

14 MR. MCDANIEL: Me.

15 MS. GRUBER: All right. I don't object.

16 THE COURT: Claimant 3. 1, 2, and 3 are
17 admitted.

18 (Claimant's Exhibit No. 3, Photograph, was
19 marked for identification and admitted into
20 evidence.)

21 THE COURT: Ms. Gruber.

22 BY MS. GRUBER:

23 Q. Mr. Morales, you've been in this -- you've
24 been in this country for 23 years?

25 A. Yes.

1 Q. You don't speak English?

2 A. No.

3 Q. And you don't have a Social Security
4 number, do you?

5 A. No.

6 Q. And you're here illegally, correct?

7 MR. MCDANIEL: Objection. That's
8 irrelevant, Commissioner.

9 THE COURT: I'm going to allow it because
10 it's --

11 What's -- what's the relevance of it?

12 MS. GRUBER: Well, it's affects his
13 employability, Commissioner.

14 THE COURT: All right. Go ahead.

15 BY MS. GRUBER:

16 Q. And you don't have a driver's license, do
17 you?

18 A. No.

19 Q. You've never had a driver's license,
20 correct?

21 A. I could have got one in North Carolina,
22 but I moved.

23 Q. Okay. And you were in a car wreck on
24 12-31 -- December 31st, 2022, correct?

25 A. Yes.

EVARISTO MORALES VERDUGO V. INSULATION BY COHEN 2/29/2024

1 Q. And you ran a red light and had a head-on
2 collision with another driver; is that correct?

3 A. The light was green.

4 THE COURT: Ms. Gruber, what was the date
5 of that?

6 MS. GRUBER: 12-31-2022, Commissioner.

7 THE COURT: Thank you.

8 BY MS. GRUBER:

9 Q. And you totaled your car at that time,
10 correct?

11 A. Yes.

12 Q. And you didn't have any insurance, did
13 you?

14 A. Yes.

15 MR. MCDANIEL: I object.

16 THE WITNESS: Yes.

17 MS. GRUBER: Commissioner, this goes to
18 his credibility.

19 THE COURT: Rule out.

20 MR. MCDANIEL: That's fine. That's fine.

21 BY MS. GRUBER:

22 Q. Mr. Morales, you were drunk when that
23 happened, weren't you?

24 A. No. It wasn't -- it was -- I went to buy
25 meat. It was that day of Christmas, December. I

ABC REPORTING SERVICE (803) 730-3015

1 went to buy meat.

2 Q. Were you not drunk that day?

3 A. No.

4 MS. GRUBER: Commissioner, I'm on
5 Page 129 in our APAs, there's a toxicology report there.

6 MR. MCDANIEL: No chain of custody,
7 medical.

8 THE COURT: I asked you if there were any
9 objections to these submissions at the call of the
10 case.

11 MR. MCDANIEL: In --

12 THE COURT: What page?

13 MS. GRUBER: Page 129.

14 MR. MCDANIEL: I object to the
15 characterizations.

16 THE COURT: Hold on a second. Let me get
17 there.

18 Where are you reading specifically from?

19 MS. GRUBER: At the bottom of the -- at
20 the bottom of that chart, Commissioner. They talk
21 about various testing that was done, there's a
22 toxicology report. Plasma, alcohol.

23 THE COURT: I mean, I -- Mr. McDaniel,
24 I'll note the characterization. I will take that
25 into consideration.

1 Please proceed.

2 BY MS. GRUBER:

3 Q. Mr. Morales, they also treated you for
4 alcohol withdrawal in the hospital, didn't they?

5 Page 146, Commissioner.

6 A. No.

7 Q. And isn't it true that you broke six ribs?

8 A. My -- my knee.

9 MS. GRUBER: Commissioner, I'll direct
10 your attention to Page 122 of our APAs and 123.

11 BY MS. GRUBER:

12 Q. Mr. Morales, the hospital records show
13 that you broke -- you broke two ribs on the right
14 and four ribs on the left.

15 A. No.

16 Q. Do you deny that?

17 A. I don't have any. It was right here.

18 Q. Okay. But do you deny that -- that what
19 the x-rays say that you broke six ribs in your back
20 in that accident?

21 A. No.

22 Q. Is it your testimony you did not break six
23 ribs in that accident?

24 A. Oh, no.

25 Q. And we know you broke your -- your left

1 leg. Did you have surgery?

2 A. Yes. Here.

3 Q. And you had hardware put in your leg?

4 A. Yes. Right here.

5 Q. You were on crutches for three and a half
6 months, correct?

7 A. Yes.

8 Q. Okay. And you were in another wreck
9 before that, weren't you, on March 26th, 2021?

10 A. Yes. Somebody hit me from behind.

11 Q. Okay. And you went to the hospital
12 because you had neck pain and head pain, correct?

13 MS. GRUBER: Page 102, Commissioner.

14 THE WITNESS: I wanted them to check my
15 head, but nothing really happened.

16 BY MS. GRUBER:

17 Q. But the hospital records said that you
18 were -- that you had neck pain. Do you deny that
19 you told them you had neck pain?

20 A. My head. I fell -- I felt bad, but I
21 was -- I left the place feeling fine. I didn't
22 think it was fine.

23 MS. GRUBER: Commissioner, I also point to
24 Page 158.

25 BY MS. GRUBER:

EVARISTO MORALES VERDUGO V. INSULATION BY COHEN 2/29/2024

1 Q. Mr. Morales, in that accident, you were
2 taken to the hospital by EMS, weren't you?

3 A. Yes. Because I asked them to check my
4 head.

5 Q. Do you know why they wrote that your chief
6 complaint was neck pain?

7 A. No. But they said I was fine.

8 Q. Okay. In July of 2022, you cut your hand
9 working somewhere, didn't you?

10 A. Yes.

11 MS. GRUBER: Page 163, Commissioner.

12 THE WITNESS: I wasn't feeling -- I
13 wasn't -- I couldn't work the same. I was not
14 feeling well.

15 BY MS. GRUBER:

16 Q. Where were you working that day when you
17 were cutting fabric?

18 A. When I was setting up the fence.

19 Q. Were you working as a landscaper?

20 A. No. In the fence.

21 Q. Okay. It said you were cutting fabric.
22 There was a block of weeds in the garden that you
23 were -- that they were putting river rocks on.
24 Where were you working?

25 A. So we need to remove it all and put a new

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1 one and I lift it and cut it and when I lifted it,
2 that's when I cut myself.

3 Q. Okay. But you were working when that
4 happened, correct?

5 A. Yes. The place what I told you where I
6 worked five hours.

7 Q. Okay. Well, when I -- weren't you working
8 six to seven hours, five days a week?

9 A. They count it like that because you have
10 to go far because they pay from the moment we
11 arrive until we came back.

12 Q. I'm sorry. When I took your deposition
13 last September, you told me that you were working
14 six to seven hours, Monday through Friday. Is that
15 correct?

16 A. Yes. But like I told you, we moved. We
17 didn't work -- we didn't work the whole time.

18 MS. GRUBER: Commissioner, our Exhibit C,
19 the --

20 BY MS. GRUBER:

21 Q. You worked some for Flores Contracting,
22 didn't you?

23 A. Yes.

24 Q. Flores Contracting, LLC.

25 A. Yes. About two months.

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EVARISTO MORALES VERDUGO V. INSULATION BY COHEN 2/29/2024

1 Q. Okay. And you started working there in
2 November of 2022; is that correct?

3 A. The same year. I didn't spend too much
4 time there.

5 Q. Well, the first paycheck they sent us was
6 dated 11-22-2022. So were you working at Flores
7 Contracting then?

8 A. Yes. Yes. Like around that time.

9 Q. And you were working for Flores
10 Contracting when you -- when you had that car wreck
11 where you broke your leg, weren't you?

12 A. Yes. I was still there.

13 Q. And --

14 A. I wasn't there too long. The job was not
15 really that much. They didn't have enough for me.

16 Q. Okay. But you -- but you had to quit that
17 job because you broke your leg; is that correct?

18 A. I was going to stop working there.

19 Q. But you were not able to work on crutches,
20 were you?

21 A. No. Like I told you, I was not really
22 feeling good working or not the same. Like I told you,
23 my back.

24 Q. The last paycheck that you -- that you had
25 from them was dated 1-12-2023.

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EVARISTO MORALES VERDUGO V. INSULATION BY COHEN 2/29/2024

1 THE INTERPRETER: I'm sorry. Can you
2 repeat the date?

3 MS. GRUBER: Yes. 1-12-23.

4 THE WITNESS: Yes.

5 BY MS. GRUBER:

6 Q. And you were on crutches and not -- no
7 weightbearing on your leg, left leg, weren't you?

8 A. Yes. Because I --

9 Q. Okay.

10 THE COURT: Ms. Gruber?

11 MS. GRUBER: Yes, sir.

12 THE COURT: I want to break your stride
13 for a five-minute break.

14 MS. GRUBER: Yes, sir. I'm sorry.

15 (A short break transpired.)

16 THE COURT: Ms. Gruber, back on the
17 record.

18 MS. GRUBER: Yes, sir.

19 BY MS. GRUBER:

20 Q. Mr. Morales, when you were working in
21 July of 2022, when you cut your hand, were you being
22 paid cash?

23 A. Yes.

24 Q. Okay. And there was a time after the
25 first hearing from 2-21-22 until 5-10-2023 that you

ABC REPORTING SERVICE (803) 730-3015

EVARISTO MORALES VERDUGO V. INSULATION BY COHEN 2/29/2024

1 were not --

2 You want to say those dates?

3 THE INTERPRETER: Could you repeat?

4 BY MS. GRUBER:

5 Q. Yes. Between -- there was a time between
6 2-21-2022 and 5-10-2023 that you were not getting
7 any -- that you were not getting your weekly checks;
8 is that correct?

9 A. From when I was working?

10 Q. No. No. Listen to my question. From
11 2-21-2022 to 5-10-2023, you did not get any weekly
12 checks; is that correct?

13 THE COURT: Specify from whom?

14 BY MS. GRUBER:

15 Q. From the -- from the workers' -- the
16 insurance company.

17 A. No.

18 Q. Well, is that correct, that you were not
19 getting checks from the insurance company?

20 A. No, I didn't. They stopped paying me.
21 That is why I tried to work.

22 Q. And were you continuing to send money back
23 to your wife?

24 A. When they were paying me, yes. I also
25 have a kid, a 16-year-old. He wasn't -- he was in

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1 Mexico, but now he came to work -- to stay here.

2 And here, I support him because he's a minor.

3 Q. But you were continuing to support your
4 family during that time that you were not getting
5 your checks; is that correct?

6 A. I just sent a little bit. My family help
7 me.

8 MS. GRUBER: I don't have -- I don't have
9 anything further.

10 THE WITNESS: Because he's my kid.

11 THE COURT: Mr. McDaniel, anything in --

12 REDIRECT EXAMINATION

13 BY MR. MCDANIEL:

14 Q. Mr. Morales, in reference to both wrecks,
15 they checked out your surgery site. They checked
16 out where you had surgery. They did an x-ray of
17 where you had surgery?

18 A. Yes. Yes, I told them I had surgery.

19 Q. Okay. They didn't find that you needed
20 any treatment for that, did they?

21 A. No. No, they just asked me and I told
22 them yes.

23 MR. MCDANIEL: Commissioner, Page 103-A,
24 Claimant's APA submissions.

25 BY MR. MCDANIEL:

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1 Q. When you went back to see -- when the
2 insurance sent you back to Dr. Stofko and his --

3 MS. GRUBER: Commissioner, object. This
4 is beyond the scope of cross-examination.

5 THE COURT: You cross-examined. This
6 is --

7 MS. GRUBER: Well, beyond the scope of --

8 THE COURT: It's redirect.

9 MS. GRUBER: I understand that, but he has
10 to still stay within scope of my cross-examination,
11 I believe.

12 MR. MCDANIEL: I'm -- she was asking him
13 about his back and she was asking him about his
14 medical care and about the wrecks.

15 THE COURT: And this is post that?

16 MR. MCDANIEL: On --

17 THE COURT: This is 1-10-24, sir, post --
18 post-accident. Post those two accidents.

19 MR. MCDANIEL: Right.

20 THE COURT: Go ahead. Go ahead.

21 BY MR. MCDANIEL:

22 Q. In reference to both those accidents, they
23 have the records from those, didn't they?

24 THE INTERPRETER: They had the records
25 from --

EVARISTO MORALES VERDUGO V. INSULATION BY COHEN 2/29/2024

1 MR. MCDANIEL: Yes. From the wrecks.

2 Correct.

3 BY MR. MCDANIEL:

4 Q. When you saw Dr. Stofko's office, they had
5 those records?

6 A. Yes. They also asked me.

7 Q. Did they ask you about it?

8 MR. MCDANIEL: That's recorded in the
9 APAs.

10 BY MR. MCDANIEL:

11 Q. And, also, the same thing when you
12 talked -- saw Dr. Poletti, he had all those x-rays
13 and MRIs and that?

14 MS. GRUBER: Objection. Unless this
15 witness knows what he had.

16 THE COURT: Unless he what?

17 MS. GRUBER: Unless the witness knows what
18 records Dr. Poletti has.

19 MR. MCDANIEL: Commissioner, it's in the
20 records. Dr. Poletti had all the --

21 THE COURT: Any other questions?

22 MR. MCDANIEL: None further, Commissioner.

23 THE COURT: For Defendants?

24 MS. GRUBER: No, sir.

25 THE COURT: Any other witnesses on behalf

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1 of the Claimant?

2 MR. MCDANIEL: None on behalf of the
3 Claimant.

4 THE COURT: Any other witnesses on behalf
5 of the Defendants?

6 MS. GRUBER: No, sir.

7 THE COURT: All right. That concludes
8 this proceeding. Thank you all very much.

9 (WHEREUPON, this hearing was concluded at
10 approximately 4:44 p.m.)

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CERTIFICATE OF COURT REPORTER

I, Jeannette M. King, Court Reporter and Notary Public in and for the State of South Carolina, do hereby certify that I reported this hearing on February 29, 2024, that the foregoing pages constitute a true and correct transcription of said hearing.

I further certify that I am neither attorney nor counsel for, not related to or employed by any of the parties connected with this action, nor am I financially interested in said cause.

I further certify that the original of said transcript was thereafter sealed by me and delivered to COMMISSIONER T. SCOTT BECK, South Carolina Workers' Compensation Commission, 1333 Main Street, Suite 500, Columbia, South Carolina.

In witness whereof, I have set my hand and seal this 12th day of May, 2024.

Jeannette M. King
Court Reporter and Notary Public
for the State of South Carolina
My commission expires 2/28/27.

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I N D E X

EVARISTO MORALES VERDUGO		
Direct Examination by Mr. McDaniel		22
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Certificate of Court Reporter		61

E X H I B I T I N D E X

		Marked for Identification	Admitted
1	Claimant's Exhibit No. 1		
	Photograph	29	45
2	Claimant's Exhibit No. 2		
	Photograph	29	45
3	Claimant's Exhibit No. 3		
	Photograph	46	46

REPORTER'S NOTE:
All exhibits were retained by the Court.

1 BEFORE THE SOUTH CAROLINA
2 WORKERS' COMPENSATION COMMISSION
3 WCC FILE NO.: 1921668

4 DEPOSITION OF
5 EVARISTO VERDUGO MORALES
6 SEPTEMBER 25, 2023

7 EVARISTO VERDUGO MORALES,

8 Employee,
9 Claimant,

10 vs.

11 INSULATION BY COHEN'S & SPRAYFOAM BY COHEN'S,
12 LLC,

13 Employer,

14 and

15 BUILDERS PREMIER INSURANCE COMPANY,

16 Carrier,
17 Defendants.

18
19 _____
20
21 TIME: 3:00 PM

22 LOCATION: CLEMENT RIVERS
23 CHARLESTON, SOUTH CAROLINA

1 REPORTED BY: MACKENZIE ALLEN
2 CLARK BOLEN
3 CHARLESTON, SC 29405
4 843-762-6294
5 WWW.CLARKBOLEN.COM

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A P P E A R A N C E S

ON BEHALF OF EMPLOYEE/CLAIMANT:

MCDANIEL LAW FIRM
BY: PRESTON MCDANIEL
1315 Elmwood Avenue
Columbia, SC 29201

ON BEHALF OF EMPLOYER/CARRIER/DEFENDANTS:

CLEMENT RIVERS
BY: COURTNEY GRUBER
25 Calhoun Street
Suite 400
Charleston, SC 29401

THE INTERPRETER: MARICELA VILLALOBOS

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I N D E X

EXAMINATION	PAGE
BY MS. GRUBER	5
BY MR. MCDANIEL	30
CERTIFICATE OF REPORTER	31

(No exhibits marked.)

1 MARICELA VILLALOBOS,
2 having been first duly sworn, interpreted from
3 English to Spanish and Spanish to English as
4 follows:

5 EVARISTO VERDUGO MORALES,
6 having been first duly sworn, was examined and
7 testified as follows:

8 EXAMINATION

9 BY MS. GRUBER:

10 Q. Is your last name Verdugo?

11 A. Yes. Verdugo Morales.

12 Q. We've met several times. I'm Courtney
13 Gruber. I represent Insulation By Cohen's, LLC,
14 and Builders Mutual Insurance Company.

15 A. Okay.

16 Q. What I'm going to do is ask you some
17 questions to find out what you've been doing
18 since we had a hearing on April 26, 2021.

19 A. Yes, ma'am.

20 Q. If you don't understand something, I'll
21 ask it again or a different way.

22 A. That's fine.

23 Q. The important thing is that you
24 understand the questions so that you know what
25 the truthful answer is.

1 A. Yes, yes.

2 Q. Okay. Where do you live now?

3 A. Well, right there at same -- at the
4 same -- the REDACTED. If you want me to, I can show
5 you where I live.

6 Q. What's the address?

7 A. Just give me a moment.

8 This is my address.

9 Q. REDACTED ?

10 A. Yeah.

11 Q. REDACTED, South Carolina?

12 A. Yes, yes.

13 Q. How long have you lived there?

14 A. Four years. Four years. It's going to
15 be four years in December.

16 Q. Okay. Who lives there with you?

17 A. Two children -- actually, three
18 children, because the one that's studying here
19 just got here.

20 Q. Okay. And what are the children's names
21 that live with you?

22 THE INTERPRETER: The interpreter
23 would like to ask Mr. Evaristo to check on the
24 spelling, just to make sure the spelling is
25 correct. The interpreter has never heard those

1 names before, and so that's why the interpreter
2 needs to ask for clarification.

3 A. One is Eliber Arim Verdugo Gonzalez.
4 The other one is Elber Verdugo Gonzalez. And the
5 other one is M **REDACTED** V **REDACTE** G **REDACTED** .

6 Q. How old are they?

7 A. Arim is 34.

8 Q. How old are the others?

9 A. The other one is 32.

10 Q. And what about the third one?

11 A. He is -- he's going to be 16. Right
12 now, he's 15. He's going to turn 16 in October.
13 And they also live with another relative of ours.
14 And he lives -- we live with another relative of
15 ours that is from there also.

16 Q. What's his name?

17 A. Roman Perez. I don't know his second
18 surname.

19 Q. Okay.

20 A. That's it.

21 Q. And how old is he?

22 A. He's about 45.

23 Q. Does he work?

24 A. Yes, he works.

25 Q. What does he do?

1 A. He works right there in Cohen's.

2 THE INTERPRETER: The interpreter
3 is going by phonetics.

4 Q. Works in homes?

5 A. No. In Cohen's.

6 THE INTERPRETER: The interpreter
7 is going by phonetics.

8 A. The same company where I used to
9 work.

10 Q. Oh, okay. And where do your two sons
11 work that are grown?

12 A. They work there as well.

13 Q. Oh, so your two sons work for Cohen's
14 also?

15 A. Yes. They work there. And the youngest
16 one, he's at school.

17 Q. Do you have a car?

18 A. No. I used to, but not anymore. I am
19 using my niece's car.

20 Q. And what kind of car is that?

21 A. It's a pylo [ph] truck. Pylo truck.
22 It's gray. It's downstairs.

23 MR. MCDANIEL: Toyota?

24 THE WITNESS: No. It's a -- what
25 do you call this? It's one of the best brands.

1 What is it? I forgot. And sometimes my son lets
2 me use his car.

3 Q. Okay.

4 A. It's also a closed car.

5 Q. What kind of car?

6 A. Closed. It's like an Expedition sort
7 of.

8 Q. Are you saying a Pilot? Is it a Honda?

9 A. Yes, yes, yes. That's it. It's a
10 Honda.

11 Q. So did you drive here today?

12 A. Yes, because nobody could bring me here.
13 And I -- and I had this friend who was going to
14 bring me over, but at the last minute, he
15 couldn't do it. So that's why I was late,
16 because I had to come here driving very slowly.
17 Yes, because my sons work. And I asked a friend
18 to come, but at the last minute, he couldn't
19 come.

20 Q. How long did it take you to get here
21 from your home in Moncks Corner?

22 A. About 45 -- 45, 50 minutes. I came
23 slowly. I came driving slowly, because I have to
24 be careful.

25 Q. Did you have a car wreck a month before

1 we had that hearing in 2021?

2 A. Yes.

3 Q. March 26, 2021, you had a wreck?

4 A. Uh-huh.

5 Q. Did you injure your neck in that
6 accident?

7 A. No. I just felt like this, and I felt
8 like it was here (indicating) a little bit. So
9 that's why I went to check myself. But
10 everything was clean. I came out clean.

11 Q. Okay. Did you injure your back in that
12 accident?

13 A. No, no.

14 Q. Did you have another car wreck on
15 December 31, 2022?

16 A. Yes.

17 Q. Were you driving your car then?

18 A. Yes, I was driving.

19 Q. Did you total your car?

20 A. Yes.

21 Q. Were you going 50 miles an hour?

22 A. 45, yes. 45, something like that. I
23 was not going too fast.

24 Q. Do you know what the police report said?

25 A. So he gave me a ticket, from what they

1 say. He gave me a ticket because I was not
2 looking. I was not looking because -- they said
3 that I was not looking. The traffic. But it was
4 green.

5 Q. Have you been to court for that yet?

6 A. No. The cop just gave me a ticket. He
7 gave me a ticket for that and a ticket for no
8 license. And they always give me that. So --
9 and he said that I didn't have to go to court if
10 I wanted to pay. And so I didn't have to go to
11 court. So that's why I didn't go.

12 Q. And what injuries did you have from that
13 accident?

14 A. Just my knee.

15 Q. Didn't you break two ribs on your right
16 side?

17 A. No.

18 Q. No? Did you break three, four ribs on
19 your left side?

20 A. In that accident, no. It was just the
21 knee.

22 Q. Are you sure?

23 A. Yes. It was only my knee that I hurt.

24 Q. And you had to have surgery on your left
25 leg?

1 A. Yes, yes. Here, right here
2 (indicating).

3 Q. And how long were you on crutches?

4 A. About four months. Like for the first
5 two months, it was both of them. But then after
6 that, it was one. And then I think it was like
7 four, four and a half months that I was using it.

8 Q. And did the crutches make your back
9 hurt?

10 A. Well, no. My back -- ever since I had
11 my accident, my back has been hurting. Ever
12 since the doctor released me, the pain is still
13 on -- in my back.

14 Q. The medical records indicate that you
15 were on crutches with no weight bearing for three
16 and a half months.

17 A. Yeah. Yeah, I know that.

18 Q. Did you have any trouble using crutches?

19 A. No. I was using them fine. So the pain
20 in my back was always there, like I just told
21 you. It has been there since God knows when.

22 Q. Were you able to drive while you were on
23 crutches?

24 A. Yes. For a month or two weeks or --
25 almost two months, I started back driving very

1 slowly. And it was out of me -- because you
2 know, you have to pay here for everything. I
3 have to drive my nieces and my son to school, you
4 know, because they're still in school.

5 Q. At the hospital, did they treat you for
6 alcohol withdrawal?

7 A. They gave me for the pain.

8 Q. Is that yes or no?

9 A. Huh?

10 Q. Did they treat you for alcohol
11 withdrawal after your December 31, 2022,
12 accident?

13 A. No. They just gave me for the pain for
14 my leg to calm my nerves. But no, no. They just
15 gave me for the pain.

16 Q. Have you had any medical treatment or
17 been to the -- let me rephrase that.

18 Have you been to the emergency room for
19 any treatment since April 26, 2021, besides the
20 December 31st car wreck?

21 A. No, no.

22 Q. Didn't you go to the emergency room July
23 the 12th, 2022, with a cut, left arm?

24 A. Oh, yes, because since -- oh, yes,
25 because they didn't pay me anymore. So I had to

1 go and start trying to work. So I tried to do
2 that, but that was starting in May. So because
3 they were not paying me anymore, out of need, I
4 had to go back to work.

5 Q. My question was, did you go to the
6 emergency room for a cut arm on July the 12th of
7 2022?

8 A. Yes, yes. I went.

9 Q. And where were you working?

10 A. This company that is in Moncks Corner,
11 like five minutes from downtown.

12 Q. What's the name of it?

13 A. I don't know the name of the company,
14 but I've got the picture here. Let me see if I
15 can find it here.

16 It's this one.

17 MS. GRUBER: The claimant is
18 handing me his phone, and it says -- it's got a
19 picture of a work sign. It says Environmental
20 Compliance Services, Construction Consulting Site
21 Management, 818F Peggy Lane. The phone number is
22 843-761-6670. It looks like the company name is
23 Integrated Site Management, ISM.

24 Q. What kind of company is that?

25 A. Well, they do -- what they do is -- what

1 you do there is they put fences around
2 construction sites.

3 Q. And when did you start working for them?

4 A. It was around May, but I don't remember
5 the date. It was around the last days of May.

6 Q. May of 2021 or '22?

7 A. '22.

8 Q. Did you work anywhere from August 26,
9 2021, until May '22?

10 A. Yes. I worked in another place with the
11 staffing. So in this first company -- because
12 they knew that I was hurting right here
13 (indicating). So the heavy work of banging with
14 a sledgehammer, they would do that. The one
15 thing that I would do would be just tie them up,
16 the plastic around it.

17 Q. Where was the first place you worked
18 after April 26, 2021?

19 A. That was the first one.

20 Q. What was the name of that company?

21 A. It's the one in the picture, the one
22 that I just showed you.

23 Q. I asked earlier if you worked anywhere
24 between April of 2021 and May of 2022, and you
25 said -- I thought you said you did. Did you or

1 did you not?

2 A. Oh, yes. I worked at that other
3 company.

4 Q. What was the name of the other company?

5 A. It was like a staffing that I was
6 working with.

7 Q. What was the name of the staffing
8 company?

9 A. Flores Construction.

10 Q. Flores Construction?

11 A. Uh-huh, uh-huh.

12 Q. How do you spell it?

13 A. Flores.

14 Q. How do you spell Flores? How do you
15 spell the name?

16 A. I think it's like this. It's Flores
17 Construction. F-L-O-R-E-S.

18 Q. Okay. And where is that business
19 located?

20 A. The office is right here. That's where
21 they have their office, is -- what's the name of
22 the street? Gosh, I never remember it. It's the
23 street right here off 26. It's tucked by -- it's
24 tucked where Walmart is. It's like where the
25 mall is but a little further up.

1 Q. Which mall?

2 A. The mall that is right here off 26. Oh,
3 what's the name of this street? What's the name
4 of this street? Man.

5 Q. When did you start working there?

6 A. So it's when -- when I finished over
7 that and this happened to me and then I started
8 working over there, it was August, I think.
9 August or September.

10 Q. August of what year? 2021?

11 A. '21 -- '22.

12 Q. Okay.

13 A. And there -- from there until November.
14 And after that, I didn't work.

15 Q. Okay. Between April of 2021 and July of
16 2022, where did you work?

17 A. '21, I didn't work.

18 Q. So 2021, you did not do any work?

19 A. No. It was in 2022. I tried, but --
20 but I tried, because I wanted to help my son with
21 his expenses and all of that.

22 Q. But you just testified that you worked
23 for Flores Construction starting August or
24 September of 2021, right?

25 A. No. I finished in May. And then until

1 August -- and then August -- August, I worked for
2 Flores until 2022. It's just that I don't have
3 the dates. I don't remember them.

4 Q. Okay. May of what year?

5 A. 2022.

6 Q. All right.

7 A. But I don't remember the date when I
8 started.

9 Q. From May of 2022 until August of 2022,
10 where did you work?

11 A. Right there, right there. Just putting
12 up fences. Right there at the fence place. And
13 I was not actually going to work, because you
14 know how I was. But then my friend was the one
15 who found me the job. And he was the one who was
16 giving me a ride. And then like I was telling
17 you, he was the one doing the heavy work. And
18 for me, it was just tighting [sic] up or --
19 tighting up the cloth.

20 Q. Well, I still don't know when you worked
21 for Flores Construction. Did you start there in
22 August or September of 2021 or 2022?

23 A. '22, until November of the same year.
24 It's just that I don't have the dates.

25 Q. Okay.

1 A. But I wasn't working that much. I was
2 only working six hours, seven hours Monday
3 through Friday. And sometimes I would not go.
4 And sometimes I would not go like one day -- one
5 day every other week because -- oh, because of
6 the same thing, because of what I have in my
7 back. And it was because it would bother me or
8 when it was too hot, it will hurt me. It's also
9 when it's very cold. It's the pain.

10 Q. Mr. Verdugo Morales, I would like for
11 you just to please answer my questions. Okay?

12 A. Yes, yes. That's fine. I understand.

13 Q. So from August or September of 2022
14 until November of 2022, did you work at Flores
15 Construction?

16 A. Yes, yes.

17 Q. Now then, did you work anywhere from
18 August of 2021 until May of 2022?

19 A. I'm sorry. What did you say?

20 Q. Did you work anywhere from April of 2021
21 until May of 2022?

22 A. No, no.

23 Q. Have you worked since November of 2022?

24 A. No.

25 Q. You said you worked for a temp service?

1 A. No.

2 Q. No? Okay. How much money did you make
3 an hour at Flores Construction?

4 A. Over there, 16.

5 Q. And how many hours did you work?

6 A. 35 hours. Sometimes 40, but -- no, no.
7 35, 30, 32.

8 Q. And were you paid in cash or by check?

9 A. They would give me a check.

10 Q. When you worked for the fencing company,
11 ISM, how much money did you make?

12 A. 15.

13 Q. And how many hours did you work?

14 A. Five, six hours Monday through Friday.

15 Q. Are those the only two places you've
16 worked since April of 2021?

17 A. 2022, not 2021.

18 Q. No. I'm asking from April of 2021. Are
19 those the only two places you've worked since
20 April of 2021?

21 A. No, no. Nothing. I haven't worked.
22 I'm sorry, but I don't understand. But I haven't
23 worked.

24 Q. And are you looking for any work now?

25 A. No. Well, right now, no, because -- no,

1 not right now. Right now, no.

2 Q. When you cut your arm with the knife,
3 what were you doing?

4 A. So because -- like I was telling you,
5 there's those little plastic things. And you
6 have to cut them. So I lifted up -- so I lift it
7 up, and I did like this (indicating) to -- up,
8 up. And then I cut -- I cut myself.

9 Q. So what did you do for that company?

10 A. So that's where I was wrapping up the
11 plastic, because the cars pass by and then they
12 toss the plastic. So that's when you have to get
13 them and put a new one around it.

14 Q. This was at ISM?

15 A. Yes.

16 Q. And you were working on building fences;
17 is that correct?

18 A. Well, putting the plastic.

19 Q. What were you putting the plastic on?

20 A. So my friends were the ones putting all
21 the steels. And I was the one putting the
22 plastic around and then wrapping it up.

23 Q. What were you putting plastic around?

24 A. Around the constructions where they are
25 building the houses on the side -- on the

1 sidewalks.

2 THE INTERPRETER: The side of the
3 road, interpreter's correction.

4 Q. Was the company working for residential
5 houses, or were they working for companies that
6 built businesses?

7 A. So we would go right there where they're
8 building construction things when they were there
9 building the houses.

10 Q. Did you do anything else for that
11 company besides put fences up?

12 A. No. No, just that.

13 Q. And why did you quit that job?

14 A. Well, because -- well, I left because
15 they let me know of the other job. So that's why
16 I left. But it's the same -- little work. Over
17 there, the machines would do the whole thing.
18 All we needed to do was put the chains that they
19 needed to wrap up.

20 Q. What do you mean -- what kind of chains?

21 A. Well, the chains they use for -- well,
22 they would do that -- well, actually, what we
23 were doing was -- so you see in this
24 construction, they do only what they have like
25 this -- factories, that's what they were doing.

1 So all we would do would be lift up the pipes,
2 because if the terrain was too low, we would put
3 another piece of pipe. And then we will level it
4 up.

5 So my friend would be -- because I also
6 had another friend over there. And he would be
7 the one doing everything. What I would do would
8 be just getting closer to cover it with soil,
9 with dirt. And that's what we would do over
10 there with the pipes.

11 Q. What were you covering with dirt?

12 A. Around the pipe. Around the sprinkle
13 [sic].

14 MR. MCDANIEL: Sprinkler?

15 THE INTERPRETER: Sprinkler.

16 Sprinkle. Sprinkler.

17 Q. Were you-all putting in sprinkler
18 systems?

19 A. Yes. I know that they were doing
20 like -- I think they do -- you see when at the
21 construction sites, they do what the -- what the
22 firemen do when they're doing all of the pipes.

23 Q. Were you-all putting in pipes? Was your
24 company -- let me rephrase that. Was your
25 company putting in pipes?

1 A. Yes. Like I was telling you, the pipes
2 were already there. But like I was telling you,
3 they were very deep. So we had to give them --
4 take them up so they could be at the level of the
5 floor.

6 Q. Were you working in the house or outside
7 the house?

8 A. Inside -- outside. Outside.

9 Q. Was it inside or outside?

10 A. Outside.

11 Q. Okay.

12 A. And when -- look at the pipes -- because
13 it was like at the level. So it was at the level
14 of the ground. So there was a concrete like this
15 around it. So the pipe would be like this, all
16 level with the concrete. All leveled.

17 Q. What did the pipe have to do with the
18 fence? Was that part of the fence?

19 A. It's a different thing.

20 Q. Okay. So you-all were working on the
21 fences, and you were lifting the pipes. What
22 else did you do for that job?

23 A. So no. It's different, because I was at
24 that SM [sic] place. And then I left there. So
25 I went -- I left that company, and I went to the

1 other company where they were fixing the pipes.

2 Q. Oh, okay. All right. I understand. It
3 was very confusing to me.

4 A. I'm sorry.

5 Q. So Flores Construction, they were
6 putting -- you-all were putting -- were working
7 with pipes?

8 A. Uh-huh, yeah.

9 Q. And what were you doing on that job?

10 A. So I already told you. In Flores
11 Construction, we were lifting the pipes because
12 they were all the way down. So that's when the
13 machine would come, because when there was -- the
14 machine could come. And they had to kind of dig
15 out. So then the machine would lift it up. So
16 when it was the sewers that were very big, those
17 squares, the machine would do that all itself.

18 And sometimes we had to do that where
19 they had those big drainage. But then -- but
20 what we mostly did was what I just told you a
21 little while ago, that we will bring up the pipes
22 so they could be level with the ground.

23 Q. What equipment did you use?

24 A. A helmet and a --

25 THE INTERPRETER: Safety hat,

1 interpreter's correction.

2 A. Safety hat and the vest.

3 Q. What sort of tools did you use?

4 A. The shovel was the only one that I was
5 using, because like I was telling you, it's only
6 to cover. It was just to cover so it could be at
7 level.

8 Q. Were you covering pipes with dirt?

9 A. The small ones, yes, with the dirt. And
10 at the end when the pipe was looking like this
11 (indicating) -- so when it was at the level of
12 the ground, they would put concrete that it would
13 be round and it would look just like this
14 (indicating).

15 Q. Did you participate in putting concrete
16 down?

17 A. No. Just sometimes, but only to tighten
18 up. But I would never pick that up. Sometimes
19 to just tighten up. But what I was in charge is
20 to cover in the ground and to make it level.

21 THE REPORTER: Are you saying
22 tighten or tidy?

23 THE INTERPRETER: Tighten.

24 MS. GRUBER: What was the answer to
25 that, because I was going to ask --

1 Q. Are you saying tidy or tighten?

2 A. Yes, to tighten when it was a chain
3 that -- it was needed. But otherwise, it would
4 just be covering.

5 Q. Why would you have to tighten the pipe?

6 A. No. It was the concrete that they would
7 put around it.

8 Q. And what did you do with the concrete?

9 A. Well, like I'm telling you, when the
10 pipe ends right here (indicating), it goes to a
11 drainage. And then the concrete is a little
12 piece like this. And then you had to level it up
13 so -- level it up so it would look nice like
14 this.

15 Q. Is that what you mean when you say
16 tighten?

17 A. Yes. Sometimes when the tractor would
18 come -- but it was sometimes the tractor would
19 bring it.

20 Q. And did you have to use a tool to make
21 the concrete look nice?

22 A. Well, with the shovel, I would level it
23 up. The ground, I would level it up with the
24 ground -- with the shovel.

25 Q. How would you do it with the concrete?

1 A. What do you mean?

2 Q. Well, when you were leveling -- didn't
3 you tell us that you had to make the concrete
4 pipe look nice sometimes?

5 A. That's when I would level it up with the
6 shovel on the ground so it would get even. And
7 then that's when they would bring the concrete
8 and they would pour it -- pour it in there.

9 Q. But when did you tighten it up?

10 A. What do you mean? Well, when the
11 machine would bring it where -- from where it
12 was. So sometimes the machine -- but it was only
13 sometimes that the machine would bring it. And
14 it would lift it up, and I would just put the
15 chain underneath. So -- but it was mostly my
16 other friend who did that. I would -- what I
17 would do mostly was to cover it up.

18 Q. And the only tool that you used was a
19 shovel?

20 A. Yeah, there was just a shovel.

21 Q. Did you have to do any bending?

22 A. Yes, but just like this (indicating).
23 Not bending, but it's just like kind of -- but I
24 had to do it with the shovel. But I had to pull
25 it with the shovel. Only like this. I would

1 have to do it only like this.

2 Q. Is that a yes or a no?

3 A. What do you mean?

4 Q. I mean did you have to do any bending on
5 that job or not?

6 A. Sometimes. But mostly it was standing
7 with the shovel.

8 Q. Was the dirt that you were moving loose,
9 or did you have to dig it?

10 A. Loose.

11 Q. Did you have to use a wheelbarrow to
12 transport the dirt, or was it already there?

13 A. No. The soil was already there.

14 Q. Okay.

15 A. It was the machine that would be digging
16 around on the edges sometimes.

17 Q. When you were working at ISM, did you
18 have to do any bending?

19 A. Like right -- like this? Like this?
20 No. But I would just kind of go like this to
21 tight up -- tighten up. And the first one, no,
22 because it was high. But at the second one, yes.
23 I had to kind of crouch like this.

24 MS. GRUBER: Okay, I don't have any
25 other questions.

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EXAMINATION

BY MR. MCDANIEL:

MR. MCDANIEL: At the first job, how long did he work? How many months did he work approximately?

THE WITNESS: About three months, I think. Something like that. From May until November in both jobs.

Q. So a total of no more than five or six months?

A. About six months. But like I was saying, it's not that I was working 12 hours. I was working six hours, five hours Monday through Friday.

MR. MCDANIEL: Nothing further. I'll get a copy.

(The deposition was concluded at 4:15 PM)

1 CERTIFICATE OF REPORTER
2 STATE OF SOUTH CAROLINA
3 COUNTY OF CHARLESTON

4 I, MacKenzie Allen, Court Reporter
5 and Notary Public for the State of South Carolina
6 at Large, do hereby certify that the witness in
7 the foregoing deposition was by me duly sworn to
8 testify to the truth, the whole truth and nothing
9 but the truth in the within-entitled cause; that
10 said deposition was taken at the time and
11 location therein stated; that the testimony of
12 the witness and all objections made at the time
13 of the examination were recorded stenographically
14 by me and were thereafter transcribed by
15 computer-aided transcription; that the foregoing
16 is a full, complete and true record of the
17 testimony of the witness and of all objections
18 made at the time of the examination; and that the
19 witness was given an opportunity to read and
20 correct said deposition and to subscribe the
21 same.

22 Should the signature of the witness
23 not be affixed to the deposition, the witness
24 shall not have availed himself/herself of the
25 opportunity to sign or the signature has been
waived.

I further certify that I am neither
related to nor counsel for any party to the cause
pending or interested in the events thereof.

Witness my hand, I have hereunto
affixed my official seal on October 10, 2023, at
Charleston, Charleston County, South Carolina.

20 MACKENZIE ALLEN

21 My commission expires
22 August 30, 2029

23
24
25

STATE OF SOUTH CAROLINA) BEFORE THE SOUTH CAROLINA
: WORKERS' COMPENSATION
COUNTY OF CHARLESTON) COMMISSION

EVARISTO VERDUGO) WCC FILE NO.: 1921668
)

Claimant,)

) DEPOSITION OF:

-vs)

) DR. DOUGLAS STOFKO

INSULATION BY COHEN'S,)
)

LLC & SPRAYFOAM BY)
)

COHEN'S, LLC,)
)

Employer,)

-and)

BUILDERS PREMIER)
)

INSURANCE COMPANY,)
)

Carrier.)
-----)

Given before Stacey L. Scoggan, Court Reporter and
Notary Public, in the offices of Trident Neurological
Specialists, 9229 University Boulevard, Suite F2, North
Charleston, South Carolina on Tuesday, February the 13,
2024, commencing at 10:30 o'clock a.m.

RAY SWARTZ & ASSOCIATES OF SOUTH CAROLINA
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A-P-P-E-A-R-A-N-C-E-S

For the Claimant : McDaniel Law Firm
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1 (Dr. Douglas Stofko, having been duly sworn,
2 testified as follows:)

3 DIRECT EXAMINATION BY MR. McDANIEL:

4 Q. Dr. Stofko, I'm Preston McDaniel. We met before
5 the deposition. Along with my co-counsel we're
6 representing Mr. Morales as a result of his Workers'
7 Compensation case. Don Gibson is my co-counsel. And Don,
8 COVID hit him pretty hard, and he wound up developing
9 severe heart problems. And that's one reason I became
10 involved in the case. I've been involved since the
11 original hearing scheduled back in 2021.

12 So I'm here to take your deposition. I'm trying to
13 find out information in reference to the records and your
14 opinions and that kind of thing. So I want to be able to
15 rely on your testimony. So if you don't understand the
16 question I ask you, please get me to repeat it, okay?

17 I've been doing this for a long time, so I sort of
18 tend to bounce around and don't follow exactly rules in
19 reference to making sure, I guess I could say try and make
20 it a little bit more friendly than just getting the
21 basics. So if you need to take a break please let me
22 know. We'll be glad to take a break. We're going to be
23 marking a lot of documents and asking you a lot of
24 questions about those, so let me know.

25 So anyway, with that said, this lady -- I know you've

1 had your deposition taken before -- she's going to be
2 taking down everything we say. So try to give her verbal
3 answers. People ask me all the time, they say, you know,
4 "I speak two languages. I speak Southern and English."
5 Southern is my first language, so try to stay away from
6 "uh-huh" and "huh-uh" and shaking of the head. All right?

7 A. Yes, sir.

8 Q. First, give me your background and experience. I
9 know you're a neuro surgeon. I don't need a lot. Just
10 tell me --

11 A. Yeah. I'm a board certificate neuro surgeon with
12 fellowship training in endo vascular and super vascular
13 neuro surgery.

14 Q. Where did you do your training?

15 A. Philadelphia College of Osteopathic Medicine.

16 Q. And what about -- osteopathic medicine?

17 A. Uh-huh.

18 Q. All right. And then where did you do your
19 residency in neuro surgery?

20 A. That's, my residency was a consortium of
21 hospitals in Philadelphia.

22 Q. Are you originally from that area?

23 A. I'm from western Pennsylvania.

24 (PROGRESS NOTE MARKED AS PLAINTIFF'S EXHIBIT
25 NUMBER 1 FOR I.D.)

1 Q. Philadelphia is a beautiful city. Now, we've got
2 a report in front of you. I want to go through that.
3 First off, this is a report from your office?

4 A. It is.

5 Q. And it's a progress note with Josephine Jennings?

6 A. Correct.

7 Q. Prior to going through that let me ask you, you
8 performed -- tell me about the surgery you performed on
9 Mr. Morales.

10 A. Mr. Morales had a fall that he suffered a T-12
11 unstable fracture, which we call a three column fracture.
12 So he ended up receiving a T-11 through L-1 percutaneous
13 fusion.

14 Q. Now, you just referred to a three column
15 fracture?

16 A. Uh-huh.

17 Q. What does that mean?

18 A. It means that we divide the thoracic spine,
19 because that's where his fracture was, into three columns,
20 anterior, middle, and posterior column. And when we have
21 fractures through two or more of those columns we deem
22 that as unstable. And we typically want to surgically
23 correct that.

24 Q. At what level was that fracture?

25 A. His fracture was T-12.

1 Q. So did it involve the entire T-12 vertebrae?

2 A. The vertebrae and/or the posterior elements,
3 which are pedicles or lamina. And then he also had
4 ligamentous injury that was appreciated on MRI.

5 Q. Now, ligamentous injury, that was between the
6 T-12 and another vertebrae?

7 A. It's at the T-12 level from his fractures, yes.

8 Q. And you performed a fusion?

9 A. Correct.

10 Q. With what kind of instrumentation?

11 A. What is that -- please specify what you mean by
12 what instrumentation.

13 Q. In other words, I believe's he's got screws and
14 rods in his back?

15 A. Correct. Those are called pedicle screws and
16 rods, yes.

17 Q. And that procedure involves, how many vertebrae
18 are involved in that procedure?

19 A. T-11 to L1. So T-11 to T-12, T-12 to L-1.

20 Q. So it involves --

21 A. Three vertebral bodies.

22 Q. In other words, basically you fuse those three
23 bodies together?

24 A. Correct.

25 Q. They lose their mobility?

1 A. Well, there's not a ton of mobility in the
2 thoracic spine to begin with because of your ribs so ---

3 Q. Right. But in other words, it involves the L-1
4 as part of the procedure, the L-1 and the T-11 are
5 involved?

6 A. Correct.

7 Q. I believe the pedicle screws, are they into those
8 vertebrae, or are they outside? Explain that to me.

9 A. They go through the pedic into the vertebral
10 body.

11 Q. Now, when you do a fusion what effect does it
12 have on the vertebrae adjacent, above the fusion and the
13 vertebrae below the fusion?

14 A. It can add added stress to above and below the
15 fusion construct.

16 Q. And that added stress -- how long have you been
17 practicing by the way?

18 A. As an attending? Nine years.

19 Q. The reason I ask that, I just want to say you've
20 done a lot of fusion surgeries, lumbar, thoracic, and
21 cervical?

22 A. Cervical, correct.

23 Q. My point is, and you just mentioned it, it puts
24 additional stress on the vertebrae above and below?

25 A. Correct.

1 Q. Does it increase the likelihood that they will
2 develop problems at those vertebrae?

3 A. It may.

4 Q. They may develop problems, but does it increase
5 the likelihood that they may?

6 A. Yes.

7 Q. Now, in your first, your original notes at the
8 hospital -- and we're going to get into those in a minute.
9 But you understood that he fell, he was standing four foot
10 off the ground on a ladder, correct?

11 A. My understanding was he fell from a ladder. The
12 exact height I don't remember at all, yeah.

13 Q. And the fall, he fell on his buttocks according
14 to the records. And we'll get into those in a little bit.
15 But according to those records he fell from that height.
16 And it was sufficient enough impact to cause a chance
17 fracture or a burst fracture of the T-12?

18 A. Correct.

19 Q. Significant amount of force on the entire spine,
20 would that be correct?

21 A. Significant for him to cause that fracture.

22 Q. Right. And I believe he was, also as part of the
23 diagnosis he was unconscious after the fall?

24 A. If that's what the record states.

25 Q. You don't remember?

1 A. Yes, I don't remember.

2 Q. Like I said, I know we're dealing with records
3 from 2019.

4 A. Sure.

5 Q. All right. Now, let's go through with that
6 background and that explanation, let's go through this
7 report. And this is a progress report from Josephine
8 Jennings?

9 A. Correct.

10 Q. I believe I've heard reference to -- can you look
11 at this report and tell me whether or not he was seen
12 prior to that recently? In other words, was he seen by
13 one of your physicians, one of your assistants prior to
14 that, Alana Cole?

15 A. Prior to this note?

16 Q. Yes.

17 A. Yeah. He's been seen multiple times which are
18 laid out pretty clearly in this note.

19 Q. So let's see, where's the one --

20 A. By both Alana Cole as well as Josephine Jennings
21 who are both physicians assistants with my service.

22 Q. So it looks like --

23 A. So he was originally operated on on 10/11 of
24 2019. His first office visit was a standard, what we do
25 is a two week wound check, on the 23rd of October '19.

1 Then he had a six week post op visit, which is also
2 standard in our office, on the 20th, excuse me, on
3 November 20th of '19. And then he was also seen on
4 January 8th of 2020, which was his 12 week, which is our
5 if you are doing well go back to work; you're cleared.

6 Q. Right. And then I see in reference to some other
7 dates in between there there's reference to a March 26th
8 date where he had a motor vehicle accident?

9 A. Correct.

10 Q. So your physicians assistant was aware of that at
11 the time of this evaluation?

12 A. Correct.

13 Q. And also, would Alana Cole have been aware of
14 that on November the 27th?

15 A. Correct.

16 Q. Then there's also a reference to a December 31st,
17 '22 accident. So she was aware of that accident at that
18 time?

19 A. Yes. At the time that the accident happened you
20 mean?

21 Q. No. I mean at the time of this treatment.

22 A. At the time that she'd seen him if it was after
23 that date she would be aware of that, yes.

24 Q. So in other words, and that was December 31st of
25 '22. And she saw him on January 10th, '24, correct?

1 A. Correct.

2 Q. And also, it looks like Alana Cole -- correct me
3 if I'm wrong, but if looks like Alana Cole or somebody
4 from your practice saw him on November the 27th?

5 A. Correct.

6 Q. Of 2023?

7 A. 2023. Yes, sir.

8 Q. And tell me, it looks like that on November 27th
9 Ms. Cole or your office ordered MRI's of the cervical and
10 lumbar spine and also a CT of the thoracic and lumbar
11 spine?

12 A. Correct.

13 Q. I know but tell me, why do you do a CT of the
14 thoracic spine and not an MRI of the thoracic spine?

15 A. CT was to evaluate the previous construct that
16 was done.

17 Q. Right.

18 A. MRI has a, tends to have a lot of mushy -- he did
19 have done as well. It cuts through that, but tends to
20 have a lot of motion artifact from the screws and rods
21 that are there. So the CT was better to more assess the
22 screws and the fusion that we did to make sure there was
23 nothing aberrant with that construct that was done in
24 2019.

25 Q. Now, then on down it says that he continues to

1 have constant mid thoracic back pain that worsens with
2 cold or movement.

3 A. Uh-huh.

4 Q. So that was one of her objective findings?
5 That's what he was reporting?

6 A. You would have to ask her that, but that's what
7 it looks to be based on the note, yes.

8 Q. And you repose confidence in your PA's?

9 A. Excuse me?

10 Q. You repose confidence in your PA's?

11 A. Yes, correct.

12 Q. And they are authorized to make treatment
13 recommendations?

14 A. Yes. In the state of South Carolina they can
15 practice and make --

16 Q. I understand. I'm not trying to be
17 argumentative. I'm just trying to establish that --

18 A. Yes.

19 Q. In other words, either on November 27th or
20 January 10th did you see Mr. Morales?

21 A. Did not.

22 Q. Have you personally reviewed the MRI scans?

23 A. I have, yes.

24 Q. You have?

25 A. Yes.

1 Q. Did you review them prior to either one of these
2 visits or --

3 A. I reviewed them prior to the visits that they saw
4 the PA's or the mid levels.

5 Q. So we can go over to -- tell me about the
6 findings in reference to the -- let's talk about the
7 lumbar spine to start with. There was mild foraminal
8 stenosis noted at L-2 - 3. Tell me, do you remember the
9 findings of the MRI?

10 A. Yeah, I reviewed them.

11 Q. Well, tell me about them in reference to -- am I
12 correct that L-2, L-3 that's the level adjacent to the
13 fusion site; is that correct?

14 A. Yes, L-2, 3.

15 Q. So that would be the vertebrae --

16 A. It's really, really the adjacent is L1, L2
17 because there's screws into 1. So adjacent is really L2
18 vertebral body, yes. So they're all adjacent, but
19 immediately adjacent would be L-1, L-2 not L-2, L-3.

20 Q. Well, in reference to our previous discussion
21 that is one of the levels at which it would cause a
22 heightened probably of developing --

23 A. It would be, L-1, L-2 would be the more direct
24 effected level. Because your screw's into L-1 vertebral
25 body. So the L-1, L-2 junction would be highly more

1 stressed than the L-2, L-3 junction.

2 Q. I got you.

3 A. So what you're saying you could carry through the
4 whole spine, which is saying that because you had a fusion
5 at L-1, L-2, L-4, L-5 are more susceptible. That's not
6 necessarily true.

7 Q. Well, tell me about your recollection --

8 A. So the MRI that I reviewed has some mild
9 degenerative changes, some mild foraminal changes, which
10 all looked to be degenerative or chronic in nature. He
11 also had some lipomatosis, which was seen on his prior
12 MRI, which is fat, just fat around the thecal sack.
13 Because it's not the spinal cord at that level. That was
14 appreciated on his 2020 imaging that was done more so than
15 his 2023 MRI.

16 Q. All right. And so based on the MRI they pretty
17 much were the same?

18 A. Yes. They -- called the, what we call the fat
19 changes on the MRI that was just done more recently. But
20 other than that they were the same.

21 Q. Was there any notation in the level just adjacent
22 to and above would be the T-11?

23 A. T-10, T-11.

24 Q. Did you appreciate anything in there?

25 A. It's a lumbar spine MRI. So it doesn't cut to

1 that level. And again, even if it did the motion artifact
2 sometimes can be very difficult to tell those, right in
3 those areas.

4 Q. Now, she made recommendations for treatment. I
5 want to talk about on page four of five she talks about,
6 "The patient has been having ongoing mid thoracic back
7 pain since his surgery in 2019".

8 A. Okay.

9 Q. Do you see that at the top of --

10 A. Okay.

11 Q. Top of the paragraph under fusion?

12 A. Yes, I see it.

13 Q. And then further down from that, "Patient's main
14 complaints are in regards to his chronic mid back pain
15 overlying the pedicle screws as well as new complaints of
16 radicular type pain".

17 A. Uh-huh.

18 Q. So his major complaint was his mid back pain over
19 the fusion site?

20 A. Uh-huh.

21 Q. And part of her recommendation for treatment she
22 recommended a referral to pain management. But was part
23 of that in reference to those findings which are directly
24 related to the fusion?

25 A. Well, her referral to pain management was more

1 because she found sacro iliac joint dysfunction on him for
2 SI joint injections from the best of my recollection of
3 the discussion we had as well as the note that's in front
4 of me. And so his mid back pain and also benefit from
5 left SI joint injection therapy for pain management for
6 his left lower extremity radicular complaints that he was
7 having at that time.

8 Q. What would be the treatment for the pain over
9 the, back pain overlying the pedicle screws?

10 A. It could be musculo -- it's typically musculo
11 skeletal in nature. So from a pain management, physical
12 therapy, and potentially plus or minus what we call
13 trigger point injections, which are just not epidurals but
14 small injections into the muscle themselves to release
15 some discomfort.

16 Q. So that would be what you would be recommending
17 in reference to simply that problem alone?

18 A. Correct.

19 Q. So in other words, regardless of the findings in
20 the lumbar spine and regardless of the findings in the
21 cervical spine he needed treatment in reference to -- your
22 group and y'all were recommending treatment for the
23 pedicle screw pain?

24 A. At that time. But if you go back he didn't have
25 any of those complaints at his, up to his 12 week, up to

1 his 12 week. So these are all new complaints after
2 unfortunately for him two new onsets of trauma.

3 Q. Well, let me ask you about that.

4 A. Sure.

5 Q. So basically according to your recollection he
6 was not complaining of the pain in his, over his screws
7 until after 12 weeks?

8 A. Correct.

9 Q. We'll go into that in a minute. All right. Now,
10 at this time it's your recommendation that he have
11 treatment for that problem with his mid back?

12 A. Correct.

13 Q. And let me ask you this. Do you do hardware
14 removal on patients?

15 A. I do. Very rarely. Typically very young
16 patients, but I do.

17 Q. Do you know Dr. Steven Poletti?

18 A. No.

19 Q. Do you know Dr. Leonard Forrest?

20 A. Do not.

21 Q. With Southeastern Spine?

22 A. I don't know who they are. Am I supposed to?
23 Should I know them?

24 Q. Well, I mean they're board certified orthopedic
25 surgeons here in Charleston.

1 A. I'm neuro surgeon though.

2 Q. They're board certified orthopedic surgeons.

3 A. Okay.

4 Q. I think Dr. Forrest has two board certifications,
5 one in reference to orthopedic surgery and the other one
6 in reference to pain management.

7 A. Okay.

8 Q. Anesthesiology.

9 A. Okay.

10 Q. Now, they have both seen -- Dr. Forrest saw him
11 at the time of the first hearing back in March of 2021,
12 prior to that.

13 MS. GRUBER: Objection. There was a previous
14 hearing in August of 2020.

15 MR. McDANIEL: So?

16 MS. GRUBER: Well, you keep saying the
17 original hearing. There was a --

18 Q. Okay. There was a hearing scheduled in March of
19 2021 which was held. And the commissioner made a decision
20 at that time. But my point is that Dr. Forrest saw him
21 back then and Dr. Steven Poletti saw and reviewed all
22 these MRI's that you've reviewed also.

23 A. Uh-huh.

24 Q. And Dr. Poletti and Dr. Forrest had expressed the
25 opinion that he would benefit from elective screw removal

1 if he wanted to have that?

2 A. Sure. Does Doctor -- these doctors, do they do
3 trauma? I forget. Southeastern Spine, they're a heavy
4 trauma center? They deal with trauma patients?

5 Q. No.

6 A. Okay. And they're neuro surgeons?

7 Q. I do not know whether or not they do trauma
8 surgery on --

9 A. And they're neuro surgeons?

10 Q. They're orthopedic surgeons.

11 A. Okay, okay. And there's no board certification
12 for spine surgery, so they're just board certified general
13 orthopedists. So they do knees and hips, or what do they
14 do?

15 Q. They limit their practice to backs.

16 A. Oh, okay. Yeah. You'd have to -- that's their
17 opinion. We all have our opinions so ---

18 Q. Well, I'm really asking for yours.

19 A. Yeah.

20 Q. When's the last time you actually physically
21 examined Mr. Morales?

22 A. You'd have to go back through the notes and see.
23 I don't know off the top of my head.

24 Q. But neither of the last two times did you --

25 A. Correct. Did not.

1 Q. When's the last time you looked at his back?

2 A. You'd have to go through the notes to see when I
3 saw him last.

4 Q. And in fairness to you would you need to see him
5 personally to be able to make a determination as to
6 whether or not you would agree or disagree with
7 recommending elective screw removal?

8 A. A hundred percent. It's a surgery.

9 Q. Right, right. To remove the --

10 A. Correct. So --

11 Q. Tell me what, in reference to his procedure if
12 you determine that hardware removal would benefit him,
13 what would you be talking about? What would you
14 recommend? What would be removed?

15 A. I'm sorry. Just clarify your question.

16 Q. Okay. They recommended elective hardware removal
17 --

18 A. I have to stop. They? I don't know who they
19 are, okay? I don't know their background. And I don't
20 know anything that they reviewed. So it's hard -- all due
21 respect, somebody else's recommendation without knowing
22 who they are and what they've seen isn't a whole lot. For
23 me to make my recommendation on what I would and would not
24 remove, do hardware removal on a patient; is that what
25 you're asking me?

1 Q. Yeah.

2 A. Let's just stick to that and not who they are --

3 Q. Right. I was trying to --

4 A. -- play into my decision making of what somebody
5 else's recommendations are that I don't, okay?

6 Q. And I wasn't trying to do that. I'll agree with
7 you. What I was trying to do was just simply preference
8 that like if you saw him and recommended what would you
9 recommend?

10 A. If I recommended hardware removal or my decision
11 to do hardware removal?

12 Q. Yes, yes.

13 A. You've got to be more specific please.

14 Q. Okay. If you saw him and you found that you
15 recommended hardware removal explain -- a commissioner's
16 going to read this. And he's going to say, "Okay. What
17 would you recommend removing? And what would be removed?"

18 A. The screws and the rods.

19 Q. All that would be removed?

20 A. Correct.

21 Q. Let me ask you this. Is one of the things that
22 would be, that you would consider at the time that you
23 evaluated and saw him as to whether or not you'd recommend
24 hardware removal, would be the condition of his thoracic
25 spine now?

1 A. No. Typically the reason for hardware removal is
2 for him specifically would be site infection, would be
3 pain at the incision site on -- not on movement, but it
4 would be more that he can feel the hardware like he can
5 actually sense the hardware. And he's sensing it in those
6 focal areas. But as far as having just musculo skeletal
7 pain, I think there's lots of other reasons for him to
8 have that that does not incite another surgery. That in
9 itself is not recommended for me to take him back, put him
10 under general anesthesia, and remove hardware.

11 So if he was having incision site pain, like I lean
12 back, I'm on a chair, I can feel the screws. That's a
13 different -- but based on this, this is more just diffuse
14 thoracic musculo skeletal discomfort, which can be from
15 other traumas, falls, just lots of other reasons to do
16 that, which I don't believe immediately you jump from that
17 to let's remove the hardware; that's going to fix the
18 problem.

19 Going back through an incision, opening up the muscles
20 again doesn't necessarily going to resolve musculo
21 skeletal pain. In fact, it can re-agitate it or make it
22 worse. So they that you speak of, I don't know that I
23 agree with them, right, that you're speaking of without
24 seeing and knowing. Because based off this it doesn't
25 look to me like it's a very focal. It's just diffuse

1 thoracic discomfort. He's also having lumbar pain. He's
2 having thoracic pain -- I'm sorry -- cervical pain. He's
3 pretty much whole spine problems.

4 Q. Of course Mr. Morales is Spanish speaking only.
5 And of course that causes some difficulty.

6 A. Sure. But we, you know we do use translators
7 though, right?

8 Q. Yeah.

9 A. But yes, I agree with you.

10 Q. And of course, when he's talking about mid back
11 pain overlying the pedicle screws. So I think earlier in
12 your testimony you said that if he was having problem with
13 pain on the screws when he leaned back, or like if you
14 touch him and it causes pain --

15 A. Focal pain.

16 Q. -- focal pain -- that would be a reason to
17 consider hardware removal?

18 A. Consider. After we maximize conservative
19 management, right? Rarely do we want to go from the least
20 aggressive to the most aggressive skipping all the steps
21 in between.

22 Q. Well, Doctor, Mr. Morales has testified under
23 oath repeatedly. And I'm going to show you later on some
24 pictures. But he has repeatedly testified at least since
25 that March hearing of 2021 when I was involved that he has

1 exquisite pain. And I have actually touched his back.
2 And he has exquisite pain over his screw sites. And he,
3 when he leans back -- he does not lean back in the car.
4 He sits up. So does that go along with your previous
5 testimony about those are the types of problems that you
6 would at least consider screw removal?

7 A. After we maximize medical therapy.

8 Q. So the first step would be what this lady, the PA
9 has recommended, Jennings?

10 A. Let's call them by their titles please. Yeah.
11 By the Physician's Assistant.

12 Q. I'm sorry. I did not mean to be offensive.

13 A. Well, would be to her. So yes, after we maximize
14 what she put in her note then I think it's more reasonable
15 at that point somebody that I would see. Again, when
16 we're considering surgical intervention, because we
17 maximize medical intervention, that's when I get involved.

18 Q. I agree. I understand completely. So again, in
19 reference to the mid back pain and given our discussion
20 here, you would recommend that treatment -- this would be
21 the first step in that treatment? So he should have this
22 treatment available in reference to his pedicle screws?

23 A. Yeah. We wouldn't recommend it if we didn't
24 believe it would help him or he should try it. Yes, sir.

25 Q. So that's your office recommendation at this

1 time?

2 A. Correct.

3 Q. All right. In reference to his thoracic --

4 A. Thoracic. Yes, sir.

5 Q. And those are, all of your opinions have been
6 stated to a reasonable degree of medical certainty?

7 A. Yes, sir.

8 (OCTOBER 10, 2019 RECORDS MARKED AS PLAINTIFF'S
9 EXHIBIT NUMBER 2 FOR I.D.)

10 MR. McDANIEL: Any objection to admission of
11 Plaintiff's Exhibit --

12 MS. GRUBER: No.

13 Q. All right. Doctor, of course his injury occurred
14 and y'all saw him back in October the 10th of 2019. And
15 these are records from Trident Health Systems.

16 A. Yes, sir.

17 Q. First off, do you know the first doctor is
18 Dr. Sean Jones. Do you know ---

19 A. It's Sean Jones. Yes, sir. He's a trauma
20 surgeon.

21 Q. And in reference to on page two of his note in
22 additional history the patient's only complaint was lower
23 back pain without any neuralgia consciousness; do you see
24 that?

25 A. On the second page?

1 Q. Second page. I'm sorry.

2 A. For the review of systems, sir? I'm not sure
3 exactly --

4 Q. Well, additional history, HIP, is that --

5 A. That's -- yeah, it's review of systems though.
6 So this, we have a different second page.

7 (Deposition went off the record for a brief
8 period of time.)

9 Q. Now, look at page two.

10 A. Okay.

11 Q. It says additional history notes; is that
12 correct?

13 A. Correct, sir. Yes, sir.

14 Q. And basically Spanish speaking only. And
15 patient's only complaint was lower back pain without any
16 neurologic symptoms?

17 A. Correct.

18 Q. All right. The next page is reference to
19 medications. And how heavy of a drug is fentanyl?

20 A. I mean what do you mean "heavy of a drug", sir?

21 Q. Well, in other words like in reference to pain --

22 A. It's a narcotic.

23 Q. That was given IV. All right. Flip on over to
24 page five. And Dr. Jones recorded musculo skeletal
25 decreased range of motion, midline spine tenderness,

1 muscle tenderness, paraspinal tenderness, back board. So
2 at that time was he reporting low back pain?

3 A. To be specific it would be low thoracic pain, but
4 yes.

5 (ALANA COLE REPORT MARKED AS PLAINTIFF'S EXHIBIT
6 NUMBER 3 FOR I.D.)

7 Q. Now, this is a report from Alana Cole. That's
8 your PA, Alana Cole?

9 A. It's a consultation note from my service for
10 which Alana Cole scribed. Yes, sir.

11 Q. And then I believe on page -- she discussed this
12 with you and both of y'all signed that?

13 A. Correct.

14 Q. Now again, in reference to the history of course
15 there's where it gives the history of ladder falling about
16 four feet landing on his buttocks and possible fall on the
17 head as well with brief consciousness. Alana Cole
18 recorded, "Patient's only complaint was lower back pain
19 without any neurologic symptoms." Would that be her --

20 A. Yes. Probably information she got potentially
21 even from the previous notes to my suspicion.

22 Q. She recorded under ROS, review of systems,
23 difficulty with speech?

24 A. Yeah. I can't answer that. That's review of
25 symptoms. And to me it looks like an error, but you'd

1 have to -- I'm not sure.

2 Q. On page three she did -- it looks like she did --
3 under it says general appearance and then neuro/CNS. What
4 is that record there?

5 A. It's the physical examination. It's the
6 neurological exam.

7 Q. She records in there that break away pain and
8 bilateral lower extremities on straight leg raising?

9 A. Uh-huh.

10 Q. So she performed straight leg raise?

11 A. Well, she didn't. He did. She had him do it.
12 Is that what you mean? I mean, she's testing lower
13 extremity muscle strength testing. And he has break away
14 pain, which means that he can't fully cooperate with the
15 exam for the duration that we like because he's in too
16 much discomfort because of his fracture.

17 Q. Right. He couldn't lift his legs as high --

18 A. No, he could. He just can't do it for the length
19 and the duration that we want, because it breaks away
20 because his back hurt too bad.

21 Q. Right.

22 A. So he could do it. It's just that he didn't do
23 it for the duration.

24 Q. Along with that is then on page one of three --
25 there's a record here. These are the MRI scans that were

1 taken. These are the reports that were taken at that
2 time, the scans that were taken at that time on page one
3 of three.

4 A. That's not --

5 Q. Oh, that's your operative note. Excuse me. I'm
6 sorry.

7 A. Correct.

8 Q. Now, it said it was then discussion with patient
9 via translator he could benefit from formal surgical
10 correction for which he understood and agreed. So there
11 was a translator present throughout all this?

12 A. Translator phone.

13 Q. Translator phone?

14 A. Yeah. I don't remember exactly specifically on
15 him, but we use translator phones throughout the hospital
16 for Spanish speaking patients or any non-English speaking
17 patient.

18 Q. Sure, absolutely. So you are communicating with
19 him and his reports were being recorded by a medical
20 translator?

21 A. If it's via the telephone then there's a
22 translator via telephone. If they're recording or not I
23 don't know the system of the hospital what they use, if
24 they record them or not.

25 Q. I'm sorry. I didn't mean to -- it wasn't in

1 reference to them recording it. But in other words, you
2 have a medically certified translator to translate the
3 patient's complaints available?

4 A. Yes, sir. Yes, sir.

5 (SCANS MARKED AS PLAINTIFF'S EXHIBIT NUMBER 4 FOR
6 I.D.)

7 Q. Now Doctor, this looks like the -- what is this
8 record?

9 A. This looks like a CT of the thoracic and lumbar
10 spine done at Moncks Corner Medical Center, Moncks Corner
11 I guess. I don't know what that is. But it's a CT of the
12 spine report or the thoracic lumbar spine.

13 Q. How does -- you're not looking at the scans. I
14 think you've already -- you've actually done comparison of
15 the scans taken back then and the ones now; am I right
16 about that?

17 A. Yes. Compare MRI's they had done prior versus
18 the recent MRI's, CAT scans. Yes, we compare them all.

19 Q. And of course on this one it records the chance
20 fracture. But then down at the bottom it says in
21 reference to the lumbar spine it records degenerative disc
22 disease L4 through S1 without significant osteo stenosis.
23 Based on your recollection how does that compare to the
24 one that was taken --

25 A. You would have to ask the radiologist that read

1 this. Because I don't comment on degenerative changes on
2 a CAT scan. Those are MRI findings. So these are the
3 radiology's findings. Those are not appreciated by the
4 neuro surgeons like myself.

5 Q. And the same thing would apply to the CT of the
6 cervical spine?

7 A. Correct. Yes, sir.

8 Q. And the same thing would apply to the, I think
9 there's one more under the thoracic, lumbar, spine, AP.
10 That's x-rays?

11 A. X-rays. Yes, sir.

12 Q. So again, you would -- you don't comment on
13 degenerative changes?

14 A. I don't put too much weight on degenerative
15 changes on a CAT scan. That's why we do the MRIs.

16 (FOLLOW UP REPORT MARKED AS PLAINTIFF'S EXHIBIT
17 NUMBER 5 FOR I.D.)

18 Q. Doctor, in reference to the other report you've
19 already testified that y'all do a two week follow up, a
20 six week follow up I think it is, and then a --

21 A. 12 week. That's standard unless there's other
22 issues or concerns with the patient that we bring them in
23 other extra dates. But those are standard follow ups for
24 us for spine trauma.

25 Q. In reference to the October 23rd, 2019 visit it

1 says, "Patient is accompanied by a family member who is
2 interpreting".

3 A. Yes.

4 Q. So do you have available a translation service?

5 A. Yes. We would have available translation
6 service.

7 Q. Look at that first report and let me know whether
8 or not you had any -- we know PA Alana Cole did this
9 evaluation. Did you review it or this particular one at
10 the time?

11 A. If there's imaging done I would have reviewed it
12 at the time. Yes, sir. If there's concerns with the
13 patient, if she stated that she spoke to me about it then
14 I did. If not, then possibly not. Let me just review.

15 Q. Okay.

16 A. This is the two week check. No, I would not -- I
17 do not -- the answer is no. Because this is a two week
18 wound check, which sometimes is even done by our nurses
19 because they're just wound checks. But he was actually
20 seen by a PA here. Patient doing well. Incision without
21 issues. So no, I did not see this patient, nor was there
22 any imaging to look at at the time.

23 Q. And this report and all of his reports of
24 problems he's having was in reference to "is accompanied
25 by a family member who is interpreting", correct?

1 A. For the 23rd?

2 Q. Yeah.

3 A. Yes, sir. But just to be clear this was a wound
4 check. So that's the only purpose of this. So sometimes
5 these are actually seen by my nurses in the office just as
6 wound checks, just to make sure the incision's healing.
7 These aren't problem checks. These aren't standardized,
8 you know, overall how are you doing. They're just wound
9 checks. It just happened to be at this time he was seen
10 by one of my PA's because she must have been available.

11 Q. And acute bilateral low back pain unspecified
12 whether sciatica. That's the assessment. And then the
13 other is the 12th thoracic vertebrae closed fracture.

14 A. Correct.

15 Q. So two diagnoses, correct?

16 A. Correct.

17 Q. Now, and then they talked about wanting to see
18 him back with AP lateral x-rays. And then it also says,
19 "He and his translator state understanding and agreement
20 to this", correct?

21 A. Correct.

22 Q. All right. Now, let's go to November the 20th of
23 2019.

24 A. Okay.

25 Q. All right. In the patient history says, "Patient

1 is accompanied by a family member who is interpreting."

2 A. Okay.

3 Q. So on November 20th, 2019 Alana Cole saw him at
4 that time, correct?

5 A. Correct.

6 Q. So again, it appears -- correct me if I'm wrong,
7 but Alana Cole, PA -- I don't want to be offensive -- was
8 relying on a family member for the interpretation of his
9 complaints?

10 A. As it appears, correct.

11 Q. And again, she found acute bilateral low back
12 pain, fall from a ladder, initial encounter. And then on
13 this one she said she discussed -- she notes doing well
14 percutaneous. But again, she relied on that
15 interpretation by a family member for interpretation of
16 his complaints that he was reporting?

17 A. Correct.

18 Q. Now, I put in here the x-ray of -- these are the
19 ones taken in November that you had, I believe she ordered
20 new -- do you have those images?

21 A. I do not.

22 Q. I'm going to pull those out and show you those.

23 (IMAGES MARKED AS PLAINTIFF'S EXHIBIT NUMBER 6
24 FOR I.D.)

25 Q. If you would Doctor, would you mind just identify

1 those for me?

2 A. Sure. First number six, Exhibit Number 6 is an
3 EP thoraco lumbar x-ray showing the construct. And this
4 is November 20th of 2019.

5 Q. And these would be -- what about the next two?

6 A. The next one is a November 19th, 2020 lateral
7 x-ray or thoraco lumbar showing the construct that was
8 done with the good placement of hardware and the
9 previously seen T-12 fracture, more appreciated on the
10 lateral. And then this is not labeled. This is just
11 another EP, which looks to be like this EP. But there's
12 no -- not even a name on that one, so I'm not going to
13 comment.

14 Q. All right. We'll remove that one and make this
15 one and two. And in reference to those, just again for
16 the record I've labeled those one of two and two of two.
17 And those are the two reports you just went over; is that
18 correct?

19 A. Yes, sir.

20 Q. Now, in reference to the report of November the
21 20th if she ordered x-rays the scans that you referred to,
22 does that appear to be the ones that she ordered at that
23 time?

24 A. Correct.

25 Q. Now, the next one is January 8th of 2020.

1 A. I have it. Yes, sir.

2 Q. Again, "Patient is accompanied by a family member
3 who is interpreting".

4 A. Agree. That's what it states.

5 Q. So now, everything that Mr. Morales is reporting
6 to her, to PA Alana Cole on all three of these visits
7 she's relied on a family member for the interpretation of
8 his complaints?

9 A. Okay.

10 Q. Is that correct?

11 A. Correct.

12 Q. Now, on this one on January 8th there's a record
13 at the very last of that. It says, "Complains of some
14 mild pain in his left side when he lies down on that side
15 but is otherwise without complaint."

16 A. I see it.

17 Q. On page three of that document under treatment
18 notes it says we will start some physical therapy?

19 A. Correct.

20 Q. He is somewhat deconditioned from being out of
21 work and on restrictions for 12 weeks. We will allow him
22 to do physical therapy times three weeks and then return
23 to work without restrictions. He does not have to wear
24 the brace any longer unless for comfort?

25 A. Correct.

1 Q. And if he continues to have this pain he can call
2 our office for further recommendations to which he and his
3 family state understanding and agreement.

4 A. Correct.

5 Q. So she gave him an out of work statement of three
6 weeks. She gave him physical therapy for three weeks.

7 (PHYSICAL THERAPY RECORDS MARKED AS PLAINTIFF'S
8 EXHIBIT NUMBER 7 FOR I.D.)

9 Q. Now Doctor, during this time do you know whether
10 or not your practice had an interpretation system in the
11 office?

12 A. We did.

13 Q. And that would be -- what service do y'all use;
14 do you know?

15 A. Do not know.

16 Q. But it's basically trained certified translators
17 that are medical translators? In other words, for
18 purposes of complying with the AMA standards and that kind
19 of thing, correct?

20 A. Correct.

21 Q. But did you know at none of these times did you
22 actually evaluate Mr. Morales?

23 A. Correct.

24 Q. Now, the last two notes that I think you reviewed
25 the treatment plan with PA Alana Cole?

1 A. Correct.

2 Q. But you didn't actually see Mr. Morales?

3 A. Correct.

4 Q. Now, I want to show you, these are physical
5 therapy records. Now, before we go into those has anybody
6 ever told you that the family member that was there
7 translating was a 13 year old niece?

8 A. No. Did not know that.

9 Q. And that the other person that possibly was with
10 him at times was a 14 year old nephew?

11 A. Did not know that.

12 Q. So all those reports and problems that he's
13 reporting are based on translation by that family member,
14 correct?

15 MS. GRUBER: I'm going to object. These are
16 questions based on facts that are not in evidence.

17 Q. Well, actually Counsel's wrong because
18 Mr. Morales testified that under oath at the hearing that
19 his 13 year old niece and 14 year old nephew were the two
20 people that accompanied him and were doing the
21 translation.

22 Now Doctor, let's look at those records. Of course it
23 refers that you referred him, but that was actually Alana
24 Cole, PA from your office referring for the physical
25 therapy; is that correct?

1 A. Her orders go under me. So it's me. She's an
2 extension --

3 Q. Do you sign off on --

4 A. Yeah. But you should know that, right? So it's
5 an extender. She's an APP, right? So she's an extender
6 of me. So all her orders, anything that she's doing is
7 acting under me.

8 Q. I got you. I didn't know. Some practices
9 actually they like them to, they personally sign off.

10 A. Yeah. So it's me. It's ordered under me. Yes,
11 sir.

12 Q. You'll see that on that first page there was a
13 translator involved there throughout the entire time.
14 Would you mind over there on the current level of
15 function, do you see that?

16 A. I do.

17 Q. What kind of problems was he reporting?

18 A. Limitations with ascending stairs, bathing, bed
19 mobility, bending, carrying, cleaning, vacuuming,
20 sweeping, climbing a ladder, descending stairs. It's all
21 blurry. Driving, lifting from floor, kneeling, lifting
22 overhead, sleeping -- looks like sleeping greater than six
23 hours -- squatting, sustained sitting, sustained standing,
24 twisting, turning, shoveling, walking.

25 Q. And under observations it says observation

1 comment, "Interpreter present during initial evaluation
2 and helped patient complete paperwork as well as BP taken
3 and sitting on the R, right upper extremity." Is that
4 correct? So there was an interpreter present throughout
5 that?

6 A. Uh-huh.

7 Q. All right. I'm going to ask you to flip over to
8 page three. And this is the page I'm referring to.

9 A. Uh-huh.

10 Q. Under treatment notes, what subjective complaint
11 is he making?

12 A. Doing good, some soreness still where screws are
13 present. He reported --

14 Q. Exercise went okay at home. He was reporting at
15 that time pain over the screws, soreness?

16 A. Some soreness still present where screws are
17 present, which I'm not sure who knows where the screws are
18 present other than the incision site. So that can be
19 incisional site discomfort too, which aren't directly from
20 the screw. It's from the incision that was made, the
21 muscle. So yes, that's a subjective complaint. I agree
22 with what's written here.

23 And who did this evaluation, sir?

24 Q. This was done by the physical therapist.

25 A. Perfect. Okay.

1 Q. And she's just recording what he's reporting?

2 A. Sure. Hence a subjective complaint.

3 Q. And I'm going back to our discussion earlier
4 about what would lead you to recommend after conservative
5 treatment.

6 A. Yes, sir.

7 Q. So at that time back in March if you'll note
8 Ms. Cole, PA Alana Cole recommended physical therapy in
9 January. But you'll note that that's the initial
10 evaluation. It wasn't conducted until March.

11 A. Yeah.

12 Q. You do a lot of workers' comp?

13 A. Do I do workmans' comp, no. Can you tell?

14 Q. No. I just noted that for, this is a delay we
15 see a lot of times. Now, let me go in this. Then let's
16 go over to let's see -- again, on a soap note, one of the
17 treatment notes, it's on page, about page five. This is
18 the one I'm referring to here. It would be, at the top it
19 would be page 34. You see at the top? That may be a good
20 reference point. He was still having some pain and
21 reporting tightness in his back?

22 A. I'm sorry. Where?

23 Q. Under subjective.

24 A. This is a different one then apparently.

25 Q. It's up here.

1 (Whereupon an off the record discussion took
2 place.)

3 A. Correct. I see it.

4 Q. And again, Vanessa was present throughout --
5 Vanessa, who is the interpreter, was present throughout
6 the treatment session, correct?

7 A. Correct.

8 Q. So this PA, this physical therapist is getting
9 her reports translated by a translator?

10 A. Is Vanessa a medical interpreter like in the
11 hospital, or is this just somebody that speaks Spanish in
12 the department?

13 Q. She's an interpreter. I do not know.

14 A. So that's almost the equivalent of having a
15 family member interpreting in the -- it's just a worker.

16 Q. Might be.

17 A. But yes, I see it says, "Vanessa present for
18 treatment session." I agree with that.

19 Q. Let's go over this. On the last report he was
20 last seen on, and discharged -- and this is the very last
21 page. Now, on the last page again, if you don't mind what
22 is the assessment? What kind of problems is he still
23 reporting at that time in here?

24 A. Yes, sir. "Patient continues to present with
25 impairments involving lumbar range of motion, low

1 extremity strength, low extremity flexibility, posture,
2 and pain. These deficits limit the patient's ability to
3 perform these tasks: Ascending stairs, bending, carrying,
4 cleaning, vacuuming, sweeping, climbing a ladder,
5 descending stairs, dressing, donning shoes, socks,
6 driving, kneeling, lifting from floor, lifting overhead,
7 overhead tasks greater than six hours, squatting,
8 sustained sitting, twisting, turning, shoveling, and
9 walking.

10 Q. So he's still having problems with all those kind
11 of problems?

12 A. Per this evaluation.

13 Q. If you look down one below that it says progress
14 note, April 16th, 2020?

15 A. I do. Patient says his lower back hurts all the
16 time. Where he has his screws he reports he has made some
17 progress with physical therapy but his back is always
18 going to hurt him.

19 Q. What about on the progress note of April 23rd,
20 2020?

21 A. The observation?

22 Q. Yeah.

23 A. It says, "Interpreter present during session.
24 Her name is Vanessa."

25 Q. No, up here, Doctor.

1 A. Okay. "Patient says that his lower back hurts
2 all the time where the screws -- where he has the screws.
3 Patient reports he has made some progress in physical
4 therapy but his back is always going to hurt him."

5 Q. And then the interpreter was present again during
6 the entire session. And again, we don't know if she's a
7 physical therapist. Now, so through these medical records
8 at physical therapy he was reporting pain over the screws;
9 is that correct? Back in April of 2020.

10 A. Per this report. Well, not per our records. Per
11 this report he's reporting it. That's what you're asking?

12 Q. Exactly, yeah.

13 A. And you're saying pain over the screws. He's --
14 I don't know they know where the screws are. Pain over
15 the incision would probably be more appropriate.

16 Q. Right.

17 A. So he's reporting incisional pain.

18 Q. But to him he's saying he feels it over his
19 screws?

20 A. He doesn't know where his screws are. I mean,
21 his screws are this deep. So I'm not sure he knows where
22 his screws are is what I'm saying.

23 Q. So the tops of the screws, how deep are they
24 under the skin?

25 A. I'd have to measure on him specifically, but

1 they're usually about this deep.

2 (PHOTOGRAPHS MARKED AS PLAINTIFF'S EXHIBIT NUMBER
3 8 FOR I.D.)

4 Q. These are pictures taken of Mr. Morales' back.

5 A. I have know idea what I'm looking at.

6 Q. Okay. Does that look about like where the screw
7 sites would be?

8 MS. GRUBER: I'm going to object unless he's
9 identified these --

10 A. I have no idea what this is, sir. I mean, this
11 could be a picture of a dark sky with some lights on it.
12 I have no -- this is -- I will not comment on those
13 pictures.

14 Q. Assuming that those are picture of his back and
15 those four places are the screw sites, is that how you
16 would expect his back to look?

17 MS. GRUBER: Objection to the form of the
18 question.

19 Q. Go ahead and answer, Doctor, if you --

20 A. I can't. Please just try to rephrase it so I can
21 understand what you're asking me.

22 Q. Well, assuming that that is a picture of his
23 back, and assuming those four dark spots are where the
24 screws are and where he has pain, is that how you would
25 expect his back to look?

1 MS. GRUBER: I object to that question or that
2 exhibit. It's not been identified yet. Dr. Stofko said
3 he doesn't know what it is.

4 A. The answer to -- my answer to your question is, I
5 have know idea because I don't know what this is a picture
6 of.

7 Q. I was asking you to make the assumption.

8 A. I'm not going to make that assumption, what it
9 should look like or what it shouldn't look like, because I
10 don't know what that is. That's --

11 Q. Now, going on in the medical records of Alana
12 Cole, PA, she again saw him on July 22nd, 2020. Do you
13 see that report?

14 A. I do, yes.

15 Q. At that time he had an interpreter present. And
16 I believe this is when he was reporting various problems?

17 A. Which I am going to comment on.

18 Q. History of present illness.

19 A. All of these other follow up appointments with
20 Mr. Morales were routine follow ups where it deemed he
21 wasn't having a lot of problems. And I'll let Alana Cole
22 comment, but my assumption is that's why she used the
23 family. Granted, 13 or 14, or whatever it may be, but she
24 used family that was there. This is a new complaint. He
25 had new problems. And so now you can see that there's an

1 interpreter present or translator via phone. So just for
2 the record that's the difference between those visits.

3 But yes, it seems as though --

4 Q. The insurance company sent an interpreter --

5 A. They sent --

6 Q. You don't know whether or not, it was either by
7 phone or by an interpreter present?

8 A. Yeah, okay.

9 Q. Now, I forgot to show you one thing. I'm going
10 to ask you to look at this. This is part of that
11 discharge we just read in physical therapy. And PA Alana
12 Cole had advised him back in January if he had anymore
13 problems to come back and see y'all, right? And of
14 course, this is right in the middle of COVID too. But you
15 see why the recommendation, physical therapist recommended
16 for physical therapy, you see why it wasn't authorized?

17 A. Am I reading this?

18 Q. Yeah.

19 A. Okay. "Discharge patient per adjuster, Janie
20 Wilson. More visits are denied." Denied by whom?

21 Q. Janie Wilson, the adjuster.

22 A. Okay.

23 Q. So in other words, this is where y'all sent him
24 for --

25 A. And it didn't happen. And there was a --

1 Q. Right. And then it also says, "I don't have any
2 new orders from the doctor." So in other words, based on
3 this had he been sent back to you by the insurance company
4 would you believe y'all would have authorized more
5 physical therapy?

6 A. Correct, yes.

7 Q. And I believe you testified earlier that one of
8 the things that you would recommend before considering
9 screw removal would be trigger point injections and the
10 same thing that your other PA, PA Jennings recommended?

11 A. Correct.

12 Q. And which is y'all's recommendation now?

13 A. Correct.

14 Q. And all the opinions that you've expressed,
15 again, are to a reasonable degree of medical certainty?

16 A. Correct.

17 Q. I believe it's part of that packet there. The
18 next page after that last report. And that's where she
19 recommended the MRI and treatment. And we talked about,
20 you referenced those however -- this is, I believe this is
21 a questionnaire that Don Gibson sent to you?

22 A. It is. And I went over with Ms. Cole, yes.

23 Q. Did you go over this with Ms. Cole?

24 A. It looks familiar. Yes, sir.

25 Q. And in reference to that, at the time that Don

1 was trying to get treatment for Mr. Morales in reference
2 to his low back and his cervical spine, at that time is it
3 fair to say number one, you were not aware of the physical
4 therapy records in reference to the problems he's had,
5 were you?

6 A. Was not.

7 Q. Were you aware of the importance of low back pain
8 at the hospital at the time?

9 A. At Trident Medical Center?

10 Q. Yeah.

11 A. On his initial visit or later visits?

12 Q. Yeah, his initial visit.

13 A. He had --

14 Q. When you looked at that questionnaire you
15 referenced that these are all new complaints that he only
16 reported nine months later. So basically at that time
17 your understanding was the July reported problems; is that
18 fair to say in reference to you, your opinions?

19 A. And I apologize. Just say that one more --

20 Q. On page one it says, "These symptoms, complaints
21 not present at three month follow up. Presented nine
22 month after follow with these issues."

23 A. Correct.

24 Q. And when you made that comment you're not aware
25 of the reports to the physical therapist?

1 A. That we just read? No, I was not.

2 Q. And you were not aware of the report, I think in
3 December where he was reporting pain on his side. And you
4 were not aware of the initial reports of low back pain at
5 the hospital.

6 A. The pain on his side I was aware of, because we
7 sent him -- that's what prompted him to go to physical
8 therapy. So what is your last question now?

9 Q. Well, my last question, and you were not aware of
10 the reports of low back pain at the hospital?

11 A. When he was here in October of '19 he didn't, the
12 low back pain was low thoracic pain from his fracture
13 site. So he didn't have low back pain. He had fracture
14 site pain. I understand he's putting low back pain, but
15 he has radicular referred pain from where his fracture
16 was. He didn't have a separate complaint from that.

17 And nowhere is that proven in any documentation from
18 what you've shown me that he has that. He has straight
19 leg raising with break away pain. The low back pain that
20 you're referring to, it's a T-12 fracture. So it's, some
21 people call it low back pain. Be a neuro surgeon you call
22 it low thoracic pain, right? But for a trauma surgeon or
23 a nurse or somebody else to call low back pain it's a very
24 subjective way to view that.

25 So he did not have low back pain in a view that was

1 not associated with his fracture. Doesn't mean he didn't
2 have musculo skeletal on top of that, but yes.

3 Q. Right. And I think you commented on that before.
4 I think I've seen some of that. In other words, you
5 really can't -- because of the lack of -- number one,
6 we've added these physical therapy records where he's
7 clearly reporting problems with both the low back and the
8 thoracic spine through an interpreter. And we just found
9 out today that --

10 A. Just the interpreter part, because we don't know
11 who the interpreter is. We used an interpreter, but
12 apparently they're a 14 year old, right? So let's just,
13 we've got to watch on the interpreter, because we don't
14 know who Vanessa is, correct?

15 Q. Yeah. I can -- it's an interpreter used by the
16 physical therapist, but however --

17 A. Yes.

18 Q. And I'm not sure if she was provided by the
19 insurance company or not.

20 A. Okay.

21 Q. But clearly there's a detail report of problems
22 with the low back pain, low back, and the thoracic, and
23 the cervical in reference to in March of 2020, correct?
24 He's reporting problems doing all these different things.
25 And he's reporting problems with his low back and his

1 upper back. And you weren't aware of those --

2 A. Yeah. And this is just -- what I read in this
3 report, sir, was just saying he has reports doing these
4 different activities but doesn't specify where -- why
5 because it's upper neck pain or it's low back.

6 So I agree that her report states he has difficulty
7 with all the functions as state that I read off. But I'm
8 not sure exactly where it states the other part of it.
9 Now he did complain to us, which we have documentation on
10 Ms. Cole's record from --

11 Q. July?

12 A. -- July that he now came into us at that time
13 with new low back and cervical discomfort for which we
14 ordered imaging for.

15 Q. In other words, I understand what you're saying.
16 But also in the assessment he says that he presents today
17 with decreased thoracic and lumbar range of motion, lower
18 extremity flexibility, and increased pain as well as
19 impairments with posture and gait. Then it goes on.
20 There's also -- but anyway --

21 A. And I agree with you, but I don't know that that
22 cervical and lumbar pain, that could just be all related
23 to his initial thoracic complaints that we just weren't
24 aware that he was to this degree.

25 Q. Right. And we know about the interpreter being a

1 13 or 14 year old niece or nephew?

2 A. That's what you tell me. I don't know that
3 personally, but I'm going by what you're telling me.

4 Q. So would it be fair to say that we do not know
5 whether or not these were -- there's indication that he
6 was, would you agree with me at least that there are
7 indications that he was reporting problems outside of the
8 T-12 at the time the cervical fusion area --

9 A. Thoracic fusion you mean.

10 Q. Yeah. Thoracic fusion area. As early as March
11 of 2020?

12 A. We were aware of issues, complaints outside of
13 his -- we'll call it the area of surgery, on 7/22/2020.
14 That's when we became aware of these issues.

15 Q. All right. Now last page of the document is, I
16 believe it's a Form 14B required of the commission. And
17 the commission requires that we retain hardware. That's
18 where it refers to down there in the pedicle screws and
19 rods. And then down there it asks if there's other needs
20 as a result of the injury for an additional time that
21 would tend to lessen the period of disability. MRI on
22 lumbar spine ordered for assessment.

23 So PA Alana Cole is reporting at that time this is
24 part of the --

25 A. This was ordered -- this was after his new

1 complaints on the 7/22 of 2020, correct?

2 Q. Yeah.

3 A. What's the date of this --

4 Q. January of 2021.

5 A. Yeah. Okay. So I'm sorry. Yes. Is there a
6 question?

7 Q. So she completed this form and stated he needed
8 that as part of assessment in reference to the injury --

9 A. Yes.

10 (SUBPOENA MARKED AS PLAINTIFF'S EXHIBIT NUMBER 9
11 FOR I.D.)

12 Q. All right. Now, the first document I'm showing
13 here which is -- what's the exhibit number?

14 A. 9.

15 Q. Is a subpoena issued to Alana Cole, PA on April
16 13th. Were you ware of that subpoena that day?

17 A. I don't know if was that day, but I was aware of
18 the subpoena in a timely fashion. I can't recall if it
19 was that day.

20 Q. And it noted that the hearing had been set on
21 April 26th, so we didn't have much time. But we'd
22 subpoenaed her to come to that hearing. But you were
23 aware of that subpoena, right?

24 A. Correct, yes.

25 Q. Doctor, as part of the Workers' Compensation we

1 have to file what is called a pre-hearing brief. And
2 you'll notice that this one that I've handed you is a
3 second amended pre-hearing brief.

4 A. Okay.

5 Q. You notice that?

6 A. Uh-huh.

7 Q. In other words, that means there's been the
8 initial pre-hearing brief that's been filed. Then there
9 was an amendment to that pre-hearing brief. And then now
10 there's a second amendment. And you note the date of
11 this, this was filed on April 15th? Down at the bottom,
12 left-hand corner.

13 A. Yes, April 15th.

14 Q. And you'll note this is a subpoena and the date
15 of the subpoena is April 13th, correct?

16 A. Correct.

17 Q. I'm going to ask you to flip up and look over
18 here and notify how we're amending the -- you see how
19 she's amending to include records from your office?

20 A. Okay.

21 Q. And then attached to that is the records she
22 amended it with. And here's what she amended. You'll see
23 a letter from Don Gibson dated October the 11th.

24 A. Okay. Correct. I have October 15th.

25 Q. October 15th. I'm sorry. You're correct.

1 A. Okay.

2 Q. October 15th. And then you'll see below that she
3 also included another urgent request of October 27th, 2020
4 from Don Gibson's office.

5 A. Okay. Correct.

6 Q. Now, and then attached to that is that same
7 questionnaire that we referred to earlier.

8 A. Okay.

9 Q. And then below that is the cover letter simply
10 filing that second amended pre-hearing brief.

11 A. Okay.

12 Q. All right. Now, those letters are October 15th
13 of 2020?

14 A. Uh-huh.

15 Q. And your report, that questionnaire was issued
16 back in 2020. And Counsel listed those as records
17 received from your practice, okay?

18 A. Okay.

19 Q. So, and those are filed on the 15th, two days
20 after this subpoena.

21 A. Okay.

22 Q. Can you tell me how, when those records were
23 provided to Counsel?

24 A. No idea.

25 Q. Do you remember anything else about this?

1 A. This is -- we're looking back -- just so I don't
2 get my dates -- we're looking back four years, three and a
3 half years ago. No, I do not remember.

4 Q. But in other words --

5 A. In the middle of COVID. Okay. So no, I don't
6 remember.

7 Q. But you would agree with me that Counsel filed
8 records supposedly from your practice two days after this
9 subpoena was issued?

10 A. I'm reading what I see. I don't recall.

11 (RECORDS MARKED AS PLAINTIFF'S EXHIBIT NUMBER 10
12 FOR I.D.)

13 (BAR COMPLAINT MARKED AS PLAINTIFF'S EXHIBIT
14 NUMBER 11 FOR I.D.)

15 Q. Do you remember filing a complaint against
16 Mr. Gibson with the South Carolina Bar?

17 A. I do.

18 Q. Or South Carolina Supreme Court? All right.
19 Since we're talking about letters back in October of 2020
20 and you filing a grievance on April 19th, what led you at
21 that time to file that complaint?

22 A. I don't recall. I recall the letter, and I
23 recall -- but I'm trying to read to -- it's probably in
24 here.

25 Q. Take your time.

1 A. I think it's pretty self explanatory. He tried
2 to get our office to addend our medical records to fit
3 into what you're looking for. I think that's the reason
4 why, okay?

5 Q. I understand that. My question is --

6 A. Go ahead. I'm sorry.

7 Q. My question is, that letter was issued back in,
8 those letters were issued back in the fall, and you know,
9 some time in the summer. But then you wait from August --
10 you don't -- it doesn't upset you then. But then for some
11 reason you choose to --

12 A. Am I on trial, or is this a workmans' comp case?

13 Q. It's a workers' comp case.

14 A. So then what are we getting into this for? If
15 you want to discuss this on aside and this is like some
16 schtick because this is your buddy we can do that. But
17 this is a workmans' comp case about this patient. So if
18 this relates to the patient I'm happy to answer it. If
19 this is because this is your buddy that now has COVID that
20 you're upset about we can talk to that on the side. But
21 this is pretty clear why I sent it. He's trying to get us
22 to alter a medical record to fit into his agenda.

23 Q. And so all I want to know is why after your PA
24 gets served with a subpoena on April 13th, six to eight
25 months after this letter that upset you and you decided to

1 make it after that, and then you provide records to a
2 defense lawyer two days later, then you file a complaint.

3 Did you discuss that with anybody?

4 A. With the hospital.

5 Q. With the hospital?

6 A. With who I'm employed by, my employer.

7 Q. I have no further questions.

8 CROSS EXAMINATION BY MS. GRUBER:

9 (COMPLAINT MARKED AS DEFENDANT'S EXHIBIT NUMBER 1 FOR
10 I.D.)

11 Q. I'm just going to show you what that complaint
12 was about, Dr. Stofko.

13 A. Okay.

14 Q. I'm Courtney. I represent the insurance carrier
15 and the employer in this case. You were asked about a
16 complaint without being given the basis for the complaint.
17 I've just handed you the basis for the complaint. Do you
18 have anything you want to say about that?

19 A. I don't.

20 Q. I do have some other questions though about what
21 we talked about. With regard to the questionnaire that
22 you completed -- and I don't know what the exhibit number
23 is on it. I'll just hand you my copy.

24 Dr. Stofko, with regard to the question number two
25 about Mr. Morales -- what's the exhibit number?

1 MR. McDANIEL: Hold on a second. It's Exhibit
2 Number 5.

3 Q. This is the questionnaire completed dated
4 11/18/2020. Question number three, these are questions
5 that Don Gibson sent you. Well, question number two it
6 says, "Mr. Evaristo Verdugo Morales was presented with
7 complaints of pain in the neck and upper back into the
8 bilateral shoulders to a reasonable degree of medical
9 certainty are causally related his October 10, 2019
10 accident." And you disagree. Are you still of that
11 opinion today?

12 A. Correct.

13 Q. And with regard to the question presented in
14 number three, "Presentation complaints of low back pain
15 with radiation into the bilateral lower extremities to the
16 bottom of the feet and radiating pain into the left
17 anterior thigh." Your opinion was it was not causally
18 related to the work injury. Is that still your opinion?

19 A. Correct.

20 Q. And back to the, specifically the fracture of
21 T-12. Do you have an opinion to a reasonable degree of
22 medical certainty as to whether or not the cervical
23 complaints that were most recently noted in November of
24 2023 and January of 2024 are causally related to the
25 fracture at T-12?

1 A. They are unrelated.

2 Q. And the reference in the report of January 10,
3 2024, new complaints of radicular type pain in left upper
4 and left lower extremity. Do you have an opinion to a
5 reasonable degree of medical certainty as to whether they
6 are causally related to the fracture at T-12?

7 A. Unrelated.

8 Q. I think you had referenced the fact that
9 Mr. Morales has had two, at least two traumatic events
10 between when he was last treated at your office and
11 November 27, 2023. Specifically he had a car wreck
12 3/26/2021, reported head and neck pain. And then on
13 12/31/2022 he was hospitalized, had a left tibial plateau
14 fracture, sternal fracture, multiple rib fractures,
15 underwent ORIF left tibial fracture with Dr. Gotleach
16 (ph). I will also advise you that he's testified that he
17 was on non-weight bearing for his leg and on crutches for
18 three and a half months.

19 Do you have an opinion to a reasonable degree of
20 medical certainty as to whether those two traumatic events
21 at least could have had some impact on the complaints he
22 has with regard to his back?

23 A. Possibly, correct.

24 Q. Based on the information that we've gone over
25 today including these other two incidents as well as the

1 length of time that's involved --

2 A. The other two incidents, the car accidents?

3 (HOSPITAL REPORT MARKED AS DEFENDANT'S EXHIBIT
4 NUMBER 2 FOR I.D.)

5 Q. The two car accidents, yeah. Let me show you
6 this. I'll just refer you to page number five.

7 A. Okay.

8 Q. And again, this is the hospital report from the
9 head on collision he had 12/31/2022. What were the listed
10 injuries there?

11 A. Under impression for the imaging you mean?

12 Q. Yeah.

13 A. Okay. Non-displaced acute anterior rib fractures
14 on the right at 5 and 6 and left from 3 to 6.

15 Non-displaced sternal body fracture with overlying soft
16 stranding. No acute osseous abnormality in thoracic and
17 lumbar spine. No acute intra thoracic or abdominal post
18 traumatic abnormality. Impression common due to fracture
19 throughout the proximal tibial metastasis with fracture
20 lines extending lateral tibial plateau with large joint.
21 Lipo hemarthrosis, hematoma.

22 Q. Do you have an opinion as to whether to a
23 reasonable degree of medical certainty as to whether or
24 not those injuries particularly with regard to the ribs
25 and the sternal body fracture would have had some effect

1 on the area of T-12 that you operated on?

2 MR. McDANIEL: Objection calls for
3 speculation.

4 A. Rib fractures cause referred pain throughout the
5 thoracic spine and in certain dermatomal patterns. It's
6 not speculation.

7 Q. So is that yes or no?

8 A. Yes.

9 Q. With regard to the fracture at T-12 that you
10 treated Mr. Morales for, is it still your opinion to a
11 reasonable degree of medical certainty that he is at
12 maximum medical improvement for that specific injury?

13 MR. McDANIEL: Objection. Asked and answered.
14 Contrary to doctor's testimony.

15 Q. You can answer it.

16 A. The fracture is healed, yes.

17 Q. Do you have an opinion to a reasonable degree of
18 medical certainty as to whether any of the medical
19 treatment recommended in the January 10, 2024 note is
20 causally related to the T-12 fracture resulting from the
21 accident of 10/10/2019?

22 MR. McDANIEL: Objection. Asked and answered.

23 A. I'd have to look at those notes. If you can hand
24 me the notes.

25 Q. Yeah.

1 A. Restate your question please.

2 Q. Do you have an opinion to a reasonable degree of
3 medical certainty as to whether or not any of the medical
4 treatment recommended on January 10, 2024 is causally
5 related to the fracture at T-12 resulting from the
6 accident of 10/10/2019? And taking into consideration the
7 other accidents that have occurred since that time.

8 MR. McDANIEL: Objection to the form of the
9 question. Objection, asked and answered.

10 A. I do not believe that his complaints from this
11 note on January 10th of 2024 are due to his original
12 accident that I treated him for in October of 2019.

13 (FCE MARKED AS DEFENDANT'S EXHIBIT NUMBER 3 FOR
14 I.D.)

15 Q. I've just handed you a copy of the Functional
16 Capacity Evaluation. Well, you can review it, but I'm
17 going to ask you about deficits noted on page two.

18 A. Client deficits. Number one, "Client
19 demonstrates significant deficits to cervico and thoraco
20 lumbar spine range of motion. Functional limitations were
21 most notable with safe positioning for material handling
22 in the lumbar spine as well as overhead activity for the
23 cervical spine.

24 Q. Is that causally related to the fracture at T-12?

25 A. It is not.

1 Q. How about number two?

2 A. "Client demonstrates decreased bilateral shoulder
3 elevation range of motion. Functional range of motion was
4 noted, however with overhead activities."

5 Q. Is that causally related to the fracture at T-12
6 which occurred 10/10/2019?

7 A. It is not.

8 Q. How about number three?

9 A. "Client demonstrates mild bilateral extremity
10 proximal weakness. He reports pain in the upper back with
11 resistance to MMT testing in the bilateral shoulders."

12 Q. Is that causally related to the T-12 fracture
13 that occurred 10/10/2019?

14 A. It is not.

15 Q. How about number four?

16 A. "Client demonstrates significant deficits with
17 bilateral grip and pinch strength. Inconsistencies in
18 presentation is noted, however with dynamometer testing on
19 the bilateral grip strength with ranges inconsistent with
20 observed unilateral carrying material, handling loads.

21 Q. Is that causally related to the T-12 fracture
22 which occurred 10/10/2019?

23 A. It is not.

24 Q. How about the last one, number five?

25 A. "Client reports high subjective baseline pain.

1 Increases in pain was reported during the evaluation.
2 Exaggerated or inorganic pain behaviors were not noted
3 however."

4 Q. Well --

5 A. I'm not commenting on that.

6 Q. That's not a limitation. These opinions that
7 you've given us with regard to questions one through four,
8 are they your opinion to a reasonable degree of medical
9 certainty?

10 A. Opinion of what?

11 Q. Opinion that --

12 A. It's my opinion with a medical degree of
13 reasonable certainty these were not caused by T-12
14 fracture. They're all upper cervical issues, etiologies.

15 Q. I don't have any other questions.

16 RE-DIRECT EXAMINATION BY MR. McDANIEL:

17 Q. Doctor, just a few follow ups. Doctor, we went
18 through a bunch of records. And you went through the
19 MRI's back then and the MRI's present time. Do you stand
20 by your opinions as you expressed during direct
21 examination?

22 A. I do.

23 Q. Now, Counsel asked you about reference to the
24 T-12. And we know that he had a significant amount of a
25 fall to where he had a chance fracture of the T-12. Is

1 that type of fall sufficient to have caused or aggravated
2 pre-existing conditions, that kind of a fall aggravate the
3 problems in the lumbar and the cervical spine, would those
4 with consistent with that kind of a fall?

5 A. Possibly, but they weren't present for months, as
6 far as I'm aware of.

7 Q. Now, I'll be glad to play this back, but can you
8 tell me -- Counsel, when she handed you Exhibit Number 1
9 she stated that, "I'm going to show you the letter that
10 resulted in the complaint." Do you remember her asking
11 you?

12 A. I do, yes.

13 Q. Do you know how she knew that?

14 A. I'm not even sure what the purpose of this is.
15 No, I'm not aware.

16 Q. That's fine. And I know we're asking for a long
17 time recollection, but as far as your recollection you
18 don't remember directing, or do you remember talking to
19 counsel of defense between April 13th and the filing of
20 that complaint on April 19th?

21 A. Of 2020?

22 Q. Uh-huh. When it was filed back --

23 A. No, I do not.

24 Q. Do you remember whether or not anybody in your
25 office was instructed to send any kind of records?

1 A. No. I don't remember seeing any of this. In
2 fact, this is addressed to one of my --

3 Q. Records custodian?

4 A. No. It's not even a nurse. It's a MA in my
5 office. So I don't --

6 Q. A medical assistant?

7 A. Yeah, correct. Medical assistant.

8 Q. And that was faxed.

9 A. It says August 12th, 2020.

10 Q. It doesn't say whose fax number?

11 A. No.

12 Q. I have no further questions. That's it. Thank
13 you, Doctor.

14 A. Thank you.

15 (Deposition concluded at 12:20 o'clock p.m.)

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1 STATE OF SOUTH CAROLINA)

2 : C-E-R-T-I-F-I-C-A-T-E

3 COUNTY OF DORCHESTER)

4 I, Stacey L. Scoggan, Court Reporter and Notary
5 Public, certify that I did have Dr. Douglas Stofko to
6 appear before me at 10:30 o'clock a.m. on Tuesday,
7 February 13, 2024, in the offices of Trident Neurological
8 Specialists, 9229 University Boulevard, Suite F2, North
9 Charleston, South Carolina; that the witness was sworn and
10 cautioned to tell the truth, the pages constitute a true
11 and accurate transcript of the testimony given at that
12 time and place.

13 I further certify that I am not of counsel or kin
14 to any of the parties to this cause of action, nor am I
15 interested in any manner in its outcome.

16 IN WITNESS WHEREOF, I have hereunto set my hand
17 and seal this the 27th day of February, 2024.

18

19

20

21

22 _____

23 Stacey L. Scoggan

24 Notary Public for South Carolina

25 My Commission Expires: February 26, 2031



Claimant's Name: Evaristo Verdugo Morales SSN: - - Employer's Name: Insulation by Cohens, LLC & Spray Foam by Cohens, LLC
Address: REDACTED Address: 1415 Old Highway 52
City: REDACTED State: SC Zip: RE City: Moncks Corner State: SC Zip: 29461
Home Phone: () - Work Phone: () - Insurance Carrier: Builders Premier Insurance Company
Preparer's Name: Don C. Gibson Law Firm: Gibson Law Firm Preparer's Phone #: (843) 744-1887

A claim for workers' compensation benefits is made based on the following grounds:

- Injury Illness Repetitive Trauma Occupational Disease Physical Brain Injury Concurrent Jurisdiction
- The claimant sustained an injury to upper, middle and lower back, left shoulder, right shoulder, interval posterior spinal fusion from T11-L1; T12 vertebral fracture, concussion (Part(s) of Body Injured) on 10/10/2019 in Colleton County, State of SC. Body part(s) affected are listed above.
 - Briefly describe how the accident occurred. Putting up plastic around garage, fell off ladder approx. 4 ft., landing on back. He lost consciousness and his coworker took him to the hospital. He was admitted and treated for three days.
 - Both the claimant and the employer were subject to the South Carolina Workers' Compensation Act at the time of injury.
 - The relationship of employer and employee existed at the time of injury.
 - At the time of the injury the claimant was performing services arising out of and in the course of employment.
 - Notice of the accidental injury was given to the Employer on 10/10/2019 in the following manner: verbally by coworker, Elvar Verdugo Gonzalez
 - Due to injury, the claimant is in need of (check one):
 (a) medical examination and treatment for:
 (b) additional medical examination and treatment for: All injuries listed above; and any related medical problems which arise therefrom.
 - Due to injury, the claimant requests temporary total disability benefits because of lost compensable time from work and wages for the period of: October 10, 2019 to current.
 - Due to the injury, the claimant has permanent disability of the following nature and extent (check one):
 (1) General Disability: Total Partial (2) Specific Disability: Total Partial (3) Wage Loss
9a Claimant at MMI: Yes No
 - 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 \$ 725.00, 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:
11. Further grounds or unusual aspects of claim: Injured worker speaks Spanish.
 - 11a. List names and addresses of all physicians or other medical specialists who have seen or treated the claimant as a result of the accident: Moncks Corner Medical Center, 401 N. Live Oak Drive, Hwy 17-A, Moncks Corner, SC 29461; Sean Jones, MD, Jon A. Carmain, MD, David Joshua Rosen, PA Douglas L. Stofko, DO of Trident Medical Center, 9330 Medical Plaza Drive, Charleston, SC 29406
 - 11b. To the best of your knowledge, did you have any prior permanent disability?
If yes, describe:
 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.
 13. I am filing a claim. I am not requesting a hearing at this time.
 14. I am requesting a hearing. A \$50 fee is required. Estimated time needed for hearing: 1.5 Hrs.
- Mediation
 a. Mediation is requested to be ordered pursuant to Reg. 67-1801B.
 b. Mediation is required pursuant to Reg. 67-1802.
 c. Mediation is requested by consent of the Parties pursuant to Reg. 67-1803.
 d. Mediation has been conducted by a duly qualified mediator and resulted in an impasse.
Questions regarding mediation may be submitted to mediation@wcc.sc.gov

SCWCC
JAN 27 2020

I certify I have served this document pursuant to Reg. 67-211 by delivering a copy to See attached certificate of service on January 22, 2020, by first class postage certified mail personal service electronic service
I verify the contents of this form are accurate and true to the best of my knowledge.

Preparer's Signature: [Signature] Attorney for the Claimant: dgibson@gibsonlaw.com Date: January 22, 2020
Title: _____ Email: _____

Questions about the use of this form should be directed to the Claims Department at 803.737.5723. Refer to Regulations 67-204 through 67-211 and Regulations 67-601 through 67-615 as well as Reg. 67-1801.
WCC Form # 59 1/19 50 Employee's Notice of Claim and/or Request for Hearing Revised

STATE OF SOUTH CAROLINA, COUNTY OF CHARLESTON
BEFORE THE WORKERS' COMPENSATION COMMISSION
W.C.C. FILE NUMBER: PENDING

EVARISTO VERDUGO)
MORALES,)
)
Claimant/Employee,)
)
vs.)
)
INSULATION BY COHENS, LLC &)
SPRAY FOAM BY COHENS, LLC,)
)
Employer,)
)
BUILDERS PREMIER)
INSURANCE COMPANY,)
)
and,)
)
SC SECOND INJURY FUND,)
)
Carrier(s)/Defendant(s).)

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that I, the undersigned, am an employee of Gibson Law Firm LLC, and that I served on the date set forth below a copy of the document(s) described below, in connection with the above-captioned matter and pursuant to SC Code Ann. §§ 15-9-930 and 15-9-940, by depositing a copy of same in the United States Mail, postage prepaid, addressed to the following:

TO: Via First Class Mail
Ms. Amy Bracy, Judicial Director
SC Workers' Compensation Commission
PO Box 1715
Columbia, SC 29201

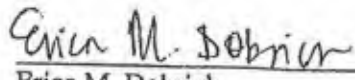
Via First Class Mail
Lisa Glover, Esquire
Uninsured Employers' Fund
PO Box 210039
Columbia, SC 29221

Via First Class Mail
Insulation by Cohens, LLC & Spray Foam by Cohens, LLC
David C. Gaskins, Registered Agent
1415 Old Highway 52
Moncks Corner, SC 29461

Via First Class Mail
Builders Premier Ins. Co.
PO Box 150006
Raleigh, NC 27624

DOCUMENT: Form 50 Requesting a Hearing

January 24, 2020
North Charleston


Erica M. Dobrich
Law Clerk to Don C. Gibson



Claimant's Name: Evaristo Verdugo Morales SSN: - - Employer's Name: Insulation by Cohens, LLC & Spray Foam by Cohens, LLC
 Address: REDACTED Address: 1415 Old Highway 52
 City: _____ State: SC Zip: _____ City: Moncks Corner State: SC Zip: 29461
 Home Phone: () - _____ Work Phone: () - _____ Insurance Carrier: Builders Mutual Insurance Company
 Preparer's Name: Don C. Gibson Law Firm: Gibson Law Firm Preparer's Phone #: (843) 744-1887

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 (a) medical examination and treatment for:
 (b) additional medical examination and treatment for: All injuries listed above; with emphasis on and lower back, left shoulder, right shoulder and any related medical problems which arise therefrom.

8. Due to injury, the claimant requests temporary total disability benefits because of lost compensable time from work and wages for the period of: October 10, 2019 to current.

9. Due to the injury, the Claimant has permanent disability of the following nature and extent (check one):
 (1) General Disability: Total Partial (2) Specific Disability: Total Partial (3) Wage Loss
 9a Claimant at MMI: Yes No

10. 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 \$ 1,302.27, 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:

11. Further grounds or unusual aspects of claim: Injured worker speaks Spanish.

11a. List names and addresses of all physicians or other medical specialists who have seen or treated the Claimant as a result of the accident: Moncks Corner Medical Center, 401 N. Live Oak Drive, Hwy 17-A, Moncks Corner, SC 29461; Sean Jones, MD, Jon A. Carmain, MD, David Joshua Rosen, PA Douglas L. Stafko, DO of Trident Medical Center, 9330 Medical Plaza Drive, Charleston, SC 29406

11b. To the best of your knowledge, did you have any prior permanent disability?
 If yes, describe:

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

14. I am requesting a hearing. A \$50 fee is required. Estimated time needed for hearing: 1.5 Hrs.

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 a. Mediation is requested to be ordered pursuant to Reg. 67-1801B.
 b. Mediation is required pursuant to Reg. 67-1802.
 c. Mediation is requested by consent of the Parties pursuant to Reg. 67-1803.
 d. Mediation has been conducted by a duly qualified mediator and resulted in an impasse.
 Questions regarding mediation may be submitted to mediation@wcc.sc.gov

I certify I have served this document pursuant to Reg. 67-211 by delivering a copy to See attached certificate of service on the 16th day of June, 2020
 by first class postage certified mail personal service electronic service
 I verify the contents of this form are accurate and true to the best of my knowledge.

Don C. Gibson Attorney for the Claimant dgibson@dalbisonlaw.com June 16, 2020
 Preparer's Signature Title Email Date

Evaristo Verdugo Morales				Insulation By Cohen's & Sprayfoam by Cohen's, LLC			
Claimant's Name				Employer's Name			
SSN				1415 Old Highway 52, Moncks Corner, SC 29461			
Address				Address			
City State Zip				City State Zip			
Home Phone: () Work Phone: ()				Builders Premier Insurance Company			
Date of Injury: 10/10/2019				Insurance Carrier			
E. Courtney Gruber		Young Clement Rivers, LLP		(843) 720-5410			
Preparer's Name:		Law Firm:		Phone #			

Date of Injury or Illness: 10/10/2019 **Estimated time for hearing:** 45 minutes
Complete each information blank. Specify clearly when contentions are admitted in part and denied in part. The employer/carrier, in answer to the claim, respectfully shows:

1. It is ~~ADMITTED~~/~~DENIED~~ the employee sustained an injury or illness on or about the date set forth in the Form 50. The reasons for denial are: Admitted as to back; denied as to other body parts alleged and extent of injuries.
2. It is ~~ADMITTED~~/~~DENIED~~ both the employer and employee were subject to the Workers' Compensation Act at the time in question. The reasons for denial are: _____
3. It is ~~ADMITTED~~/~~DENIED~~ the relationship of employer and employee existed at the time in question. The reasons for denial are: _____
4. It is ~~ADMITTED~~/~~DENIED~~ at the time in question the employee was performing services arising out of and in the course of employment. The reasons for denial are: _____
5. It is ~~ADMITTED~~/~~DENIED~~ notice of injury was given the employer. The reasons for denial are: _____
6. It is ~~ADMITTED~~/~~DENIED~~ the employee **Needs / Is Entitled to Additional** medical care as a result of injury or illness. The reasons for denial are: Claimant is continuing to receive authorized medical treatment for his back as per the treating doctor.
7. It is ~~ADMITTED~~/~~DENIED~~ the employee is entitled to temporary total disability for the period(s) of: Claimant is currently receiving temporary total compensation.
8. It is ~~ADMITTED~~/~~DENIED~~ the employee is permanently disabled. The reasons for denial are: No medical evidence.
9. It is ~~ADMITTED~~/~~DENIED~~ the employee has serious disfigurement.
10. It is contended that an average weekly wage of \$ Form 20 to be provided applies, according to attached Form 20 as provided by law.
11. Further contentions, grounds of defense, or unusual aspects are: See number 1; all affirmative defenses available under the Code; reserve right to amend.

- Mediation**
- a. Mediation is requested to be ordered pursuant to Reg. 67-1801 B.
 - b. Mediation is required pursuant to Reg. 67-1802.
 - c. Mediation is requested by consent of the Parties pursuant to Reg. 67-1803.
 - d. Mediation has been conducted by a duly qualified mediator and resulted in an impasse.
- Questions regarding mediation may be submitted to mediation@wcc.sc.gov.

I certify I have served this document pursuant to Reg. 67-211 by delivering a copy to:
Don C. Gibson, Esquire, P. O. Box 60669, North Charleston, SC 29419-0669 on the 19th day of June, 2020, by first class postage.

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

Preparer's Signature	Attorney for Employer/Carrier	cgruber@ycrlaw.com	June 19, 2020
	Title	Email	Date

Refer to R.67-204 through R.67-210 and R.67-601 through R.67-615 for mediation. Questions about the use of this form may be directed to the Commission's Judicial Department at 803.737.5675 or jud@wcc.sc.gov or mediation@wcc.sc.gov. 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.

STATE OF SOUTH CAROLINA
BEFORE THE SOUTH CAROLINA WORKERS' COMPENSATION COMMISSION
WCC FILE NUMBER 1921668

Evaristo Verdugo Morales,
Employee,

-versus-

CERTIFICATE OF SERVICE

Insulation By Cohen's & Sprayfoam by Cohen's, LLC,
Employer,

and

Builders Premier Insurance Company,
Carrier.

I HEREBY CERTIFY that on June 19, 2020, I served the Form 51 on:

Amy A. Bracy, Judicial Director
S.C. Workers' Compensation Commission
P.O. Box 1715
Columbia, SC 29202-1715

And

Don C. Gibson, Esquire
Gibson Law Firm, LLC
P. O. Box 60669
North Charleston, SC 29419-0669

VIA FIRST CLASS MAIL

by placing said documents in the United States Mail with sufficient postage thereon.

E. Courtney Gruber

PATIENT INFORMATION

CLIENT NAME:	Evaristo Verdugo Morales	REFERRED BY:	Douglas Stofko, MD
		EMPLOYER:	Insulation by Cohen
DATE OF BIRTH:	10/26/65	INSURER:	Builders Mutual/Bardavon
DATE OF INJURY:	10/10/19	CASE #:	EVM102320
DATE OF REPORT:	10/23/20		
DIAGNOSIS:	Low back pain		

PURPOSE OF EVALUATION

- Comprehensive Functional Evaluation
- Occupational/Work Capacity
- Address Specific Referral Questions
- Other/Comments:

VITAL SIGNS

	Pre-Test	Post-Test
Height:	5'8"	NA
Weight:	203	NA
H.R. (Rest)	116	120
B.P. (Rest)	120/85	125/95
Pain Level	7/10	9/10

RESULTS

REFERENCED PHYSICAL DEMAND CATEGORIES OF WORK					
	Sedentary	Light	Medium	Heavy	Very Heavy
Occasional (1-33%)	10 lbs.	20 lbs.	50 lbs.	100 lbs.	> 100 lbs.
Frequent (34-66%)	Negligible	10 lbs.	20 lbs.	50 lbs.	> 50 lbs.
Constant (67-100%)	Negligible	Negligible	10 lbs.	20 lbs.	> 20 lbs.

CLIENT'S DETERMINED PHYSICAL DEMAND CATEGORY:

- Sedentary
 Light
 Medium
 Heavy
 Very Heavy

Comments:

MAXIMUM SAFE OBSERVED LIFT:

Floor to waist	35 lbs.
Waist to shoulder	30 lbs.
Shoulder to overhead	20 lbs.

MAXIMUM SAFE OBSERVED CARRY:

25 ft. carry	35 lbs.
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PARTICIPATION LEVEL/VALIDITY:

The client demonstrated consistent participation during the evaluation. No inorganic or exaggerated pain behaviors were noted. He completed all testing areas without declination. The results of this evaluation cannot be considered valid, however. Coefficient of variation for grip and pinch strength was not suggestive of maximal volitional effort and Gaussian distribution was not noted for 5 level grip testing with inconsistencies noted in grip strength readings and observed material handling loads.

SUMMARY & RECOMMENDATIONS:

Evaristo Morales is a 54-year-old Hispanic male referred for FCE following injury at work on 10/10/19. He is accompanied by a translator today. He reports a fall from a ladder from a height of approximately 4-5 feet with resultant thoracic spine injury while working as a spray foam insulation installer. Corrective surgery was performed 10/11/19 though specific level of his fractures is unknown. Post-op PT was ordered, and he reports 6 weeks of formal PT beginning in January of this year. He has not returned to work and is referred for FCE to determine work capacity by his W/C provider. MD has requested IRE for the thoracic spine which is outside the scope of this evaluation. FCE is approved however, with the W/C provider with physical demand level (PDL) and work capacity recommendations provided hereafter.

Client Strengths:

1. Client was early for his appointment.
2. Client demonstrates bilateral elbow and distal AROM WFLs for baseline functional testing.
3. Client demonstrates bilateral elbow and distal MMT grossly 5/5.
4. Client demonstrates bilateral knee and distal AROM WFLs for baseline functional testing.
5. Client demonstrates BLE MMT grossly 5/5.
6. Client demonstrates low fall risk per Tinetti Balance Assessment Tool.
7. Client demonstrates good tolerance and activity threshold for .25-mile treadmill ambulation.
8. Client demonstrated functional fine motor coordination as observed by overhead nut and bolt assembly. 9-hole peg test times were WNLs per age, gender, and handedness with standard deviation limits applied.
9. Client demonstrates good BUE repetitive motion as evidenced by rapid 25 cup stacking activity at shoulder level and overhead.

Client Deficits:

1. Client demonstrates significant deficits in cervical and thoracolumbar spine AROM. Functional limitations were most notable with safe positioning for material handling in the lumbar spine as well as overhead activities with the cervical spine.
2. Client demonstrates decreased bilateral shoulder elevation AROM. Functional ROM was noted, however with overhead activities.
3. Client demonstrates mild BUE proximal weakness. He reports pain in the upper back with resistance of MMT testing of the bilateral shoulders.
4. Client demonstrates significant deficits with bilateral grip and pinch strength. Inconsistencies in presentation is noted, however with dynamometer testing of his bilateral grip strength with ranges inconsistent with observed unilateral carry material handling loads.
5. Client reports high subjective baseline pain. Increase in pain was reported during the evaluation. Exaggerated or inorganic pain behaviors were not noted, however.

Based on the results of this evaluation, the client's physical demand level (PDL) can be classified as "Light" as defined by the US Department of Labor Dictionary of Occupational Titles. He demonstrates functional BUE/BLE ROM overall but exhibits significant deficits with cervical and thoracolumbar spine ROM. ROM limitations were most notable with overhead activity compensation and material handling positioning for floor to 12 inch levels. While Tinetti Balance Risk Assessment indicates a low fall risk, functional ladder, stairs, and baseline functional positions of kneel, squat, crawl, crouch require increased time with cautious execution. Safety with dynamic balance requirements such as stair and ladder management is concerning given these observations. Moderate to high pain is reported without exaggerated or inorganic pain behaviors present. Discrepancies were noted between formal grip and pinch strength results on JAMAR dynamometer and observed material handling capacities. Exaggerated or inorganic pain behaviors and positions were not noted however, with material handling assessment. Limitations in cervical and thoracolumbar AROM, high subjective pain, material handling limitations secondary to ROM deficits and pain are present. Return to prior work installing insulation is not recommended given the positional requirements for access to attics, lofts, or crawlspaces, need for frequent ladder management, dynamic balance requirements, and potential material handling requirements. Concerns for safety are present with material handling loads greater than those identified.

Therapist: Rod Tyler, OTR/L, CHT, CSFA
Date: 10/23/20

Rod Tyler, OTR/L, CHT, CSFA

INTAKE INTERVIEW

HAND DOMINANCE:

Right Left Ambidextrous

PAST MEDICAL HISTORY:

Non-contributory

PREVIOUS WORK-RELATED INJURIES:

None reported

HISTORY OF PRESENT INJURY/ILLNESS:

Client is a 54-year-old Hispanic male who sustained a fall injury at work on 10/10/19. He works as a spray foam insulation installer and states he fell backwards from a ladder from a height of approximately 4-5 feet and injured his back. He describes fracture of his thoracic spine requiring fixation which occurred 10/11/19. The client does not recall the specific level of injury and specifics are not identified on his referral. He participated in course of post-operative PT in early January of this year and states he was seen for approximately 6 weeks. He has not returned to work and is referred for FCE for physical capacity determination.

CURRENT WORK STATUS:

Current Work Restrictions:	Off work
Time Off from Work:	10/10/19 - present
Date of Next Physician Appointment:	Post-FCE

MEDICAL/SURGICAL INTERVENTIONS

	<i>Comments</i>
<input checked="" type="checkbox"/> Surgery	Thoracic spine – level and operative details are unknown
<input type="checkbox"/> Chiropractic Treatment	
<input checked="" type="checkbox"/> Medications	"pills" – The client does not know the exact name of his medication
<input type="checkbox"/> Other	

THERAPEUTIC INTERVENTIONS

<input type="checkbox"/> Occupational Therapy	
<input checked="" type="checkbox"/> Physical Therapy	
<input type="checkbox"/> Other	

HEALTH & SOCIAL HABITS

<input type="checkbox"/> Regular Exercise	
<input type="checkbox"/> Smoking	
<input type="checkbox"/> Alcohol Consumption	
<input type="checkbox"/> Diet	
<input checked="" type="checkbox"/> Leisure Activities	Spending time with family
<input type="checkbox"/> Other	

CURRENT FUNCTIONAL LIMITATIONS

<input checked="" type="checkbox"/> Work	
<input checked="" type="checkbox"/> Activities of Daily Living	The client reports challenges tying his shoes and bending over for hygiene/bathing.
<input type="checkbox"/> Leisure Interests	
<input type="checkbox"/> Other	

SUBJECTIVE TESTS

PAIN SCALE/TEST	SCORE		SCORE INDICATING IMPAIRMENT OR ABNORMAL ILLNESS BEHAVIORS	POSITIVE SCORE	
				Yes	No
Numerical Pain Scale (NPS)	7		6 or greater	<input checked="" type="checkbox"/>	<input type="checkbox"/>
Visual Analog Scale (VAS)	8		6 cm or greater	<input checked="" type="checkbox"/>	<input type="checkbox"/>
Difference b/w NPS and VAS	1		Greater than 1.5	<input type="checkbox"/>	<input checked="" type="checkbox"/>
Randsford Pain Drawing	1		3 or greater	<input type="checkbox"/>	<input checked="" type="checkbox"/>
Dallas Pain Questionnaire	I	75	Greater than 50% for each of the four categories	<input checked="" type="checkbox"/>	<input type="checkbox"/>
	II	70		<input checked="" type="checkbox"/>	<input type="checkbox"/>
	III	75		<input checked="" type="checkbox"/>	<input type="checkbox"/>
	IV	60		<input checked="" type="checkbox"/>	<input type="checkbox"/>

PAIN COMMENTS:

McGill Pain Questionnaire: Pain Rating Index (PRI/T) 29/78 (N=<30)

NEUROMUSCULOSKELETAL TESTS

PROM = Passive Range of Motion (deg.)

AROM = Active Range of Motion (deg.)

UPPER EXTREMITY EXAMINATION					
LEFT		JOINT MOTION	AROM NORMS	RIGHT	
PROM	AROM			PROM	AROM
SHOULDER					
	130	Flexion	0-180°		130
		Extension	0-60°		
	115	Abduction	0-180°		95
		Ext. Rotation	0-30°		
		Int. Rotation	0-20°		
ELBOW					
	WFL	Flexion	0-150°		WFL
	WFL	Extension	0°		WFL
FOREARM					
	WFL	Supination	0-80°		WFL
	WFL	Pronation	0-80°		WFL
WRIST					
	WFL	Flexion	0-80°		WFL
	WFL	Extension	0-70°		WFL
	WFL	Ulnar Deviation	0-30°		WFL
	WFL	Radial Deviation	0-20°		WFL

UPPER EXTREMITY RANGE OF MOTION (ROM) EXAM COMMENTS:

Bilateral hand/digital AROM WFLs for baseline functional testing and material handling testing

UPPER EXTREMITY MANUAL MUSCLE TEST (MMT) COMMENTS:

BUE MMT grossly 4+/5 (deltoids/supraspinatus) to 5/5 proximal to distal

LOWER EXTREMITY EXAMINATION					
LEFT		JOINT MOTION	AROM NORMS	RIGHT	
PROM	AROM			PROM	AROM
HIP					
	80	Flexion	0-120°		80
		Extension	0-30°		
	30	Abduction	0-45°		25
		Adduction	0-30°		
		Ext. Rotation	0-45°		
		Int. Rotation	0-45°		
KNEE					
	WFL	Flexion	0-135°		WFL
	WFL	Extension	0°		WFL
ANKLE					
	WFL	Dorsiflexion	0-20°		WFL
	WFL	Plantarflexion	0-50°		WFL
	WFL	Inversion	0-35°		WFL
	WFL	Eversion	0-20°		WFL

LOWER EXTREMITY RANGE OF MOTION (ROM) EXAM COMMENTS:

LOWER EXTREMITY MANUAL MUSCLE TEST (MMT) COMMENTS:
 BLE MMT grossly 5/5 throughout

SPINE EXAMINATION					
CERVICAL SPINE		JOINT MOTION	AROM NORMS	LUMBAR SPINE	
PROM	AROM			PROM	AROM
	30	Flexion	0-80°		35
	15	Extension	0-70°		10
	15	R. Lateral Flexion	0-45°		10
	20	L. Lateral Flexion	0-45°		10
	20	Right Rotation	0-80°		NA
	20	Left Rotation	0-80°		NA

SPINE EXAM COMMENTS:
 Lumbar spine AROM norms: Flexion: 60 Extension: 25 Lateral Flexion: 25

GRIP TESTING - 3 TRIALS IN STANDARD POSITION					
LEFT HAND	Dominant Hand? <input type="checkbox"/> Yes <input checked="" type="checkbox"/> No				
	Injured Hand? <input type="checkbox"/> Yes <input checked="" type="checkbox"/> No				
Position	Trial 1 (lbs.)	Trial 2 (lbs.)	Trial 3 (lbs.)	Average (lbs.)	C.V. (%)
2	5	10	5	6.67	43.30%
RIGHT HAND	Dominant Hand? <input checked="" type="checkbox"/> Yes <input type="checkbox"/> No				
	Injured Hand? <input type="checkbox"/> Yes <input checked="" type="checkbox"/> No				
Position	Trial 1 (lbs.)	Trial 2 (lbs.)	Trial 3 (lbs.)	Average (lbs.)	C.V. (%)
2	5	5	5	5.00	0.00%

GRIP TESTING - 5 LEVEL		
Dynamometer Position	LEFT (lbs.)	RIGHT (lbs.)
1	0	0
2	2	2
3	2	2
4	2	5
5	2	10

GRIP TEST COMMENTS:
 Norms per age, gender, and handedness: Left: 101.9 lbs. Right: 113.6 lbs.
 Gaussian distribution absent on 5 level grip testing

PINCH TESTING					
LEFT HAND	Dominant Hand? <input type="checkbox"/> Yes <input checked="" type="checkbox"/> No				
	Injured Hand? <input type="checkbox"/> Yes <input checked="" type="checkbox"/> No				
Pinch Type	Trial 1 (lbs.)	Trial 2 (lbs.)	Trial 3 (lbs.)	Average (lbs.)	C.V. (%)
Lateral Pinch	4	5	2	3.67	41.66%
3-Point Chuck Pinch	7	4	4	5.00	34.64%
RIGHT HAND	Dominant Hand? <input checked="" type="checkbox"/> Yes <input type="checkbox"/> No				
	Injured Hand? <input type="checkbox"/> Yes <input checked="" type="checkbox"/> No				
Pinch Type	Trial 1 (lbs.)	Trial 2 (lbs.)	Trial 3 (lbs.)	Average (lbs.)	C.V. (%)
Lateral Pinch	9	4	2	3.67	41.66%
3-Point Chuck Pinch	9	6	4	6.33	39.74%

PINCH TEST COMMENTS:
 Norms per age, gender, and handedness: Lateral: Left: 26.1 Right: 26.7 3-Point Chuck: Left: 23.8 Right: 24.0

SPECIAL TESTS:	
9 Hole Peg Test - Fine Manual Dexterity Assessment	
Left	24.73 seconds
Right	25.30 seconds
Comments: Norms per age, gender, and handedness: Left: 20.7 Right: 19.2	
Box and Block Test - Gross Manual Dexterity Assessment	

Left	53 blocks in 60 seconds
Right	62 blocks in 60 seconds
Comments:	

POSTURE/GAIT/BALANCE:		
Tinetti Balance Assessment Tool – Balance Section		
Item	Score Interpretation	Score
Sitting balance	0 = leans, slides 1 = steady, safe	1
Rises from chair	0 = Unable without help 1 = Able using arms for help 2 = Able	2
Attempts to rise	0 = Unable without help 1 = Able with > 1 attempt 2 = Able in 1 attempt	2
Immediate standing balance (first 5 seconds)	0 = Unsteady 1 = Steady using walker/support 2 = Steady without walker/support	2
Standing balance	0 = Unsteady 1 = Steady, wide stance/support 2 = Narrow stance, no support	2
Nudged	0 = Begins to fall 1 = Staggeres 2 = Steady	1
Eyes closed	0 = Unsteady 1 = Steady	1
Turning 360 degrees	0 = Discontinuous steps 1 = Continuous	1
	0 = Unsteady 1 = Steady	1
Sitting down	0 = Unsafe 1 = Uses arms, not smooth motion 2 = Safe, smooth	2
Balance Score		15 / 16
Tinetti Balance Assessment Tool – Gait Section		
Item	Score Interpretation	Score
Indication of gait	0 = Hesitancy, multiple attempts 1 = No hesitancy	1
Step length and height	0 = Step to 1 = Step through R 1 = Step through L	2
Foot clearance	0 = Foot drop 1 = L foot clears floor 1 = R foot clears floor	2
Step symmetry	0 = R and L step length not equal 1 = R and L step length equal	1
Step continuity	0 = Stopping, discontinuity 1 = Continuous steps	1
Path	0 = Marked deviation 1 = Mild/moderate deviation, aid 2 = Straight, without aid	2
Trunk	0 = Marked sway, uses aid 1 = No sway but flex knees/back 2 = No sway	2

Walking time	0 = Heels apart 1 = Heels almost touching	1
Gait Score		12 / 12
TOTAL TINETTI ASSESSMENT SCORE (Balance + Gait) ≤ 18: High risk of falls 19-23: Moderate risk of falls ≥ 24: Low risk of falls		27 / 28

BASELINE FUNCTIONAL TESTS

FUNCTIONAL ACTIVITY	Tested Ability Constant (67-100%)	Tested Ability Frequent (34-66%)	Tested Ability Occasional (1-33%)	Required for Job (C, F, O, weight)
NON-MATERIAL HANDLING				
Standing	<input type="checkbox"/>	<input checked="" type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
Walking	<input type="checkbox"/>	<input checked="" type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
Sitting	<input type="checkbox"/>	<input checked="" type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
Stooping	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
Bending	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
Twisting	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
Climbing	<input type="checkbox"/>	<input type="checkbox"/>	<input checked="" type="checkbox"/>	<input type="checkbox"/>
Ladders	<input type="checkbox"/>	<input type="checkbox"/>	<input checked="" type="checkbox"/>	<input type="checkbox"/>
Stairs	<input type="checkbox"/>	<input type="checkbox"/>	<input checked="" type="checkbox"/>	<input type="checkbox"/>
Kneeling	<input type="checkbox"/>	<input type="checkbox"/>	<input checked="" type="checkbox"/>	<input type="checkbox"/>
Squatting	<input type="checkbox"/>	<input type="checkbox"/>	<input checked="" type="checkbox"/>	<input type="checkbox"/>
Crouching	<input type="checkbox"/>	<input checked="" type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
Crawling	<input type="checkbox"/>	<input type="checkbox"/>	<input checked="" type="checkbox"/>	<input type="checkbox"/>
Reaching Horizontal	<input type="checkbox"/>	<input type="checkbox"/>	<input checked="" type="checkbox"/>	<input type="checkbox"/>
Reaching Overhead	<input type="checkbox"/>	<input type="checkbox"/>	<input checked="" type="checkbox"/>	<input type="checkbox"/>
Grasping	<input type="checkbox"/>	<input type="checkbox"/>	<input checked="" type="checkbox"/>	<input type="checkbox"/>
Fine Manipulation	<input type="checkbox"/>	<input checked="" type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
Fingering	<input type="checkbox"/>	<input checked="" type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
Repetitive UE	<input type="checkbox"/>	<input checked="" type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
Repetitive LE	<input type="checkbox"/>	<input checked="" type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>

STRENGTH TESTING AND SAFE LIFT CALCULATION			
Position	Observed Safe Lift Maximum (lbs.)	Maximal Safe Lift Calculation	Frequent Safe Lift Calculation
		(Observed x 1.2)	(Observed x 0.6)
Lift Floor to Waist	35	42.0	21.0
Lift 12" to Waist	35	42.0	21.0
Lift Waist to Shoulder	30	36.0	18.0
Lift Shoulder to Overhead	20	24.0	12.0
Carry 25 feet	35	120 lbs. sled on carpet. Client demonstrated 35 lbs. unilateral UE carry as well as bilaterally carry of 35 lbs.	
Push 25 feet	120		
Pull 25 feet	120		

PHYSICAL DEMAND CATEGORIES OF WORK					
	Sedentary	Light	Medium	Heavy	Very Heavy
Occasional (1-33%)	10 lbs.	20 lbs.	50 lbs.	100 lbs.	> 100 lbs.
Frequent (34-66%)	Negligible	10 lbs.	20 lbs.	50 lbs.	> 50 lbs.
Constant (67-100%)	Negligible	Negligible	10 lbs.	20 lbs.	> 20 lbs.

BASELINE FUNCTIONAL TEST COMMENTS:

Client demonstrated capacity for .25-mile treadmill ambulation at 1.6 mph in 9:06.
 Client demonstrated capacity for 25 cup stacking activity from shoulder level to overhead and back to shoulder level as well as overhead nut/bolt assembly with bilateral UEs.
 Client demonstrated safe ascension/descension of 12 step stairs using handrails.
 Client demonstrated safe ascension/descent of 6-foot fiberglass ladder. Increased time required for foot placement.

APPENDIX A

Figure 1: Grip Strength Adult Norms

Table 2: Performance of All Subjects on Grip Strength (pounds)

	Hand	Men					Women				
		Mean	SD	SE	Low	High	Mean	SD	SE	Low	High
20-24	R	121.0	20.6	3.8	91	167	70.4	14.5	2.8	48	95
	L	104.5	21.8	4.0	71	150	61.0	13.1	2.6	33	88
25-29	R	120.8	23.0	4.4	78	158	74.5	13.9	2.7	48	97
	L	110.5	19.2	3.1	77	139	63.5	12.2	2.4	48	87
30-34	R	121.8	22.4	4.3	70	170	78.7	19.2	3.8	48	137
	L	110.4	21.7	4.2	84	145	68.0	17.7	3.5	38	115
35-39	R	119.7	24.0	4.8	76	178	74.1	10.8	2.2	50	99
	L	112.9	21.7	4.4	73	157	66.3	11.7	2.3	49	91
40-44	R	118.8	20.7	4.1	84	165	70.4	13.5	2.4	38	103
	L	112.8	18.7	3.7	73	157	62.3	13.8	2.5	35	94
45-49	R	109.9	23.0	4.3	85	155	62.2	15.1	3.0	39	100
	L	100.8	22.8	4.3	58	160	56.0	12.7	2.5	37	83
50-54	R	113.8	18.1	3.6	79	151	65.8	11.6	2.3	38	87
	L	101.9	17.0	3.4	70	143	57.3	10.7	2.1	35	76
55-59	R	101.1	26.7	5.8	59	154	57.3	12.5	2.5	33	86
	L	83.2	23.4	5.1	43	129	47.3	11.9	2.4	31	76
60-64	R	89.7	20.4	4.2	51	137	55.1	10.1	2.0	37	77
	L	76.8	20.3	4.1	27	116	45.7	10.1	2.0	29	66
65-69	R	91.1	20.8	4.0	56	131	49.6	9.7	1.8	35	74
	L	78.8	19.8	3.8	43	117	41.0	8.2	1.5	29	63
70-74	R	75.3	21.5	4.2	32	108	48.6	11.7	2.2	33	78
	L	64.8	18.1	3.7	32	93	41.5	10.2	1.9	23	67
75+	R	65.7	21.0	4.2	40	135	42.6	11.0	2.2	25	65
	L	55.0	17.0	3.4	31	119	37.6	8.9	1.7	24	61
All	R	104.3	28.3	1.6	32	170	62.8	17.0	0.98	25	137
Subjects	L	93.1	27.6	1.6	27	160	53.9	15.7	0.88	23	115

Figure 2: Nine Hole Peg Test Adult Norms

Table 3
Average Performance of Normal Males
on the Nine Hole Peg Test (time in seconds)

Age	Hand	Mean	SD	SE	Low	High
20-24	R	16.1	1.9	.35	13	22
	L	16.8	2.2	.41	13	23
25-29	R	16.7	1.6	.31	14	21
	L	17.7	1.6	.31	15	21
30-34	R	17.7	2.5	.48	14	24
	L	18.7	2.2	.45	14	24
35-39	R	17.9	2.4	.48	15	26
	L	19.4	3.5	.70	14	28
40-44	R	17.7	2.2	.45	14	22
	L	18.9	2.0	.39	16	24
45-49	R	18.8	2.3	.45	15	24
	L	20.4	2.9	.55	15	27
50-54	R	19.2	1.8	.36	15	22
	L	20.7	2.3	.46	16	25
55-59	R	19.2	2.6	.56	14	23
	L	21.0	3.1	.70	17	27
60-64	R	20.3	2.6	.54	15	25
	L	21.0	2.5	.51	18	27
65-69	R	20.7	2.9	.55	19	29
	L	22.9	3.5	.67	18	30
70-74	R	22.0	3.5	.65	17	30
	L	23.8	3.9	.77	16	33
75+	R	22.0	4.0	.80	17	35
	L	26.4	4.8	.96	19	37
All Male Subjects	R	19.0	3.2	.64	13	31
	L	20.6	3.9	.72	13	37

Table 4
Average Performance of Normal Females
on the Nine Hole Peg Test (time in seconds)

Age	Hand	Mean	SD	SE	Low	High
20-24	R	15.8	2.1	.41	12	22
	L	17.2	2.4	.47	14	26
25-29	R	15.8	2.2	.43	13	25
	L	17.2	2.1	.40	13	25
30-34	R	16.3	1.9	.36	13	20
	L	17.8	2.0	.40	15	22
35-39	R	16.4	1.6	.32	14	20
	L	17.3	2.0	.40	15	21
40-44	R	16.8	2.1	.37	14	23
	L	18.6	2.8	.51	19	24
45-49	R	17.3	2.0	.39	13	23
	L	18.4	1.9	.38	16	24
50-54	R	18.0	2.5	.50	14	24
	L	20.1	3.0	.60	16	26
55-59	R	17.8	2.6	.52	14	26
	L	19.4	2.5	.47	16	24
60-64	R	18.4	2.0	.39	15	22
	L	20.6	3.2	.64	17	25
65-69	R	19.5	2.3	.44	16	29
	L	21.4	2.7	.51	17	25
70-74	R	20.2	2.7	.51	19	26
	L	22.0	2.7	.51	18	27
75+	R	21.5	2.9	.58	17	31
	L	24.6	4.3	.85	18	33
All Female Subjects	R	17.9	2.8	.46	12	21
	L	19.6	3.4	.56	14	24

Figure 3: Box and Block Test Adult Norms

Table 3
Average Performance of Normal Males on the Box and Block Test (number of cubes transferred in 1 minute)

Age, yr	Hand	Mean	SD	SE	Low	High
20-24	R	88.2	8.0	1.8	70	105
	L	88.4	8.8	1.8	70	102
25-29	R	85.0	7.5	1.4	71	85
	L	84.1	7.1	1.4	69	100
30-34	R	81.9	9.0	1.7	68	98
	L	81.3	8.1	1.6	69	99
35-39	R	81.9	8.6	1.9	64	104
	L	79.8	8.7	1.9	68	97
40-44	R	83.0	8.1	1.8	69	101
	L	80.0	8.8	1.7	59	93
45-49	R	78.9	8.2	1.7	61	93
	L	75.8	7.8	1.5	60	88
50-54	R	78.0	9.7	1.9	62	106
	L	77.0	9.2	1.8	60	97
55-59	R	75.2	11.9	2.8	45	97
	L	73.8	10.5	2.3	43	94
60-64	R	71.3	8.8	1.8	62	84
	L	70.5	8.1	1.8	47	82
65-69	R	68.4	7.1	1.4	55	80
	L	67.4	7.8	1.5	48	88
70-74	R	68.3	9.2	1.8	50	85
	L	64.3	9.8	1.9	45	84
75+	R	63.0	7.1	1.4	47	78
	L	61.3	8.4	1.7	46	74
All male subjects	R	78.8	11.8	.90	45	100
	L	75.4	11.4	.85	43	104

R, right; L, left.

Table 4
Average Performance of Normal Females on the Box and Block Test (number of cubes transferred in 1 min)

Age, yr	Hand	Mean	SD	SE	Low	High
20-24	R	88.0	8.3	1.8	67	103
	L	83.4	7.0	1.6	66	99
25-29	R	88.0	7.4	1.4	63	96
	L	80.9	8.4	1.2	63	95
30-34	R	85.2	7.4	1.5	76	101
	L	80.2	5.8	1.1	66	92
35-39	R	84.6	8.1	1.2	71	85
	L	83.5	8.1	1.2	72	97
40-44	R	81.1	8.2	1.5	60	97
	L	78.7	8.8	1.8	57	97
45-49	R	82.1	7.8	1.5	68	99
	L	78.3	7.8	1.5	58	91
50-54	R	77.7	10.7	2.1	57	98
	L	74.3	9.8	2.0	53	93
55-59	R	74.7	8.9	1.8	58	94
	L	73.6	7.8	1.8	54	85
60-64	R	78.1	8.9	1.4	63	85
	L	73.8	6.4	1.4	62	88
65-69	R	72.0	8.2	1.2	60	82
	L	71.3	7.7	1.4	61	89
70-74	R	68.6	7.0	1.3	53	80
	L	68.3	7.0	1.3	51	81
75+	R	65.0	7.1	1.4	62	79
	L	63.6	7.4	1.5	51	81
All female subjects	R	78.4	10.4	.86	52	100
	L	75.9	9.5	.81	51	99

R, right; L, left.



Claimant's Name: Evaristo Verdugo Morales SSN: - - Employer's Name: Insulation by Cohens, LLC & Spray Foam by Cohens, LLC
Address: REDACTED Address: 1415 Old Highway 52
City: _____ City: Moncks Corner State: SC Zip: 29461
Home Phone: () - Work Phone: () - Insurance Carrier: Builders Mutual Insurance Company
Preparer's Name: Don C. Gibson Law Firm: Gibson Law Firm Preparer's Phone #: (843) 744-1887

A claim for workers' compensation benefits is made based on the following grounds:

- Injury Illness Repetitive Trauma Occupational Disease Physical Brain Injury Concurrent Jurisdiction
- The claimant sustained an injury to upper, middle and lower back, left shoulder, right shoulder, interval posterior spinal fusion from T11-L1; T12 vertebral fracture, concussion (Part(s) of Body Injured) on 10/10/2019 in Colleton County, State of SC. Body part(s) affected are listed above.
 - Briefly describe how the accident occurred. Putting up plastic around garage, fall off ladder approx. 4 ft., landing on back. He lost consciousness and his coworker took him to the hospital. He was admitted and treated for three days.
 - Both the claimant and the employer were subject to the South Carolina Workers' Compensation Act at the time of injury.
 - The relationship of employer and employee existed at the time of injury.
 - At the time of the injury the claimant was performing services arising out of and in the course of employment.
 - Notice of the accidental injury was given to the Employer on 10/10/2019 in the following manner: verbally by coworker.
 - Due to injury, the claimant is in need of (check one):
 (a) medical examinations and treatment for: His injuries listed above and with an orthopedic specializing in and an emphasis in spine treatment.
 (b) additional medical examination and treatment for: _____
 - Due to injury, the claimant requests temporary total disability benefits because of lost compensable time from work and wages for the period of: _____
 - Due to the injury, the Claimant has permanent disability of the following nature and extent (check one):
 (1) General Disability: Total Partial (2) Specific Disability: Total Partial (3) Wage Loss
9a Claimant at MMI: Yes No
 - 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 \$ 1,302.27, 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: _____
 - Further grounds or unusual aspects of claim: Injured worker speaks Spanish.
 - List names and addresses of all physicians or other medical specialists who have seen or treated the Claimant as a result of the accident: Moncks Corner Medical Center, 401 N. Live Oak Drive, Hwy 17-A, Moncks Corner, SC 29461; Sean Jones, MD, Jon A. Carnain, MD, David Joshua Rosen, PA Douglas L. Stoffko, DO of Trident Medical Center, 9330 Medical Plaza Drive, Charleston, SC 29406
 - To the best of your knowledge, did you have any prior permanent disability? If yes, describe: _____
 - 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.
 - I am filing a claim. I am not requesting a hearing at this time.
 - I am requesting a hearing. A \$50 fee is required. Estimated time needed for hearing: 1.5 Hrs.
 - Mediation
 a. Mediation is requested to be ordered pursuant to Reg. 67-1801B.
 b. Mediation is required pursuant to Reg. 67-1802.
 c. Mediation is requested by consent of the Parties pursuant to Reg. 67-1803.
 d. Mediation has been conducted by a duly qualified mediator and resulted in an impasse.
Questions regarding mediation may be submitted to mediation@wcc.sc.gov

I certify I have served this document pursuant to Reg. 67-211 by delivering a copy to See attached certificate of service on the 11th day of January, 2021 by first class postage certified mail personal service electronic service
I verify the contents of this form are accurate and true to the best of my knowledge.

Don C. Gibson Attorney for the Claimant dgibson@dgibsonlaw.com January 11, 2021
Preparer's Signature Title Email Date

South Carolina Workers' Compensation Commission
1612 Marion Street • Post Office Box 1715
Columbia, South Carolina 29202-1715
(803) 737-5723
www.wcc.sc.gov



Physician's Statement

Claimant's Name: <u>Evaristo Morales</u>	Employer's Name: <u>Insulation By Cohen LLC</u>
Physician's Name: <u>Douglas Stofko, MD</u>	Insurance Carrier: <u>Builders Mutual Insurance Company</u>
Practice/Clinic: <u>Trident Orth. Spec.</u>	SWCC File No: <u>1921668</u>
Preparer's Name: <u>X</u>	Phone: <u>X</u>

The undersigned physician has been authorized to evaluate or treat this Claimant for his or her work injury or illness pursuant to *South Carolina Code Sections 42-15-60, 42-15-80, 42-1-172, or 42-11-10.*

Date of injury: 10/10/2019 Date of first office visit: 10/23/19 Date of last office visit: 7/22/2020

The medical opinions below are stated to a reasonable degree of medical certainty.

Diagnosis or nature of injury or illness: T12 fracture
 Body part(s) injured: thoracic spine T12 Body part(s) affected: S/p T11-L1 perc fusion
 Date of maximum medical improvement: 1/8/2020

Has the Claimant sustained permanent physical impairment as a result of the work injury? Yes No AE

If so, the permanent physical impairment is: 5 % medical impairment to the back (injured body part).

If there is a permanent physical impairment to other body part(s) as a result of the work injury, please indicate below:
0 % medical impairment to the _____ (additional body part injured or affected).

The impairment rating(s) above are based upon the following:

The AMA's *Guides to the Evaluation of Permanent Impairment* 6th Edition; or
 Other medical treatise: _____ or
 Other: _____

Does the Claimant have permanent physical limitations as a result of the injury? _____ Yes No

If so, the permanent physical limitations are: _____

Does the Claimant possess retained hardware as a result of the injury? Yes _____ No

If so, the retained hardware is: T11-L1 pedicle screws + rods

Is there medical, surgical, hospital or other treatment that that the Claimant needs as a result of the injury for an additional time that will tend to lessen the period of disability or maintain the current level of function: Yes _____ No

If so, the medical care and treatment that is needed is/are:

MRI lumbar spine ordered for assessment
*An indication or statement that future medical care "may be necessary" or "might be necessary" is not sufficient and will require further clarification.

I certify that I am a physician or other licensed healthcare provider, I have personally read and prepared this document, and the opinions reflected above are mine.

Treating or Evaluation Physician [Signature] Date 1/12/21

South Carolina Workers' Compensation Commission
1333 Main Street, Suite 500
Post Office Box 1715
Columbia, South Carolina 29202-1715
(803) 737-5675 www.wcc.sc.gov

WCC File # 1921668
Carrier File # WCV001062422
Carrier Code # _____
Employer FEIN _____

Evaristo Verdugo Morales
Claimant's Name **REDACTED** Social Security Number
REDACTED
Address City State Zip
() ()
Home Phone Work Phone

Insulation By Cohen's & Sprayfoam by Cohen's, LLC
Employer's Name
1415 Old Highway 52, Moncks Corner, SC 29461
Address City State Zip
Builders Premier Insurance Company
Insurance Carrier

E. Courtney Gruber P.O. Box 993, Charleston, SC 29402 (843) 720-5410
Preparer's Name Address Phone #

The date of injury reported on the Form 12A is: **10/10/2019**

Check appropriate section(s). The employer's representative requests a hearing to:

- I. **Stop payment of compensation.** Claimant has reached maximum medical improvement and Claimant continues to receive temporary compensation payments. The employer's representative requests a hearing pursuant to § 42-9-260(D) to stop payment of temporary compensation. A hearing requested pursuant to this section must be held within sixty days of the date of the request.

Claimant reached maximum medical improvement on 1/8/2020 (m/d/yyyy) (copy of medical report must be attached).
Compensation payments are current as of 2/1/2021 (m/d/yyyy) and shall continue until otherwise ordered or until Form 17 is signed by the claimant.
A Form 17 was offered and refused on 2/4/2021 (m/d/yyyy).

- II. **Address suspension, termination, or reduction of temporary disability payments for any cause.**
 a. At any time pursuant to § 42-9-260(E).
 b. After the one-hundred-fifty day period has expired pursuant to § 42-9-260(F), R.67-505 and R.67-506.

The basis for the termination/suspension is: _____

- III. **Determine if compensation is due** pursuant to § 42-9-10, § 42-9-20 or § 42-9-30 and, if so, in what amount, based on the following grounds:
Claimant has reached MMI and been assigned an impairment rating.

Claimant reached maximum medical improvement on 1/8/2020 (m/d/yyyy) (copy of medical report must be attached).

- IV. **Request Credit for Overpayment of temporary compensation pursuant to § 42-9-210.**

- V. **Determine amount of compensation for claims involving a fatality.**
 a. Payment of unpaid balance of compensation when employee dies pursuant to § 42-9-280.
 b. Amount of compensation of death of employee due to accident pursuant to § 42-9-290.

- VI. **Mediation**
 a. Mediation is requested to be ordered pursuant to Reg. 67-1801 B.
 b. Mediation is required pursuant to Reg. 67-1801.
 c. Mediation is requested by consent of the Parties pursuant to Reg. 67-1803.
 d. Mediation has been conducted by a duly qualified mediator and resulted in an impasse.

Failure to respond pursuant to Reg. 67-208 B in writing or by submission of a Form 22 may result in ordered mediation pursuant to Reg. 67-1801 B.
Questions regarding mediation may be submitted to mediation@wcc.sc.gov.

I certify I have served this document pursuant to Reg. 67-211 by delivering a copy to:
Don C. Gibson, Esquire, P O. Box 60669, North Charleston, SC 29419-0669 on the 5th day of February, 2021, by first class postage.
A \$50.00 filing fee and updated Form 18 is required.

Preparer's Signature _____ Attorney for Employer/Carrier cgruber@ycrlaw.com February 5, 2021
Title _____ Email _____ Date _____

Questions about the use of this form should be directed to the Judicial Department at 803-737-5675, or jud@wcc.sc.gov or mediation@wcc.sc.gov.
Refer to Regulations 67-211, 67-504, 67-506; and 67-510.

Evaristo Verdugo Morales Claimant's Name	REDACTED SSN	Insulation By Cohen's & Sprayfoam by Cohen's, LLC Employer's Name
REDACTED Address	City State Zip	1415 Old Highway 52, Moncks Corner, SC 29461 Address City State Zip
Home Phone: ()	Work Phone: ()	Builders Premier Insurance Company Insurance Carrier
Date of Injury: 10/10/2019		
E. Courtney Gruber Preparer's Name:	Young Clement Rivers, LLP Law Firm:	(843) 720-5410 Phone #

Date of Injury or Illness: 10/10/2019 **Estimated time for hearing: 45 minutes**
Complete each information blank. Specify clearly when contentions are admitted in part and denied in part. The employer/carrier, in answer to the claim, respectfully shows:

1. It is ~~ADMITTED~~/~~DENIED~~ the employee sustained an injury or illness on or about the date set forth in the Form 50. The reasons for denial are: Admitted as to T12 vertebral fracture; denied as to all other body parts alleged
2. It is ~~ADMITTED~~/~~DENIED~~ both the employer and employee were subject to the Workers' Compensation Act at the time in question. The reasons for denial are: _____
3. It is ~~ADMITTED~~/~~DENIED~~ the relationship of employer and employee existed at the time in question. The reasons for denial are: _____
4. It is ~~ADMITTED~~/~~DENIED~~ at the time in question the employee was performing services arising out of and in the course of employment. The reasons for denial are: _____
5. It is ~~ADMITTED~~/~~DENIED~~ notice of injury was given the employer. The reasons for denial are: _____
6. It is ~~ADMITTED~~/~~DENIED~~ the employee **Needs / Is Entitled to Additional** medical care as a result of injury or illness. The reasons for denial are: Claimant has been released at MMI with regard to the fracture at T12. All other body parts have been denied in a Decision & Order filed 1/11/2021.
7. It is ~~ADMITTED~~/~~DENIED~~ the employee is entitled to temporary total disability for the period(s) of: Claimant has been released at MMI.
8. It is ~~ADMITTED~~/~~DENIED~~ the employee is permanently disabled. The reasons for denial are: No medical evidence.
9. It is ~~ADMITTED~~/~~DENIED~~ the employee has serious disfigurement.
10. It is contended that an average weekly wage of **\$ Form 20 to be provided** applies, according to attached Form 20 as provided by law.
11. Further contentions, grounds of defense, or unusual aspects are: See number 1; all affirmative defenses available under the Code; reserve right to amend. Defendants further claim that the issues raised in the Form 50 are barred by res judicata as an evidentiary hearing was held and the Decision & Order of the Single Commissioner filed 1/11/2021 was not appealed. That Decision & Order has specific findings denying additional medical treatment for the lumbar spine, cervical spine, and both shoulders and further limiting the compensable injuries resulting from this accident to the fracture at T12. The issues raised in the Form 50 have already been adjudicated.

- Mediation**
- a. Mediation is requested to be ordered pursuant to Reg. 67-1801 B.
 - b. Mediation is required pursuant to Reg. 67-1802.
 - c. Mediation is requested by consent of the Parties pursuant to Reg. 67-1803.
 - d. Mediation has been conducted by a duly qualified mediator and resulted in an impasse.
- Questions regarding mediation may be submitted to mediation@wcc.sc.gov.

I certify I have served this document pursuant to Reg. 67-211 by delivering a copy to: Don C. Gibson, Esquire, P. O. Box 60669, North Charleston, SC 29419-0669 on the 5th day of February, 2021, by first class postage.

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	cgruber@yclaw.com Email	February 5, 2021 Date
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Refer to R.67-204 through R.67-210 and R.67-601 through R.67-615 for mediation. Questions about the use of this form may be directed to the Commission's Judicial Department at 803.737.5675 or jud@wcc.sc.gov or mediation@wcc.sc.gov. 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.

McDANIEL LAW FIRM
ATTORNEYS AND COUNSELORS AT LAW
1315 ELMWOOD AVENUE
COLUMBIA, SOUTH CAROLINA 29201

Proudly representing injured workers
for over 35 years

Preston F. McDaniel

Telephone (803) 771-7211

Matthew C. Robertson

Facsimile (803) 252-0709

February 26, 2021

VIA EMAIL: bskarbek@wcc.sc.gov
Commissioner Susan Barden
SC Workers' Compensation Commission
1333 Main Street, Suite 500
Columbia, SC 29201

Re: Don Gibson - Hospital Covid
Case Pending Before You
Request for Assistance

Dear Commissioner Barden,

Don Gibson is in the hospital and has been in the hospital for over 2 weeks with Covid. The good news is, he was moved to a private room yesterday and is improving, but anticipates being in the hospital at least another week and maybe more than that. In addition, his paralegal, Debra Kadoves is also in the hospital with Covid and is not doing very well, but we do anticipate recovery. That is my basic understanding from my discussions with Don.

I am sending a copy of this to Courtney Gruber because my understanding is Don has a Workers' Compensation claim that is pending before you and is actually set for hearing on, I believe, Courtney Gruber's 21. I cannot give you the name of the case because I cannot fully understand Don, as his speak is labored. I would ask Courtney to please help us in that regard. After speaking with Barbara it is my understanding that Don may have other cases pending, so I am sending a copy of this to Amy Bracy and would ask her if she would check the roster and give you and/or me a copy of that list so I can help Don.

Don wants to associate me on that case and other cases, but we cannot even do that because no one is at the office, which is on answering machine that knows anything about the workers' compensation cases and of course we can't even get the clients in to sign any kind of an agreement.

However, based on my understanding of the case, it is a back case and I would submit that our position is, in reference to the 21, that this man is totally and permanently disabled, which would require mandatory mediation. In

Commissioner Susan Barden
February 26, 2021
Page 2

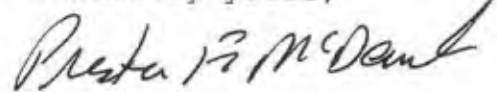
addition, Don has authorized me to advise that we would be glad to give Courtney a credit through and up to the time that this matter is heard from the original date, at least back to the date of the filing of the 21 or the date from which Courtney claimed a credit on behalf of the clients. Of course, assuming the man is not given a total and permanent disability award and/or were not able to resolve it at mediation.

By copy of this email I am notifying Courtney Gruber of this communication and my cell phone number in addition to my office number is 803-606-2107.

I appreciate everyone's consideration and I am going to try to help Don and his staff get through this in reference to all of these cases and other cases in his practice.

I look forward to hearing from you.

Sincerely yours,



Preston F. McDaniel
Attorney at Law

PFM/amt

cc: Courtney Gruber (cgruber@ycrlaw.com)
Amy Bracy (via email abracy@wcc.sc.gov)

Bonnie Kelly

From: Gruber, Courtney <CGruber@ycrlaw.com>
Sent: Wednesday, March 24, 2021 2:36 PM
To: 'rgsmith@wcc.sc.gov'
Cc: 'law2@dgibsonlaw.com'; 'dgibson@dgibsonlaw.com'; Bonnie Kelly; Preston F. McDaniel; Kim Hinkle
Subject: Evaristo Verdugo Morales v. Insulation By Cohen's & Sprayfoam by wcc # 1921668
Attachments: 4893659.pdf

Commissioner Taylor

I recently sent this proposed consent order to you cancelling the hearing set for 4/12/2021 and agreeing to mediation- It doesn't appear that you have signed it yet as it has not been filed-

If that is the case, please do not sign it as I have withdrawn my consent to mediation at this time-

We would also like to have the hearing put back on the docket-

Thank you-

Courtney

E. Courtney Gruber
Partner
(843) 720 5410
cgruber@ycrlaw.com



CLEMENT RIVERS, LLP

25 Calhoun Street • Suite 400 • Charleston, SC 29401
ycrlaw.com

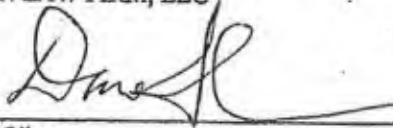
Clement Rivers, LLP
<http://www.ycrlaw.com>
Charleston: (843) 577-4000

Attachments larger than 40MB may be rejected by the firm's server. If you are sending an attachment of this size or larger, please contact the intended recipient to inform him/her of your transmission.


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WE SO CONSENT:

GIBSON LAW FIRM, LLC

By: 
Don C. Gibson
Attorneys for the Claimant

CLEMENT RIVERS, LLP

By: 
E. Courtney Gruber
Attorneys for the Defendants

Bonnie Kelly

From: Smith, Renee <rgsmith@wcc.sc.gov>
Sent: Wednesday, March 24, 2021 2:57 PM
To: Gruber, Courtney
Cc: 'law2@dgibsonlaw.com'; 'dgibson@dgibsonlaw.com'; Bonnie Kelly; Preston F. McDaniel; Kim Hinkle
Subject: RE: [External] Evaristo Verdugo Morales v. Insulation By Cohen's & Sprayfoam by wcc # 1921668

Good Afternoon,
I've added the claim back to the docket.
Thanks

Renee' Smith
Administrative Coordinator to
Commissioner Aisha Taylor
803-737-5692
rgsmith@wcc.sc.gov

The Commission is now open to the public normal business hours 8:30 a.m. to 5:00 p.m. operating with minimal staff on-site. For additional information go to <https://wcc.sc.gov/news>

From: Gruber, Courtney <CGruber@yclr.com>
Sent: Wednesday, March 24, 2021 2:36 PM
To: Smith, Renee <rgsmith@wcc.sc.gov>
Cc: 'law2@dgibsonlaw.com' <law2@dgibsonlaw.com>; 'dgibson@dgibsonlaw.com' <dgibson@dgibsonlaw.com>; 'aham@pfmcdlaw.com' <aham@pfmcdlaw.com>; 'PRESTON@PFMCDLAW.COM' <PRESTON@PFMCDLAW.COM>; 'kim@pfmcdlaw.com' <kim@pfmcdlaw.com>
Subject: [External] Evaristo Verdugo Morales v. Insulation By Cohen's & Sprayfoam by wcc # 1921668

Commissioner Taylor
I recently sent this proposed consent order to you cancelling the hearing set for 4/12/2021 and agreeing to mediation- It doesn't appear that you have signed it yet as it has not been filed- If that is the case, please do not sign it as I have withdrawn my consent to mediation at this time- We would also like to have the hearing put back on the docket-
Thank you-
Courtney

E. Courtney Gruber
Partner
(843) 720 5410
cgruber@yclr.com

Rose Thielke

From: Kadoves, Debra <law2@dgibsonlaw.com>
Sent: Wednesday, March 24, 2021 4:00 PM
To: Rose Thielke; Preston F. McDaniel; Bonnie Kelly
Subject: FW: reset notice 1921668 Evaristo Verdugo Morales
Attachments: bik0wsh41qz.pdf

With Kindest Regards,

Debra Kadoves
Paralegal to Don C. Gibson

Gibson Law Firm, LLC
5422 Rivers Ave.
N. Charleston, SC 29406
Ph: 843-744-1887
Fax:843-744-5320
Law2@dgibsonlaw.com

CONFIDENTIALITY. This electronic message may contain confidential information and is protected by the attorney-client privilege. If you are not the intended recipient, you may not read, print, distribute or copy this communication. If you have received this communication in error, please notify the sender immediately and delete this message and any attachments from your computer system.

From: Smith, Renee <rgsmith@wcc.sc.gov>
Sent: Wednesday, March 24, 2021 3:26 PM
To: Gruber, Courtney <CGruber@ycrlaw.com>; Hendriks, Donna <DHendriks@ycrlaw.com>; Gibson, Don <DGibson@dgibsonlaw.com>; Kadoves, Debra <law2@dgibsonlaw.com>
Subject: reset notice 1921668 Evaristo Verdugo Morales

Renee' Smith
Administrative Coordinator to
Commissioner Aisha Taylor
803-737-5692
rgsmith@wcc.sc.gov

South Carolina Workers' Compensation Commission

1333 Main Street, Suite 500
P.O. BOX 1715
Columbia, SC 29202-1715
(803) 737-5723



WCC File #: 1921668
Carrier File #: WCV001062422
March 24, 2021

NOTICE OF HEARING RESET

Evaristo Verdugo Morales v. INSULATION BY COHEN LLC

Subject: To determine issues as set forth on Forms 50/51 and Form 21 to determine if the employer/carrier may stop payment, and if so, to determine if claimant is entitled to any further benefits.

Date: April 12, 2021 at 01:30 PM

Location: Colleton County Recreation Dept.
280 Recreation Lane
Meeting Rm & Activity Rm
WALTERBORO, SC 29488

South Carolina Regulations 67-601 through 67-615 govern hearings before the South Carolina Workers' Compensation Commission. The claimant must attend when not represented by an attorney or when disfigurement is involved. Corporations must be represented by an attorney, and uninsured employers must attend.

Attorneys must file a Form 58 with proof of service pursuant to Regulation 67-611. Postponements are only granted pursuant to Regulation 67-613. Please visit www.wcc.sc.gov/Commissioners to view Commissioners' Preferences. If you have questions regarding this matter, please contact the office of the undersigned Jurisdictional Commissioner.

Commissioner Aisha Taylor
803-737-5692, rgsmith@wcc.sc.gov

CERTIFICATE OF SERVICE – This is to certify the undersigned has served this notice in the above entitled action upon all parties to this cause by sending a copy hereof by electronic mail or United States mail.

By: Renee G Smith, SC Workers' Compensation, March 24, 2021

Party

Employee: Evaristo Verdugo Morales

Employer: INSULATION BY COHEN LLC
Carrier: Builders Premier Insurance Company

Attorney

Don C. Gibson
dgibson@dgibsonlaw.com
843-744-1887

E. Courtney Gruber
cgruber@ycrlaw.com
843-720-5410

The Commission is now open to the public normal business hours 8:30 a.m. to 5:00 p.m. operating with minimal staff on-site. For additional information go to <https://wcc.sc.gov/news>

CONFIDENTIAL & PRIVILEGED

The preceding email message, including any attachments, may be confidential and/or protected by the attorney-client or other applicable privileges. It is intended for the sole use of the individual or entity named above. If the reader of this transmission is not the intended recipient, please notify the sender immediately and destroy any copies, electronic, paper or otherwise, that you may have of this communication. Any unauthorized review, use, disclosure or distribution is strictly prohibited and may be unlawful.

Bonnie Kelly

From: Bonnie Kelly
Sent: Wednesday, March 24, 2021 5:45 PM
To: Smith, Renee; Gruber, Courtney
Cc: 'law2@dgibsonlaw.com'; 'dgibson@dgibsonlaw.com'; Preston F. McDaniel; Kim Hinkle; Rose Thielke
Subject: RE: [External] Evaristo Verdugo Morales v. Insulation By Cohen's & Sprayfoam by wcc # 1921668

Renee,

To say that I am shocked is to say the least at Courtney requesting that this matter be put back on the docket knowing Don's situation. In case Courtney doesn't know, Don has just been readmitted to the hospital and quite frankly is not in good shape; and Deb, his paralegal, is just back in the office after hospitalization for COVID. I have not even been associated on the file yet, although that was our intention once the paperwork could be obtained from Mr. Morales.

I do not even have the whole file yet, but it is my understanding that Don has taken the position that Mr. Morales is totally and permanently disabled due to his injuries; and it's my understanding the Commission has been notified to that effect. Assuming that is true and again, on behalf of Don at this point, mediation is not voluntary, it is mandatory. Quoting from Rule 67-1802(A): The Commission orders that the following claims must be mediated prior to a hearing:

- (1) Claims for permanent and total disability arising under either Section 42-9-10 or Section 42-9-31(21).

At this point I would request that you review the file and if what I state is accurate and if Don has taken the position his client is totally and permanently disabled, then I would request an Order ordering that mediation be conducted in this case and this matter removed from the Hearing Roster.

Quite frankly, I've known Courtney for a long time and I'm shocked knowing Don's situation that an attorney would try to ramrod through a Hearing. I'm sure there's some kind of mistake and look forward to the Commission notifying both Don's office and Courtney that this matter has been removed from the Docket and submitted to mandatory mediation. I would appreciate a courtesy copy to me, although at this point, again, I'm not attorney of record at the Commission. At this point I'm trying to help a friend through a terrible situation and I hope all are praying for Don after his readmission to the hospital.

Sincerely yours,

Preston F. McDaniel, Esq.

From: Smith, Renee <rgsmith@wcc.sc.gov>
Sent: Wednesday, March 24, 2021 2:57 PM
To: Gruber, Courtney <CGruber@ycrlaw.com>
Cc: 'law2@dgibsonlaw.com' <law2@dgibsonlaw.com>; 'dgibson@dgibsonlaw.com' <dgibson@dgibsonlaw.com>; Bonnie Kelly <bkelly@pfmcdlaw.com>; Preston F. McDaniel <preston@pfmcdlaw.com>; Kim Hinkle <kim@pfmcdlaw.com>
Subject: RE: [External] Evaristo Verdugo Morales v. Insulation By Cohen's & Sprayfoam by wcc # 1921668

Good Afternoon,
I've added the claim back to the docket.



CLEMENT RIVERS LLP

ATTORNEYS AT LAW

E. Courtney Gruber
Partner

Direct Dial: (843) 720-5410
Direct Fax: (843) 579-1304
E-mail: cgruber@ycrlaw.com

March 25, 2021

Via WCC eCase Upload

Honorable Aisha Taylor
S.C. Workers' Compensation Commission
P. O. Box 1715
Columbia, SC 29202-1715

Re: Evaristo Verdugo Morales v. Insulation By Cohen's & Sprayfoam by Cohen's, LLC
WCC File Number: 1921668
Claim Number: WCV001062422
Date/Accident: 10/10/2019
YCR File: 10857-20200118

Dear Commissioner Taylor:

The above-referenced matter is scheduled for a hearing before you on 4/12/2021. Accordingly, please find enclosed the original Pre-Hearing Brief and Notice of Witnesses/Evidence on behalf of the employer/carrier.

I am, by copy of this letter, providing the claimant's attorney with a copy of the Pre-Hearing Brief, Notice of Witnesses/Evidence and all submissions pursuant to the Administrative Procedures Act. Please note the hearing will require additional time as the claimant speaks Spanish.

With kindest regards, I am

Sincerely,

CLEMENT RIVERS, LLP

E. Courtney Gruber

ECG/dah
Enclosures

cc: Don C. Gibson, Esquire, Gibson Law Firm, LLC
Preston F. McDaniel, Esquire, McDaniel Law Firm
Janey Wilson, Builders Mutual Insurance Company

South Carolina Workers' Compensation Commission
1333 Main Street, Suite 500
P. O. Box 1715
Columbia, SC 29202-1715
(803) 737-5739 www.wcc.sc.gov

PRE-HEARING BRIEF
WCC File No.: 1921668

Claimant's Name: Evaristo Verdugo Morales

Employer's Name: Insulation By Cohen's & Sprayfoam by Cohen's, LLC

Address: **REDACTED**
REDACTED

Address: 1415 Old Highway 52
Moncks Corner, SC 29461

Home Phone: _____

Work Phone: _____

Carrier: Builders Premier Insurance Company

Preparer's Name: E. Courtney Gruber

Preparer's Phone # (843) 720-5410

A claim for workers' compensation benefits is made based on the following grounds:

Injury Illness Repetitive Trauma

1. Comp. Rate: \$ 845.74

2. AWW: \$ 1302.27

Date of Injury: 10/10/2019

3. Type of injury and body part(s): thoracic spine

4. Facts in controversy: This is an accepted claim to the thoracic spine only. All other body parts are denied per the Decision & Order filed 1/11/21. Claimant's authorized treating physician, Dr. Stofko, opined the claimant reached maximum medical improvement on 1/8/20, with no permanent physical limitations. The issues at hand are whether the claimant has reached maximum medical improvement, the extent of permanent impairment, whether the claimant is entitled to additional benefits under the Act, whether the employer/carrier is entitled to stop payment of compensation, and whether the employer/carrier is entitled to credit for overpayment of compensation.

5. Legal issues involved: _____

6. Unusual aspects: The claimant speaks Spanish and will require an interpreter.

7. Witnesses (designate if expert)*: Claimant

8. Exhibits: A. Deposition of claimant 3/13/20 13 pages; B. Decision & Order 1/11/21 10 pages

9. Medical evidence: (indicate report pursuant to R.67-612; deposition or appearance):

1. Trident Orthopaedic Specialists 10/23/19-1/12/21 20 pages
2. CORA Physical Therapy 12/24/20 2 pages
3. Trident Health System 10/10/19-10/12/19 37 pages

10. Name, address, and specialty, if any, of the treating physician: Dr. Douglas Stofko

11. Impairment rating(s); body part(s); physician and date of opinion: Dr. Stofko, 1/8/20, 5% impairment to the back

12. I am amending my Form 50/51 in the following manner: _____

Mediation

- a. Mediation is requested to be ordered pursuant to Reg. 67-1801 B.
- b. Mediation is required pursuant to Reg. 67-1801.
- c. Mediation is requested by consent of the Parties pursuant to Reg. 67-1803.
- d. Mediation has been conducted by a duly qualified mediator and resulted in an impasse.

Questions regarding mediation may be submitted to mediation@wcc.sc.gov.

I certify I have served this document pursuant to Reg. 67-211 by delivering a copy to Don C. Gibson, Esquire, P.O. Box 60669, North Charleston, SC 29419; Preston F. McDaniel, Esquire, McDaniel Law Firm, 1315 Elmwood Avenue, Columbia, SC 29201 on the 25th day of March 2021

By first class postage certified mail personal service electronic service

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

Signature: Carly Blakely

Email: cgruber@ycrlaw.com

Date of hearing: 4/12/2021

Time needed for hearing: 1 hour

Questions about the use of this form should be directed to the Jurisdictional Commissioner. Refer to Regulations 67-204 through 67-211 and Regulations 67-601 through 67-15; as well as Regulation 67-1801. File this form and proof of service on the opposing party according to R.67-611 and R.67-212. Do not send medical reports. * Commissioners reserve the right to admit expert witnesses at hearings.

WCC Form # 58
Rev. 7/15

58

PRE-HEARING BRIEF

STATE OF SOUTH CAROLINA)
)
 COUNTY OF COLLETON)
)
 EVARISTO VERDUGO MORALES,)
 Claimant,)
)
 vs.)
)
 INSULATION BY COHEN'S & SPRAYFOAM BY)
 COHEN'S, LLC,)
 Employer,)
)
 BUILDERS PREMIER INSURANCE COMPANY,)
 Carrier,)
 Defendants.)

BEFORE THE
 SOUTH CAROLINA WORKERS'
 COMPENSATION COMMISSION

WCC FILE NO. 1921668

NOTICE OF WITNESSES AND WRITTEN
 REPORT(S)/PHYSICIAN OR OTHER
 EVIDENCE TO BE INTRODUCED ON BEHALF
 OF DEFENDANTS

To: South Carolina Workers' Compensation Commission

YOU ARE HEREBY NOTIFIED that the Defendants, pursuant to the provisions of the South Carolina Workers' Compensation Act and S.C. Code Ann. §1-23-330, (1985), herewith submits the following reports/physician or other evidence on behalf of the Defendants, to wit:

<u>Name Of Report/Physician or Other Evidence</u>	<u>Date of Report(s)</u>	<u>Pages</u>
1. Trident Orthopaedic Specialists	10/23/19-1/12/21	1-20
2. CORA Physical Therapy	12/24/20	21-22
3. Trident Health System	10/10/19-10/12/19	23-59

Exhibits:

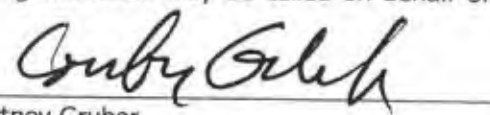
A. Deposition of claimant	3/13/20	60-72
B. Decision & Order	1/11/21	73-82

YOU ARE FURTHER HEREBY NOTIFIED that you have the right of cross-examination; and, should you desire to exercise said right, you are to forthwith schedule the deposition(s) of any of the physicians or other person(s) whose reports are submitted, for the purposes of cross-examination.

YOU ARE FURTHER HEREBY NOTIFIED that the originals of the documents referred to herein, or photocopies received from said physicians/others, will be submitted at the Hearing before the South Carolina Workers' Compensation Commission, for insertion in the file of the South Carolina Workers' Compensation Commission and inclusion into evidence on behalf of the Defendant.

YOU ARE FURTHER HEREBY NOTIFIED that the following witnesses may be called on behalf of the Defendants.

Claimant



E. Courtney Gruber
 Attorney for Employer/Carrier

March 25, 2021

STATE OF SOUTH CAROLINA
BEFORE THE SOUTH CAROLINA WORKERS' COMPENSATION COMMISSION
WCC FILE NUMBER 1921668

EVARISTO VERDUGO MORALES
Employee,

-versus-

CERTIFICATE OF SERVICE

INSULATION BY COHEN'S & SPRAYFOAM BY COHEN'S, LLC
Employer,

and

BUILDERS PREMIER INSURANCE COMPANY
Carrier.

I HEREBY CERTIFY that on March 25, 2021 I uploaded a copy of the **Pre-Hearing Brief and Notice of Witnesses only** to:

S.C. Workers' Compensation Commission
Honorable Aisha Taylor
P. O. Box 1715
Columbia, SC 29202-1715

VIA WCC eCase Upload

And

I e-mailed a copy of the **Pre-Hearing Brief, Notice of Witnesses/Evidence and all APA Submissions** to:

Gibson Law Firm, LLC
Don C. Gibson, Esquire
P. O. Box 60669
North Charleston, SC 29419-0669

McDaniel Law Firm
Preston F. McDaniel, Esquire
1315 Elmwood Avenue
Columbia, SC 29201

VIA FIRST CLASS MAIL
 VIA CERTIFIED MAIL RETURN RECEIPT REQUESTED


E. Courtney Gruber

Gibson Law Firm, LLC

Attorney Don C. Gibson
Telephone: (843) 744-1887
Facsimile: (843) 744-5320

STREET ADDRESS:
5422 Rivers Avenue
North Charleston, SC 29406

WEBSITE:
www.dgibsonlaw.com

March 29, 2021

Via E-mail rgsmith@wcc.sc.gov
SC Workers' Compensation Commission
Attn: Commissioner Aisha Taylor
P.O. Box 1715
Columbia, SC 29202-1715

**RE: Claimant: Evaristo Verdugo Morales v. Employer: Insulation By Cohen S.,
LLC and Builders Mutual Insurance Company
Date of Injury: 10/10/2019
WCC File No.: 1921668
Carrier File No.: WCV001062422**

Dear Commissioner Taylor:

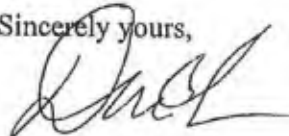
In connection with the above-referenced, a hearing is scheduled before you on April 12, 2021 at 1:30 PM. I am now in recovery from a two- and half-week hospitalization at St Francis battling Coronavirus. Last week, I was re-admitted to the hospital for Atrial fibrillation procedure. I am humbly requesting this hearing be re-set for later this month. I appreciate all the assistance that the attorneys have provided. I can provide you with me doctors medical reports on my conditions, should you need me too.

Please do not hesitate to e-mail or call should you need anything further,.

As always, thank you for your courtesies in this matter.

With kind regards, I remain,

Sincerely yours,



Don C. Gibson

DCG/djk
Enclosure: as stated
cc: E. Courtney Gruber, Esquire (via e-mail only)
Preston McDaniel, Esquire (via e-mail only)
Claimant

McDANIEL LAW FIRM
ATTORNEYS AND COUNSELORS AT LAW
1315 ELMWOOD AVENUE
COLUMBIA, SOUTH CAROLINA 29201

Proudly representing injured workers
for over 35 years

Preston F. McDaniel

Telephone (803) 771-7211

Matthew C. Robertson

Facsimile (803) 252-0709

March 29, 2021

URGENT!! IMMEDIATE
ATTENTION REQUESTED!!

VIA EMAIL ONLY: rgsmith@wcc.sc.gov
Commissioner Aisha Taylor
SC Workers' Compensation Commission
Post Office Box 1715
Columbia, SC 29202

RE: Evaristo Verdugo Morales v. Insulation by Cohen, LLC
WCC File No. 1921668

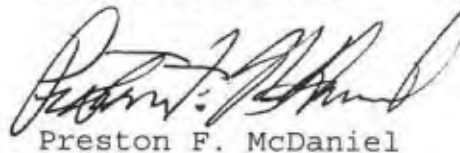
Dear Renee:

In follow-up to Don Gibson's letter, this is to request this matter be reset for the latest possible date in April.

Don Gibson's office just forwarded me the Reset Notice. Don was in the hospital two days last week and is on oxygen 24/7 and is only coming in the office, it is my understanding, for a few hours each day. There is no way that he can try this case at this time. We are getting the client in to sign the paperwork to add me as Counsel of Record but I cannot try the case on the 12th and would request on behalf of Don, and assuming that I am added as Counsel, that the case be moved for hearing until the latest possible date in April. For your help, I can try it: April 22, 23, 26, 28 and 30.

Please note I would appreciate confirmation of the receipt of this request and a reply as soon as possible so I will know whether to follow-up. By copy of this letter I am notifying both Courtney Gruber and Don's office of this communication.

Sincerely yours,



Preston F. McDaniel

PFM/kth

cc: Don C. Gibson, Esquire
E. Courtney Gruber, Esquire

South Carolina Workers' Compensation Commission

1333 Main Street, Suite 500
P.O. BOX 1715
Columbia, SC 29202-1715
(803) 737-5723



WCC File #: 1921668
Carrier File #: WCV001062422
April 2, 2021

NOTICE OF HEARING RESET

Evaristo Verdugo Morales v. INSULATION BY COHEN LLC

Subject: To determine issues as set forth on Forms 50/51 and Form 21 to determine if the employer/carrier may stop payment, and if so, to determine if claimant is entitled to any further benefits.

Date: April 26, 2021 at 10:30 AM

Location: Colleton County Recreation Dept.
280 Recreation Lane
Meeting Rm & Activity Rm
WALTERBORO, SC 29488

South Carolina Regulations 67-601 through 67-615 govern hearings before the South Carolina Workers' Compensation Commission. The claimant must attend when not represented by an attorney or when disfigurement is involved. Corporations must be represented by an attorney, and uninsured employers must attend.

Attorneys must file a Form 58 with proof of service pursuant to Regulation 67-611. Postponements are only granted pursuant to Regulation 67-613. Please visit www.wcc.sc.gov/Commissioners to view Commissioners' Preferences. If you have questions regarding this matter, please contact the office of the undersigned Jurisdictional Commissioner.

Commissioner Aisha Taylor
803-737-5692, rgsmith@wcc.sc.gov

CERTIFICATE OF SERVICE – This is to certify the undersigned has served this notice in the above entitled action upon all parties to this cause by sending a copy hereof by electronic mail or United States mail.

By: Renee G Smith, SC Workers' Compensation, April 2, 2021

Party

Employee: Evaristo Verdugo Morales

Employer: INSULATION BY COHEN LLC
Carrier: Builders Premier Insurance Company

Attorney

Don C. Gibson
dgibson@dgibsonlaw.com
843-744-1887

E. Courtney Gruber
cgruber@ycrlaw.com
843-720-5410

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Telephone (803) 771-7211

Matthew C. Robertson

Facsimile (803) 252-0709

April 8, 2021

VIA EMAIL ONLY: rgsmith@wcc.sc.gov
Commissioner Aisha Taylor
SC Workers' Compensation Commission
Post Office Box 1715
Columbia, SC 29202

RE: Evaristo Verdugo Morales v. Insulation by Cohen, LLC
WCC File No. 1921668

Dear Commissioner Taylor,

By copy of this letter, I am notifying the Judicial Director that I have been associated along with Mr. Don Gibson, Esq., to represent Mr. Morales as the result of his work-related accident. As you are aware, both Mr. Gibson and Deb, his paralegal, were hospitalized with COVID and Mr. Morales's primary language is Spanish, and it took some time to complete the paperwork necessary for my association. On my behalf, I want to thank you for all the courtesies and kindnesses and concern that you've expressed for Mr. Gibson in his situation, and I sincerely appreciate your help in working with me when I was not formally in the case in my efforts to try to assist Mr. Gibson through this time of illness. As you may be aware, Mr. Gibson was hospitalized multiple times, including periods of severe oxygen deprivation with all of the consequences from that. In addition, he developed and was hospitalized for a severe heart condition caused by the COVID-19. He remains on 24/7 oxygen and has and is extremely distressed over his practice and clients. Don is an old-school trial lawyer like me, and we go to bed each night worrying about our clients whose lives are in our hands. Again, I thank you.

With that said, while it is my understanding that Mr. Gibson has communicated his position, assuming that Mr. Morales was found to be at maximum medical improvement, that Mr. Morales is totally and permanently disabled under the Act, that is not reflected in the Form 50 and a response to the Form 21 has not been filed.

Commissioner Aisha Taylor
April 8, 2021
Page 2

So I am hereby filing a formal response to the Form 21 and amending the Form 50 to reflect: It is our position that Mr. Morales is totally and permanently disabled for having lost 50% or more of the functional use of his back to do work requiring the use of his back; and that he has sustained a total and permanent loss of earning capacity under Section 42-9-10. Our position, of course, will mandate mandatory mediation.

In reference to the upcoming Hearing, while the Hearing Notice says it's being set on the 50 and the Form 21, the parties had signed a consent agreement to mediate and Ms. Gruber then requested the Hearing be reset. Of course, the Hearing had been cancelled for April 12th due to the agreement of the parties to mediate and that written and signed agreement included the position of the Claimant that he is totally and permanently disabled and again agreeing to mediate the case. That agreement was signed and was on your desk pending a signature at the time of Ms. Gruber's request. I have reviewed the emails and am not aware that Mr. Gibson has in any way violated the provisions of the consent agreement. So while we hope that Ms. Gruber will agree to mediate and cancel the hearing, I would appreciate a decision from you in two regards:

First, is that agreement binding. I would submit it is unless there is evidence that Mr. Gibson violated the provisions of the agreement.

Second, by having agreed to mediate, does that vacate the right to have a Hearing within 60 days. In that regard, the mediation Rules require that the mediation be conducted within 60 days and also the consent agreement sets out Ms. Gruber's client's right to pursue a credit all the way back to the MMI of January 8th; thus, they are protected.

Next, assuming the Hearing goes forward, I sincerely appreciate your offer to see if we can look for other venues for several reasons. As noted, Mr. Morales does not speak English and we will have to have a translator available for the Hearing. That will cause extreme difficulty if the Hearing is held in Waltherboro. Also, as noted from the Records, Mr. Morales has a very bad back and riding for any distance will cause him a tremendous amount of pain.

Commissioner Aisha Taylor

April 8, 2021

Page 3

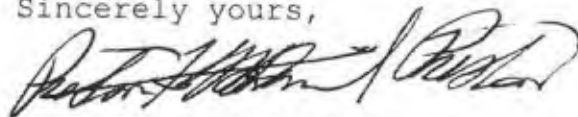
Next, in reference to the Hearing, once we know where the Hearing will be held based on a review of the medical records, it is my intent to request a Commission subpoena for and I am going to go ahead and issue a subpoena to the Physician's Assistant, Elaine Cole, who provided the vast majority of the care after hospitalization for Mr. Morales, to appear at the Hearing for the purposes of cross-examination. If I cannot get it set before the Hearing, we will ask that the Record be left open for the purposes of deposition under Morgan vs. JPS Automotive, 321 SC 201, 467 SE2d 457 (SC App 1996). Of course, I cannot issue the subpoena until I know the date for sure; and under Circuit Court Rules, until I know the location, I am not sure I can even require her attendance in Walterboro which is over 50 miles from Charleston.

So for those reasons, we would request that the matter be reset, hopefully in Charleston, if it has to go forward.

Finally, should the case go forward, we will file our PHB/APA's Monday; and at a Hearing, it will be our position that either Mr. Morales is not at MMI and is entitled to additional medical care for multiple body parts including his cervical, thoracic, and lumbar spine, and in reference to his shoulder; or if the Commission finds that he is at MMI, that he is entitled to an Award for total and permanent disability under both sections of the Act; both the scheduled member section and the wage loss section. I look forward to hearing from you on these issues, and by copy of this letter as noted, I'm notifying the Judicial Director and all parties concerned of this communication.

As always, I appreciate all the courtesies and kindnesses shown to me and my office in this and all matters. In this particular case, I would particularly like to again thank you and Renee for your kind and courteous consideration of Mr. Gibson in his situation.

Sincerely yours,



Preston F. McDaniel

PFM/bhk

cc: Don C. Gibson, Esquire
E. Courtney Gruber, Esquire
Amy Bracy, Judicial Director

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

Signature: 

Email: cgruber@ycrlaw.com

Date of hearing: 4/26/2021

Time needed for hearing: 1 hour

Questions about the use of this form should be directed to the Jurisdictional Commissioner. Refer to Regulations 67-204 through 67-211 and Regulations 67-601 through 67-15; as well as Regulation 67-1801. File this form and proof of service on the opposing party according to R.67-611 and R.67-212. Do not send medical reports. * Commissioners reserve the right to admit expert witnesses at hearings.

WCC Form # 58
Rev. 7/15

58

AMENDED PRE-HEARING BRIEF

McDANIEL LAW FIRM
ATTORNEYS AND COUNSELORS AT LAW
1315 ELMWOOD AVENUE
COLUMBIA, SOUTH CAROLINA 29201

Proudly representing injured workers
for over 35 years.

Preston F. McDaniel
Matthew C. Robertson

Telephone (803) 771-7211
Facsimile (803) 252-0709

April 12, 2021

VIA eCASE UPLOAD

Commissioner Aisha Taylor
SC Workers Compensation Commission
Post Office Box 1715
Columbia, South Carolina 29202

RE: Evaristo Verdugo Morales v. Insulation by Cohen's &
Spray Foam by Cohen's, LLC
WCC File No.: 1921668

Dear Commissioner Taylor:

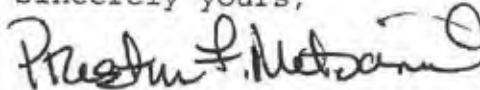
Please find enclosed a copy of the Claimant's Pre-Hearing Brief in the above referenced matter.

By copy of this letter, with enclosures, we are forwarding a copy of our Pre-Hearing Brief and APA submissions to opposing counsel on this date.

I hope this is sufficient for filing this matter with the Commission. However, if additional information is needed, please feel free to contact me at your convenience.

I look forward to seeing you at the hearing and to a resolution in the best interest of all parties concerned.

Sincerely yours,



Preston F. McDaniel

PFM/kt
Enclosures

cc: Don C. Gibson, Esquire
E. Courtney Gruber, Esquire



Claimant's Name: Evaristo Verdugo Morales Employer's Name: Insulation by Cohen's & Spray Foam by Cohen's, LLC
Address: REDACTED Address: 1415 Old Highway 52
City: REDACTED State: SC Zip: RE City: Moncks Corner State: SC Zip: 29461
Home Phone: REDACTED Work Phone: () - Carrier: Builders Premier Insurance Company
Preparer's Name: Preston F. McDaniel, Esquire Preparer's Phone #: (803) 771-7211

A claim for workers' compensation benefits is made based on the following grounds:

Injury Illness Repetitive Trauma

1. Compensation Rate: \$1,302.27 2. AWW: \$845.74 Date of Injury: 10/10/2019
3. Type of injury and body part(s): Upper, middle and lower back, left shoulder, right shoulder, interval posterior spinal fusion from T11-L1; T12 vertebral fracture, concussion
4. Facts in controversy: See Attachment.
5. Legal issues involved: See Attachment.
6. Unusual aspects: Injured worker is Spanish speaking only.
7. Witnesses (designate if expert):* Evaristo Verdugo Morales, Marina Diaz Verdugo and Jacqueline Verdugo.
8. Exhibits: See attached Notice of APA's and Claimant's deposition. Claimant requests that WCC File No. 1921668 be made a part of the Record. Claimant also reserves the right to amend.
9. Medical evidence (indicate report pursuant to R.67-612; deposition or appearance): All medical records and other supporting documentation is attached hereto and identified in the Notice of Witnesses and Written Medical Reports to be Introduced as Direct Evidence on behalf of the Claimant.
10. Name, address, and specialty, if any, of the treating physician:
Charles T. Staples, Jr., MD & Charles Geilfuss, MD of Moncks Corner Medical Center, 401 Live Oak Dr, Moncks Corner, SC 29461; Seon Jones, MD, Douglas Stofko, MD & Richard M Thompson, MD of Trident Medical Center, 9330 Medical Plaza Drive, Charleston, SC 29406; Alana N. Cole, PA-C of Trident Orthopaedic Specialists/Trauma Care and Acute Surgical Services - Trident Health, 9300 Medical Plaza Dr, Ste B, Charleston, SC 29406; Roper St Francis ATI Physical Therapy, 2061 Highway 52, Moncks Corner, South Carolina 29461.
11. Impairment rating(s); body part(s); physician and date of opinion: _____
12. I am amending my Form 50/51 in the following manner: _____

Mediation

- a. Mediation is requested to be ordered pursuant to Reg. 67-1801 B.
- b. Mediation is required pursuant to Reg. 67-1802.
- c. Mediation is requested by consent of the Parties pursuant to Reg. 67-1803.
- d. Mediation has been conducted by a duly qualified mediator and resulted in an impasse.

Questions regarding mediation may be submitted to mediation@wcc.sc.gov.

I certify I have served this document pursuant to Reg. 67-211 by delivering a copy to **SEE ATTACHED CERTIFICATE OF SERVICE** on the _____ day of _____ 20____, by: first class postage certified mail personal service electronic service

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

Signature: Preston F. McDaniel
Date of hearing: April 26, 2021

Email: preston@pfmodlaw.com
Time needed for hearing: 1.5 hrs. as Interpreter required

Questions about the use of this form should be directed to the Jurisdictional Commissioner. Refer to Regulations 67-204 through 67-211 and Regulations 67-301 through 67-615; as well as Regulation 67-1801. File this form and proof of service on the opposing party according to R.67-611 and R.67-212. Do not send medical reports. * Commissioners reserve the right to admit expert witnesses at hearings.

ATTACHMENT TO FORM 58

Evaristo Verdugo Morales v. Insulation by Cohen's
& Spray Foam by Cohen's, LLC

WCC File No. 1921668

4. SUMMARY OF FACTS:

Mr. Evaristo Verdugo Morales, a 53-year-old Hispanic male, a spray-foam installer for Insulation by Cohen's can Spray Foam by Cohen's, LLC, was working at REDACTED Walterboro, SC 29488 on 10/10/2019, at noon, while covering the wall of a garage door with plastic in preparation for his co-worker to spray insulation on a newly constructed home. Claimant fell from a ladder approximately 4 feet, landing on concrete on his back and buttock and hitting his head, and briefly losing consciousness. His co-worker tried to help him up, and the co-worker called their boss to inform him of the accident. Mr. Verdugo Morales immediately felt pain in his back and was unable to continue working due to the pain. He was transported from the jobsite by a co-worker to the office and thereafter presented to the hospital.

Claimant was first seen at Moncks Corner Medical Center under the care of Charles T. Staples, Jr., MD, who opined immediate transfer via ambulatory to Trident Medical Center as having the capability and capacity to provide appropriate treatment and evaluation with MRI and neurosurgery consultation was needed and for operative intervention for the T-spine fracture, as the CT scans performed at Moncks Corner Medical Center indicated T-12 fracture. Richard M. Thompson, MD assumed his care when he arrived at Trident Medical Center. Claimant underwent a CT of both the T and L-spine as well as MRI of the thoracic spine, which revealed a 3-column injury with posterior ligamentous disruption.

On 10/11/2019, Douglas L. Stofko, MD performed interval posterior spinal fusion from T11 through L1 procedure to repair his T-12 fracture. The T-11 - T12-L1 percutaneous fusion required the implementation of hardware; Claimant had eight (8) screws and two (2) rods implanted. On 10/12/2019, Claimant was discharged to home, instructed to wear a Thoracic Lumbar Sacral Orthosis (TLSO) Brace at all times, other than while in the shower; was given pain medication to include Flexeril, Neurontin, Ultram, and

Colace; and he was told to follow-up with Neurosurgery on 10/23/2019.

On 10/23/2019, Claimant had his follow-up appointment with Dr. Stofko. On 11/20/2019, Claimant met with Alana Cole, PA-C of Trauma Care and Acute Surgical Services of Trident Health, who indicated Claimant was unable to return to work until he followed up in the office in six (6) weeks. On 1/8/2020, Claimant presented to Alana Cole, PA-C for follow-up and indicated he continued to wear the TLSO brace and that he had not returned to work as he works in construction and was awaiting work clearance for their service. Claimant complained of pain in his left side when he lies down on that side. PA Cole's assessment indicated Claimant suffered (1) acute bilateral low back pain, unspecified whether sciatica present; and (2) other closed fracture of twelfth thoracic vertebra with routine healing. PA Cole recommended Claimant start with Physical Therapy, as he was somewhat deconditioned from being out of work and on restrictions for 12 weeks. PA Cole recommended Claimant undergo PT for 2-3x weekly for 6 weeks and advised him it was no longer necessary to continue to use his TLSO brace.

On 2/20/2020. Builders Mutual Insurance Company, the authorized workers' compensation provider for Defendant Insulation by Cohen, authorized evaluation and treatment for PT two times per week for a total of six weeks. Claimant attended his first PT appointment on March 16, 2020 at Roper St. Francis, ATI Physical Therapy - Moncks Corner, located at 2061 Hwy 52, Moncks Corner, SC 29461. Claimant participated in PT until 4/23/2020.

This matter was set for a hearing on April 7, 2020 before Commissioner Susan S. Barden. Prior to the hearing, Commissioner Barden was notified that the parties had reached an agreement as to the issues and agreed to forgo the hearing. In the Consent Order, the parties agreed among other things: (1) Claimant sustained a compensable injury by accident to his back; (2) Claimant reserves the right to pursue other body parts as part of this claim; however the Defendants' admitted compensability only for the back. (6) The authorized treating physician is Dr. Stofko, and the Defendants will provide casually related medical treatment until such time as the Claimant has reached maximum medical improvement in the opinion of his treating doctor. [Note: At the time of this Agreement the Claimant had been diagnosed and treated for both his thoracic and lumbar spine.

Throughout his physical therapy treatment, Claimant continuously voiced his complaints of pain in his thoracic lumbar. He complained of pain "where I have the screws" and indicated he cannot move too much or lie against a chair because it causes him pain; he further complained of tightness in his back. Although Claimant did receive some relief from the pain as a consequence of his participation in physical therapy, his discharge note indicates the therapist believed he would benefit from more physical therapy to progress to work hardening program, but he was not quite ready for the transition at that time.

On 7/22/2020, Claimant returned to see PA Cole complaining of pain in the neck and upper back into the bilateral shoulders. He also complained of low back pain with radiation into the bilateral lower extremities into the bottom of the feet; he further complained of radiating pain in the left anterior thigh. Additionally, Claimant complained of muscle spasms in his low back - PA Cole noted that Claimant has not had any conservative treatment for this. PA Cole diagnosed Claimant's cervical pain, indicating that the neck pain and bilateral trapezius pain seems to be musculoskeletal in nature. PA Cole recommended Claimant begin physical therapy, again, for conservative treatment of his pain. She further ordered Claimant to take a muscle relaxer, Flexeril, since July 22, 2020 and As of the time of this submission, the Carrier has yet to authorize and schedule Claimant's 6-8 weeks of physical therapy, despite the order coming from his authorized treating physician (see Consent Order, Paragraph 6 noted above).

As for his lumbar radiculopathy, PA Cole recommended obtaining an MRI of the lumbar spine without contrast for further assessment of Claimant's low back pain with bilateral lower extremity radiation. PA Cole opined that she believes Claimant does have a musculoskeletal component to this pain as Claimant does have palpable tenderness of the rectus spinae muscles. However, he does have a radicular component to this pain with bilateral lower extremity radiation; Claimant will likely be sent for physical therapy for this pain as well as potential trigger point injections to treat the musculoskeletal pain. Once an MRI is ordered, PA Cole will assess to determine if claimant would benefit from epidural steroid injections with pain management. Since July 22, 2020 and as of the time of this submission, the Carrier has failed to authorize and establish an MRI of lumbar spine without contrast as well as Claimant's 6-8 weeks of physical

therapy, despite the order coming from his authorized treating physician (see Consent Order, Paragraph 6 noted above).

Claimant has been unable to return to work since the date of the accident. The Carrier has not continued to provide medical treatment; however, Claimant is still experiencing pain in his thoracic (mid), upper and lower back, and bilateral shoulders and specifically, in his mid-back, where the screws are located. Additionally, he experiences neck pain and low back pain, the same accepted body part - the back injured at the time of the accident. Further, Claimant feels pain when lifting both of his arms; when attempting to lift his arms up above his head he feels shooting pain in his back (where his surgical and hardware area is located).

As Claimant has only received treatment related to the mid-back, he respectfully requests he be allowed to attend evaluation and/or treatment at the Southeastern Spine Institute, as this will afford him the ability to receive treatment for the full spine to include his lower back and thigh and leg pain; and his neck pain; as well as his continued thoracic pain treatment.

Based on the positions of the Defendants to seek stop payment on the basis that Mr. Morales has reached maximum medical improvement for his injuries as causally related to the accident, the Claimant's position is based on the medical evidence that he has sustained a total loss of earning capacity and has lost 50% or more of the functional use of his back to do work requiring the use of his back and thus is entitled to an Award for total and permanent disability under the Act.

FACTS IN CONTROVERSY:

Based on the Defendants' position that the Claimant has reached maximum medical improvement:

- a. 1. An Award for total and permanent disability due to wage loss. This is an accepted case and the issue is whether or not the Claimant is entitled to an Award for total and permanent disability for having sustained a total loss of earning capacity based on his age, education, background and experience, the physical facts of the injury wherein the jobs which he can perform on a residual basis are so limited in quality, quantity or dependability that a reasonably stable job market for them does not exist; and/or

2. Whether the Claimant has sustained a 50% or greater loss of use of the back and therefore is entitled to an Award for total and permanent disability under the Scheduled Member Statute for the functional loss of USE OF his back to do work requiring the use of his back, which is greater than 50% of the functional use of his back. Under the Dictionary of Occupational Titles Physical Demand Classification System, does not even qualify, based on the objective testing of the Functional Capacity Evaluation that the Claimant does not even qualify for light duty work, the lowest physical demand classification of jobs under the Dictionary of Occupational Titles Physical Demand Classification System. Therefore he is excluded on a physical basis alone due to the injury to his back from at least 60% of the jobs available in the American economy.

- b. Whether the Claimant is at maximum medical improvement and whether he is entitled to further treatment for his thoracic spine and neck pain, to include physical therapy sessions, possible trigger point and epidural steroid injections; and an MRI without contrast to assess his low back and injury/pain; and/or

The Claimant's entitlement to lifetime medical care due to being totally and permanently disabled due to his injury.

- c. Lump sum of Award requested.

5. LEGAL ISSUES INVOLVED:

- a. 1. Under S.C. Code §42-1-120 and §42-9-10 based on the Claimant's age, education, background and experience and the physical facts of the injury the jobs which the Claimant can perform are so limited in quality, quantity or dependability that a reasonably stable job market for them does not exist and thus the Claimant is entitled to an Award for total and permanent disability under the Act for loss of earning capacity-wage loss. Coleman v. Quality Concrete Products, Inc., 245 S.C. 645, 142 S.E.2d 43 (1965); Colvin v. E.I. Dupont De Nemours Co., 227 S.C. 465, 88 S.E.2d 581 (1955); Stephenson v. Rice Services, 323 S.C. 113, 473 S.E.2d 699; and/or

2. Under S.C. Code 42-9-30(21), the Claimant is entitled to an Award of 500 weeks of compensation due to the character of the injury for having lost more than 50% of the functional use of his back to do work requiring the use of his back under the substantial evidence in the Record. The

Award under The Scheduled Member statute is based solely on the character of the injury and not upon the earnings or the earning capacity of the injured worker. G.E. Moore Company v. Walker, 232 S.C. 320, 102 S.E.2d 106 (1958). McCullum v. Singer Co., 300 S.C. 103, 386 S.E.2d 471 (S.C. App. 1989).

There is no need or necessity to prove nor is it pertinent as to whether or not the Claimant has actually lost earnings.

"loss of earnings is not required for recovery under 42-9-30; compensation is based on the character of the injury." Bateman v. Town and Country Furniture, 287 S.C. 158, 336 S.E.2d 890 (S.C. App. 1985), Lyles v. Quantum Chemical Co., 315 S.C. 440, 434 S.E.2d 292 (S.C. App. 1993) (Reh. Denied, Cert. Denied.)

Where the substantial evidence in the Record establishes that the Claimant has lost 50% or more of the functional use of his back to do work requiring the use of his back, the Claimant is entitled to an Award for the maximum Award under a Scheduled Member Award which is the equivalent of a permanent and total disability Award for loss of use of the back. Clemmons v. Lowe's Home Centers, Inc.-Harbison, 420 S.C. 282, 803 S.E.2d 268 (2018).

Due to the position being taken by some defendants and some indications from some Commissioners that the Commission or some members of the Commission believe that after the 2007 amendments that wage loss has been infused into a determination and as evidence to be considered concerning an Award under S.C. Code §42-9-30(21) for loss of use of the back, the following memorandum is submitted:

AWARD IS PAID FOR CHARACTER OF THE INJURY.

While the presumption under SC Code §42-9-30 (19) was always rebuttable, the 2007 amendment was to simply set that out in Statutory Language. The effect of any presumption under our Law was and is as is stated in SC Rules of Evidence §301:

"In all civil actions..., a presumption imposes on the party against whom it is directed the burden of going forward with evidence to rebut or meet the presumption, but does not shift to such party the burden of proof in the sense of the risk of

non-persuasion which remains throughout the trial upon the party on whom it was originally cast."

In other words the Claimant had, has and will always have the burden of proof to put forth evidence, either lay, medical and/or otherwise, that the injured worker has lost 50% or more of the functional use of the worker's back to do work requiring the use of the worker's back which must be sufficient to prove that fact by a preponderance of the evidence.

The misperception that the Claimant has to prove wage loss or loss of earning capacity has been around long before the 2007 amendments and has been put to rest repeatedly by our Appellate Courts in the cases of Bateman, McCollum, and Lyles, supra:

"The Workers' Compensation Commission properly ruled that a Claimant is entitled to benefits even though the injury did not affect his performance in his subsequent job because compensation is based on the character and extent of the injury and not whether the Claimant lost earnings or is otherwise employable in another occupation". Lyles, supra.

A worker is entitled to an award for total and permanent disability for loss of earning capacity under SC §42-9-10 (A).

The pertinent part of S.C. Code §42-9-30 (21) (as Amended 2007) (the scheduled member back section) reads:

"where there is fifty percent or more loss of use of the back the injured employee shall be presumed to have suffered total and permanent disability and compensated under §42-9-10 (B).
(Emp. Add.)

S.C. Code §42-9-10 (B) provides the loss of both hands, arms, feet, legs, or vision in both eyes or any two thereof, constitutes total and permanent disability to be compensated according to the provisions of this section.

An Award under Section (B) of §42-9-10 like an Award under §42-9-30 (21) are paid due to the character of the injury, not wage loss.

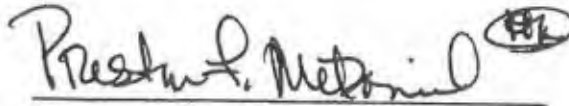
"Compensation depends on the functional loss rather than the loss of earnings." Dykes v. Daniel Construction Co., 262 S.C. 98, 202 S.E.2d 646.

Therefore, Awards under §42-9-30 (21) are not paid nor have they ever been paid for wage loss as under §42-9-10 (A). They are paid for the functional loss of use without any consideration of wage loss. A left-handed lawyer is entitled to total and permanent disability if he loses his right foot and right hand and the same is true if he loses 50% of the use of his back.

- b. Under S.C. Code §42-15-60 and under a PTD Award, the Claimant is entitled to lifetime medical care for all causally related medical care which will affect a cure or provide relief from the Claimant's disabling symptoms stemming from his work-related injury.
- c. Claimant's entitlement to a lump sum award pursuant to S.C. Code § 42-9-301 and R. 67-1605 with language in the award that such lump sum as awarded by the Commission is being ordered to be paid in lieu of the Claimant's entitlement to payments of compensation being made on a per week basis spread over the Claimant's lifetime (as established by the South Carolina Mortality Table, S.C. Code of Laws §19-1-150) which payment method the Commission may order under SC Code of Laws §42-9-240:

"The first installment of compensation payable under the terms of an award..shall become due seven days from the date of such an award . . . Thereafter compensation shall be paid in installments weekly, except when the Commission determines that payment shall be made monthly OR in some other manner."

Respectfully submitted,



Preston F. McDaniel
McDANIEL LAW FIRM
1315 Elmwood Avenue
Columbia, SC 29201
(803) 771-7211

and

Don C. Gibson
GIBSON LAW FIRM, LLC
Post Office Box 60669
North Charleston, SC 29419
(843) 744-1887

Attorneys for the Claimant

April 12, 2021

STATE OF SOUTH CAROLINA)
)
COUNTY OF COLLETON)

BEFORE THE SOUTH CAROLINA
WORKERS' COMPENSATION COMMISSION
WCC File No.: 1921668

EVARISTO VERDUGO MORALES,)
)
Employee/Claimant,)
)
v.)
)
INSULATION BY COHEN'S &)
SPRAY FOAM BY COHEN'S, LLC)
)
Employer, and)
)
BUILDERS PREMIER INSURANCE)
COMPANY,)
)
Carrier.)
_____)

NOTICE OF WITNESSES AND
WRITTEN MEDICAL REPORTS TO
BE INTRODUCED AS DIRECT
EVIDENCE ON BEHALF OF THE
CLAIMANT

TO: SOUTH CAROLINA WORKERS' COMPENSATION COMMISSION, AND
E. COURTNEY GRUBER, ESQUIRE, ATTORNEY FOR THE EMPLOYER/
CARRIER:

YOU ARE HEREBY NOTIFIED THAT THE Claimant, pursuant to the provisions of the South Carolina Workers' Compensation Act and South Carolina Code §1-23-330 (1976, as amended), herewith submits the following reports/physician or other evidence on behalf of the Claimant, to wit:

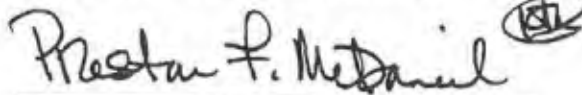
#	<u>NAME OF REPORT(S)/PHYSICIAN OR OTHER EVIDENCE</u>	<u>DATE OF REPORT(S)</u>	<u>PAGE #</u>
1.	Grace Physical Therapy Rod Tyler, PTR/L, CHT, CSFA (FCE)	10/23/20	1-11
2.	Southeastern Spine Institute Leonard Forrest, MD	04/01/21	12-20
3.	Charleston Pain & Rehab. Ctr. Jeffrey Buncher, MD	01/28/21	21-31
4.	Harriet Fowler, M.Ed., CRC Harriet Fowler VR Services	04/12/21	32-44
5.	Consent Order		45-46

YOU ARE FURTHER HEREBY NOTIFIED that you have the right to cross-examination; and, should you desire to exercise said right, you are to forthwith schedule the deposition(s) of any of the physicians or other person(s), whose reports are submitted, for the purposes of cross-examination.

YOU ARE FURTHER NOTIFIED that the originals of the documents referred herein, or photocopies received from said physicians/others, are being herewith forwarded to the South Carolina Workers' Compensation Commission for insertion in the file of the South Carolina Workers' Compensation Commission and inclusion into evidence on behalf of the Claimant.

YOU ARE FURTHER NOTIFIED that the following witnesses may be called on behalf of the Claimant: The Claimant; Alana N. Cole, PA (Commission Witness), any witness listed, named or called by the Defendants; and other lay witnesses to be named.

Respectfully Submitted,



Preston F. McDaniel
McDaniel Law Firm
1315 Elmwood Avenue
Columbia, South Carolina 29201
803-771-7211

and

Don C. Gibson
GIBSON LAW FIRM, LLC
Post Office Box 60669
North Charleston, SC 29419
(843) 744-1887

Attorneys for Claimant

April 12, 2021

CERTIFICATE OF SERVICE

Evaristo Verdugo Morales v. Insulation by Cohen's &
Spray Foam by Cohen's, LLC

WCC File No. 1921668

I HEREBY CERTIFY that on this date:

I mailed a copy of the Pre-Hearing Brief and Notice of Witnesses
and Written Reports(s)/Physician or other Evidence to:

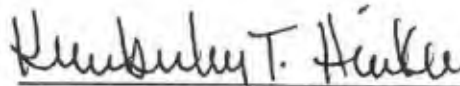
VIA eCASE UPLOAD

Commissioner Aisha Taylor
SC Workers' Compensation Commission
Post Office Box 1715
Columbia, South Carolina 29202

And I mailed a copy of the Pre-Hearing Brief, Notice of
Witnesses and Written Reports(s)/Physician or other Evidence, and
APA Submissions with enclosures to:

VIA FIRST CLASS MAIL

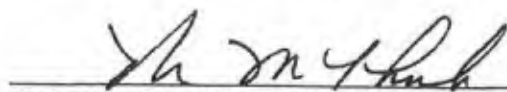
E. Courtney Gruber, Esquire
CLEMENT RIVERS
Post Office Box 993
Charleston, SC 29402



Kimberley T. Hinkle, Paralegal

SWORN TO BEFORE ME this

12 day of APRIL, 2021.

 (L.S.)

Notary Public for South Carolina

My Commission Expires: 2/4/24

GIBSON LAW FIRM, LLC

Attorney Don C. Gibson
Telephone: (843) 744-1887
Facsimile: (843) 744-5320
Toll Free: (866) 744-1887

STREET ADDRESS:
5422 Rivers Avenue
North Charleston, SC 29406

WEBSITE:
www.dgibsonlaw.com

April 13, 2021

Via First Class Mail & Fax: (843)764-1731

Alana N. Cole, PA-C
Trident Orthopaedic Specialists /
TRAUMAcare and Acute Surgical Services ~Trident Health
9300 Medical Plaza Dr. Ste. B.
Charleston, SC 29406

**RE: Claimant: Evaristo Verdugo Morales v's INSULATION BY COHENS, LLC
& SPRAY FOAM BY COHENS, LLC
Date of Injury: 10/10/2019
Carrier: Builders Premier Insurance Company
WCC File No.: PENDING**

Dear Ms. Alana N. Cole, PA-C:

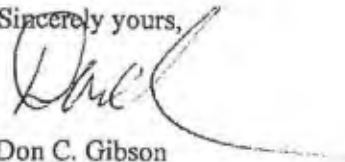
As you are aware, I represent Evaristo Verdugo Morales in the above referenced matter. I have enclosed a Form 27 Subpoena Duces Tecum which authorizes your appearance at a Hearing in this matter on April 26, 2021 at 10:30 A.M. at Colleton County Recreation Dept, 280 Recreation Lane, Walterboro, SC 29488 to be held in the Meeting and Activity Room. Enclosed, please find the Hearing Notice for your quick reference.

Also, enclosed find South Carolina Workers; Compensation Advisory Notices dated March 24, 2021, September 21, 2020 and May 18, 2020 for in-person hearing instructions.

Should you have any questions regarding this hearing, do not hesitate to contact me at the number listed above.

With kindest regards, I remain,

Sincerely yours,



Don C. Gibson

DCG/emd
Enclosure: as stated.
cc: See Attached Certificate of Service (w/ encl)
Client

South Carolina Workers' Compensation Commission
1612 Marion St.
P.O. BOX 1715
Columbia, SC 29202-1715
803-737-5675



WCC File #: 1921668
Carrier File #: WCV001062422
Carrier Code #: _____
Employer FEIN #: 46-1499167

Claimant's Name: Evaristo Verdugo Morales SSN: - -
Address: REDACTED
City: _____ State: SC Zip: RED
Home Phone: _____ Work Phone: () -
Preparer's Name: Don C. Gibson, Esquire Law Firm: GIBSON LAW FIRM
Employer's Name: Insulation by Cohens, LLC & Spray Foam by Cohens, LLC
Address: 1415 Old Highway 52
City: Moncks Corner State: SC Zip: 29461
Insurance Carrier: Builders Premier Insurance Company
Preparer's Phone #: (843) 744 - 1887

SUBPOENA

To: Alana N. Cole, PA-C of Trident Orthopaedic Specialists / TRAUMAcare and Acute Surgical Services ~ Trident Health, 9300 Medical Plaza Dr. Ste. B., Charleston, SC 29406

YOU ARE COMMANDED to appear before the above-named Commission at the place, date and time specified below to testify in the above case.

PLACE OF TESTIMONY: Colleton County Recreation Dept
280 Recreation Lane
Walterboro, Sc 29488 **ROOM:** Meeting Room & Activity Room

DATE AND TIME: April 26, 2021 at 10:30 AM

YOU ARE COMMANDED to appear at the place, date and time specified below to testify at the taking of a deposition in the above case.

PLACE OF DEPOSITION: _____ **DATE AND TIME:** _____

YOU ARE COMMANDED to produce and permit inspection and copying of the following documents or objects in your possession, custody or control at the place, date and time specified below.

LIST OF DOCUMENTS: _____ **DATE AND TIME:** _____
PLACE: _____

YOU ARE COMMANDED to permit inspection of the following premises at the date and time specified below.

PREMISES: _____ **DATE AND TIME:** _____

THIS SUBPOENA SHALL REMAIN IN EFFECT UNTIL YOU ARE GRANTED PERMISSION TO DEPART BY THE COMMISSIONER OR AN OFFICER ACTING ON BEHALF OF THE COMMISSIONER. QUESTIONS CONCERNING THIS SUBPOENA SHOULD BE ADDRESSED TO THE FOLLOWING ISSUING OFFICER.

Don C. Gibson, Esquire
Attorney for Claimant

(843) 744 - 1887
PHONE NUMBER

April 13, 2021
Date

Serve this form according to R.67-211(C). Refer to R.67-211 and R.67-214 for additional information. Procedural questions may be addressed to the Judicial Department at 803-737-5675.

South Carolina Workers' Compensation Commission

1333 Main Street, Suite 500
P.O. BOX 1715
Columbia, SC 29202-1715
(803) 737-5723



WCC File #: 1921668
Carrier File #: WCV001062422
April 2, 2021

NOTICE OF HEARING
RESET

Evaristo Verdugo Morales v. INSULATION BY COHEN LLC

Subject: To determine issues as set forth on Forms 50/51 and Form 21 to determine if the employer/carrier may stop payment, and if so, to determine if claimant is entitled to any further benefits.

Date: April 26, 2021 at 10:30 AM

Location: Colleton County Recreation Dept.
280 Recreation Lane
Meeting Rm & Activity Rm
WALTERBORO, SC 29488

South Carolina Regulations 67-601 through 67-615 govern hearings before the South Carolina Workers' Compensation Commission. The claimant must attend when not represented by an attorney or when disfigurement is involved. Corporations must be represented by an attorney, and uninsured employers must attend.

Attorneys must file a Form 58 with proof of service pursuant to Regulation 67-611. Postponements are only granted pursuant to Regulation 67-613. Please visit www.wcc.sc.gov/Commissioners to view Commissioners' Preferences. If you have questions regarding this matter, please contact the office of the undersigned Jurisdictional Commissioner.

Commissioner Aisha Taylor
803-737-5692, rgsmith@wcc.sc.gov

CERTIFICATE OF SERVICE – This is to certify the undersigned has served this notice in the above entitled action upon all parties to this cause by sending a copy hereof by electronic mail or United States mail.

By: Renee G Smith, SC Workers' Compensation, April 2, 2021

Party

Employee: Evaristo Verdugo Morales

Employer: INSULATION BY COHEN LLC
Carrier: Builders Premier Insurance Company

Attorney

Don C. Gibson
dgibson@dgibsonlaw.com
843-744-1887

E. Courtney Gruber
cgruber@ycrlaw.com
843-720-5410

State of South Carolina

1333 Main Street Suite 500
P.O. Box 1715
Columbia, S.C. 29202-1715



TBL: (803) 737-5700
FAX: (803) 737-5768
www.wcc.sc.gov

Workers' Compensation Commission

Advisory Notice

March 24, 2021

In-person Hearings and Informal Conferences

Please be advised the Commission's Advisory Notice posted on May 18, 2020 and the Advisory Notice posted on September 21, 2020 concerning the protocols for in-person hearings and informal conferences remains in effect. Please continue to follow all protocols set out in that advisory to include remaining in your vehicles or outside the building until notified by a representative of the Commissioner's office it is time to enter the building and the Hearing room. The following links will take you to the May 18, 2020 and the September 21, 2020 Advisory Notices.

[Advisory Notice for May 18, 2020](#)

[Advisory Notice for September 21, 2020](#)

We have been notified by multiple hearing venues individuals are congregating in their lobbies or hallways which is not in compliance with their COVID-19 restrictions.

Please continue to monitor our website www.wcc.sc.gov for updates and direct any questions or comments to:

Gary M. Cannon
Executive Director
GCannon@wcc.sc.gov

State of South Carolina

1333 Main Street Suite 500
P.O. Box 1715
Columbia, S.C. 29202-1715



TEL: (803) 737-5700
FAX: (803) 737-5768
www.wcc.sc.gov

Workers' Compensation Commission

Advisory Notice

September 21, 2020

In-person Hearings and Informal Conferences

Please be advised the Commission has amended the Advisory Notice posted on May 18, 2020 concerning the protocols for in-person hearings and informal conferences to include the following language:

- Individuals previously tested positive for COVID-19 or have potentially been exposed to COVID-19, may attend a hearing in-person only after they have quarantined for 14 days and have tested negative for the virus.

Please continue to monitor our website www.wcc.sc.gov for updates and direct any questions or comments to:

Gary M. Cannon
Executive Director
GCannon@wcc.sc.gov

State of South Carolina

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Workers' Compensation Commission

Advisory Notice

In-person Hearings and Informal Conferences

May 18, 2020

Effective June 1, 2020 Hearings docketed with the jurisdictional Commissioner and Informal Conferences scheduled with the Commission's mediator will be conducted in-person. In order to protect the health and safety of those participating in the in-person Hearing and Informal Conference, the following procedures should be observed:

1. Any individual scheduled to attend a Hearing or Informal Conference should immediately notify the jurisdictional Commissioner and preferably not attend the Hearing or Informal Conference if they have experienced the following:

- Are currently being treated for COVID-19 illness
- Have ever been diagnosed with or tested positive for COVID-19
- Experienced flu-like symptoms, or any other symptoms related to COVID-19, such as fever of 100.4 F or greater, cough, shortness of breath, or difficulty breathing; chills, repeated shaking with chills, muscle pain, headache, sore throat, new loss of taste or smell.
- Within the previous 14 days of the Hearing/Informal Conference traveled or had a household member who traveled on an airplane or in a high-risk area for transmission of COVID-19; or
- Been in close contact with someone under the evaluation for or confirmed infection of COVID-19.
- Additional information may be found at the following link to the Center for Disease Control:

<https://www.cdc.gov/coronavirus/2019-ncov/symptoms-testing/symptoms.html>

2. All persons scheduled to attend the Hearing or Informal Conference should remain in their vehicles or outside the building until they are notified by telephone by a

representative of the Commissioner's office it is time to enter the building and the Hearing room.

3. Prior to entering the Hearing room all persons attending the Hearing or Informal Conference` should apply hand sanitizer provided in the Hearing room.
4. All persons attending the Hearing or the Informal Conference should wear a face cover at all times while in the Hearing room. If an individual has a medical, religious or other reason for not wearing a face cover please notify the Jurisdictional Commissioner's office prior to the date of the Hearing.
5. All persons attending the Hearing or Informal Conference should maintain a social distance of six feet between themselves and others at all times. Every effort should be made by parties to arrange the seating in the hearing to maintain the appropriate social distance.
6. After the hearing the parties are asked to wipe their respective tables with the sanitary wipes provided.
7. Any party to the case preferring not to have an in-person Hearing may request an electronic Hearing using CourtCall. The request must be agreed upon by all parties and approved by the Jurisdictional Commissioner. Any dispute over the request to conduct the Hearing by CourtCall shall be heard by Conference call with the Jurisdictional Commissioner and the parties.
8. Any individual scheduled for an in-person Informal Conference may request it be conducted by telephone.
9. Please remember that health and safety is YOUR responsibility. While we are taking these precautions, the Commission cannot guarantee an environment that is free from contagion. Most of the facilities in which hearings are held are not under the Commission's care and control. Everyone must assume responsibility for their own health and safety during these unprecedented times.
10. All APA submissions, exhibits, or other documents to be submitted at the Hearing must be provided to the Commissioner and participants electronically. If circumstances make the electronic exchange of APAs, exhibits, or other evidence impossible, alternate arrangements should be made with the Commissioner's office prior to the Hearing or Informal Conference.

Please continue to monitor our website www.wcc.sc.gov for updates and direct any questions or comments to

Gary M. Cannon
Executive Director
GCannon@wcc.sc.gov

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that I, the undersigned, an employee of Gibson Law Firm, LLC, 5422 Rivers Avenue SC 29406, served the attached Subpoena to the following individual(s) as indicated below:

Via First Class Mail & Fax (843)764-1731

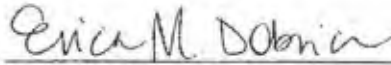
Alana N. Cole, PA-C
Trident Orthopaedic Specialists /
TRAUMAcare and Acute Surgical Services ~Trident Health
9300 Medical Plaza Dr. Ste. B.
Charleston, SC 29406

Via First Class Mail & Fax (843)579-1304

E. Courtney Gruber, Esquire
Young, Clement & Rivers, LLP
25 Calhoun Street, Suite 400
Charleston, SC 29402

Via First Class Mail & Fax (803)252-0709

Preston McDaniel, Esquire
McDaniel Law Firm
1315 Elmwood Avenue
Columbia, SC 29201



Erica M. Dobrich,
Law Clerk to Don C. Gibson, Esquire

North Charleston SC

April 13, 2021

McDANIEL LAW FIRM
ATTORNEYS AND COUNSELORS AT LAW
1315 ELMWOOD AVENUE
COLUMBIA, SOUTH CAROLINA 29201

Proudly representing injured workers
for over 35 years.

Preston F. McDaniel

Matthew C. Robertson

Telephone (803) 771-7211

Facsimile (803) 252-0709

April 14, 2021

VIA eCASE UPLOAD

Commissioner Aisha Taylor
SC Workers Compensation Commission
Post Office Box 1715
Columbia, South Carolina 29202

**RE: Evaristo Verdugo Morales v. Insulation by Cohen's &
Spray Foam by Cohen's, LLC
WCC File No.: 1921668**

Dear Commissioner Taylor:

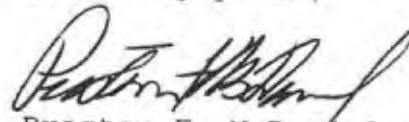
Please find enclosed a copy of the Claimant's **AMENDED**
Pre-Hearing Brief in the above referenced matter.

By copy of this letter, with enclosures, we are forwarding a
copy of our **AMENDED** Pre-Hearing Brief and APA submissions to
opposing counsel on this date.

I hope this is sufficient for filing this matter with the
Commission. However, if additional information is needed,
please feel free to contact me at your convenience.

I look forward to seeing you at the hearing and to a
resolution in the best interest of all parties concerned.

Sincerely yours,



Preston F. McDaniel

PFM/kth
Enclosures

cc: Don C. Gibson, Esquire
E. Courtney Gruber, Esquire



Claimant's Name: Evaristo Verdugo Morales
Address: REDACTED
City: REDACTED State: SC Zip: REDACTED
Home Phone: REDACTED Work Phone: () -
Employer's Name: Insulation by Cohen's & Spray Foam by Cohen's, LL
Address: 1415 Old Highway 52
City: Moncks Corner State: SC Zip: 29461
Carrier: Builders Premier Insurance Company
Preparer's Name: Preston F. McDaniel, Esquire
Preparer's Phone #: (803) 771-7211

A claim for workers' compensation benefits is made based on the following grounds:
 Injury Illness Repetitive Trauma

- 1. Compensation Rate: \$1,302.27 2. AWW: \$845.74 Date of Injury: 10/10/2019
- 3. Type of injury and body part(s): Upper, middle and lower back, left shoulder, right shoulder, interval posterior spinal fusion from T11-L1; T12 vertebral fracture, concussion
- 4. Facts in controversy: See Attachment.
- 5. Legal issues involved: See Attachment.
- 6. Unusual aspects: Injured worker is Spanish speaking only.
- 7. Witnesses (designate if expert):* Evaristo Verdugo Morales, Marina Diaz Verdugo and Jacqueline Verdugo.
- 8. Exhibits: See attached Notice of APA's and Claimant's deposition. Claimant requests that WCC File No. 1921668 be made a part of the Record. Claimant also reserves the right to amend.

9. Medical evidence (indicate report pursuant to R.67-612; deposition or appearance): All medical records and other supporting documentation is attached hereto and identified in the Notice of Witnesses and Written Medical Reports to be Introduced as Direct Evidence on behalf of the Claimant.

10. Name, address, and specialty, if any, of the treating physician:
Charles T. Staples, Jr., MD & Charles Geilfuss, MD of Moncks Corner Medical Center, 401 Live Oak Dr, Moncks Corner, SC 29461; Seon Jones, MD, Douglas Stofko, MD & Richard M Thompson, MD of Trident Medical Center, 9330 Medical Plaza Drive, Charleston, SC 29406; Alana N. Cole, PA-C of Trident Orthopaedic Specialists/Trauma Care and Acute Surgical Services - Trident Health, 9300 Medical Plaza Dr, Ste B, Charleston, SC 29406; Roper St Francis ATI Physical Therapy, 2061 Highway 52, Moncks Corner, South Carolina 29461; Grace Physical Therapy, N. Charleston, SC; Leonard Forrest, MD, Southeastern Spine Institute, Mt. Pleasant, SC; Jeffrey Buncher, MD, Charleston Pain & Rehab. Center, Charleston, SC; Harriet Fowler, M.Ed., CRC, Harriet Fowler VR Services, Columbia, SC.

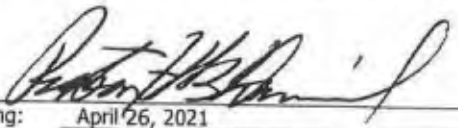
11. Impairment rating(s); body part(s); physician and date of opinion: Dr Forrest / Dr Buncher WP 22% T-Spine 100%

12. I am amending my Form 50/51 in the following manner: Total and permanent disability per Form 21 response.

- Mediation
- a. Mediation is requested to be ordered pursuant to Reg. 67-1801 B.
 - b. Mediation is required pursuant to Reg. 67-1802.
 - c. Mediation is requested by consent of the Parties pursuant to Reg. 67-1803.
 - d. Mediation has been conducted by a duly qualified mediator and resulted in an impasse.
- Questions regarding mediation may be submitted to mediation@wcc.sc.gov.

I certify I have served this document pursuant to Reg. 67-211 by delivering a copy to SEE ATTACHED CERTIFICATE OF SERVICE on the day of 20, by: first class postage certified mail personal service electronic service

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

Signature: 
Date of hearing: April 26, 2021
Email: preston@pfmcdlaw.com
Time needed for hearing: 1.5 hrs. as Interpreter required

Questions about the use of this form should be directed to the Jurisdictional Commissioner. Refer to Regulations 67-204 through 67-211 and Regulations 67-601 through 67-615; as well as Regulation 67-1801. File this form and proof of service on the opposing party according to R.67-611 and R.67-212. Do not send medical reports. * Commissioners reserve the right to admit expert witnesses at hearings.

Evaristo Verdugo Morales v. Insulation by Cohen's
& Spray Foam by Cohen's, LLC

WCC File No. 1921668

4. SUMMARY OF FACTS:

Mr. Evaristo Verdugo Morales, a 53-year-old Hispanic male, a spray-foam installer for Insulation by Cohen's can Spray Foam by Cohen's, LLC, was working at REDACTED Walterboro, SC 29488 on 10/10/2019, at noon, while covering the wall of a garage door with plastic in preparation for his co-worker to spray insulation on a newly constructed home. Claimant fell from a ladder approximately 4 feet, landing on concrete on his back and buttock and hitting his head, and briefly losing consciousness. His co-worker tried to help him up, and the co-worker called their boss to inform him of the accident. Mr. Verdugo Morales immediately felt pain in his back and was unable to continue working due to the pain. He was transported from the jobsite by a co-worker to the office and thereafter presented to the hospital.

Claimant was first seen at Moncks Corner Medical Center under the care of Charles T. Staples, Jr., MD, who opined immediate transfer via ambulatory to Trident Medical Center as having the capability and capacity to provide appropriate treatment and evaluation with MRI and neurosurgery consultation was needed and for operative intervention for the T-spine fracture, as the CT scans performed at Moncks Corner Medical Center indicated T-12 fracture. Richard M. Thompson, MD assumed his care when he arrived at Trident Medical Center. Claimant underwent a CT of both the T and L-spine as well as MRI of the thoracic spine, which revealed a 3-column injury with posterior ligamentous disruption.

On 10/11/2019, Douglas L. Stofko, MD performed interval posterior spinal fusion from T11 through L1 procedure to repair his T-12 fracture. The T-11 - T12-L1 percutaneous fusion required the implementation of hardware; Claimant had eight (8) screws and two (2) rods implanted. On 10/12/2019, Claimant was discharged to home, instructed to wear a Thoracic Lumbar Sacral Orthosis (TLSO) Brace at all times, other than while in the shower; was given pain medication to include Flexeril, Neurontin, Ultram, and

Colace; and he was told to follow-up with Neurosurgery on 10/23/2019.

On 10/23/2019, Claimant had his follow-up appointment with Dr. Stofko. On 11/20/2019, Claimant met with Alana Cole, PA-C of Trauma Care and Acute Surgical Services of Trident Health, who indicated Claimant was unable to return to work until he followed up in the office in six (6) weeks. On 1/8/2020, Claimant presented to Alana Cole, PA-C for follow-up and indicated he continued to wear the TLSO brace and that he had not returned to work as he works in construction and was awaiting work clearance for their service. Claimant complained of pain in his left side when he lies down on that side. PA Cole's assessment indicated Claimant suffered (1) acute bilateral low back pain, unspecified whether sciatica present; and (2) other closed fracture of twelfth thoracic vertebra with routine healing. PA Cole recommended Claimant start with Physical Therapy, as he was somewhat deconditioned from being out of work and on restrictions for 12 weeks. PA Cole recommended Claimant undergo PT for 2-3x weekly for 6 weeks and advised him it was no longer necessary to continue to use his TLSO brace.

On 2/20/2020. Builders Mutual Insurance Company, the authorized workers' compensation provider for Defendant Insulation by Cohen, authorized evaluation and treatment for PT two times per week for a total of six weeks. Claimant attended his first PT appointment on March 16, 2020 at Roper St. Francis, ATI Physical Therapy - Moncks Corner, located at 2061 Hwy 52, Moncks Corner, SC 29461. Claimant participated in PT until 4/23/2020.

This matter was set for a hearing on April 7, 2020 before Commissioner Susan S. Barden. Prior to the hearing, Commissioner Barden was notified that the parties had reached an agreement as to the issues and agreed to forgo the hearing. In the Consent Order, the parties agreed among other things: (1) Claimant sustained a compensable injury by accident to his back; (2) Claimant reserves the right to pursue other body parts as part of this claim; however the Defendants' admitted compensability only for the back. (6) The authorized treating physician is Dr. Stofko, and the Defendants will provide casually related medical treatment until such time as the Claimant has reached maximum medical improvement in the opinion of his treating doctor. [Note: At the time of this Agreement the Claimant had been diagnosed and treated for both his thoracic and lumbar spine.

Throughout his physical therapy treatment, Claimant continuously voiced his complaints of pain in his thoracic lumbar. He complained of pain "where I have the screws" and indicated he cannot move too much or lie against a chair because it causes him pain; he further complained of tightness in his back. Although Claimant did receive some relief from the pain as a consequence of his participation in physical therapy, his discharge note indicates the therapist believed he would benefit from more physical therapy to progress to work hardening program, but he was not quite ready for the transition at that time.

On 7/22/2020, Claimant returned to see PA Cole complaining of pain in the neck and upper back into the bilateral shoulders. He also complained of low back pain with radiation into the bilateral lower extremities into the bottom of the feet; he further complained of radiating pain in the left anterior thigh. Additionally, Claimant complained of muscle spasms in his low back - PA Cole noted that Claimant has not had any conservative treatment for this. PA Cole diagnosed Claimant's cervical pain, indicating that the neck pain and bilateral trapezius pain seems to be musculoskeletal in nature. PA Cole recommended Claimant begin physical therapy, again, for conservative treatment of his pain. She further ordered Claimant to take a muscle relaxer, Flexeril, since July 22, 2020 and As of the time of this submission, the Carrier has yet to authorize and schedule Claimant's 6-8 weeks of physical therapy, despite the order coming from his authorized treating physician (see Consent Order, Paragraph 6 noted above).

As for his lumbar radiculopathy, PA Cole recommended obtaining an MRI of the lumbar spine without contrast for further assessment of Claimant's low back pain with bilateral lower extremity radiation. PA Cole opined that she believes Claimant does have a musculoskeletal component to this pain as Claimant does have palpable tenderness of the rectus spinae muscles. However, he does have a radicular component to this pain with bilateral lower extremity radiation; Claimant will likely be sent for physical therapy for this pain as well as potential trigger point injections to treat the musculoskeletal pain. Once an MRI is ordered, PA Cole will assess to determine if claimant would benefit from epidural steroid injections with pain management. Since July 22, 2020 and as of the time of this submission, the Carrier has failed to authorize and establish an MRI of lumbar spine without contrast as well as Claimant's 6-8 weeks of physical

therapy, despite the order coming from his authorized treating physician (see Consent Order, Paragraph 6 noted above).

Claimant has been unable to return to work since the date of the accident. The Carrier has not continued to provide medical treatment; however, Claimant is still experiencing pain in his thoracic (mid), upper and lower back, and bilateral shoulders and specifically, in his mid-back, where the screws are located. Additionally, he experiences neck pain and low back pain, the same accepted body part - the back injured at the time of the accident. Further, Claimant feels pain when lifting both of his arms; when attempting to lift his arms up above his head he feels shooting pain in his back (where his surgical and hardware area is located).

As Claimant has only received treatment related to the mid-back, he respectfully requests he be allowed to attend evaluation and/or treatment at the Southeastern Spine Institute, as this will afford him the ability to receive treatment for the full spine to include his lower back and thigh and leg pain; and his neck pain; as well as his continued thoracic pain treatment.

Based on the positions of the Defendants to seek stop payment on the basis that Mr. Morales has reached maximum medical improvement for his injuries as causally related to the accident, the Claimant's position is based on the medical evidence that he has sustained a total loss of earning capacity and has lost 50% or more of the functional use of his back to do work requiring the use of his back and thus is entitled to an Award for total and permanent disability under the Act.

FACTS IN CONTROVERSY:

Based on the Defendants' position that the Claimant has reached maximum medical improvement:

- a. 1. An Award for total and permanent disability due to wage loss. This is an accepted case and the issue is whether or not the Claimant is entitled to an Award for total and permanent disability for having sustained a total loss of earning capacity based on his age, education, background and experience, the physical facts of the injury wherein the jobs which he can perform on a residual basis are so limited in quality, quantity or dependability that a reasonably stable job market for them does not exist; and/or

2. Whether the Claimant has sustained a 50% or greater loss of use of the back and therefore is entitled to an Award for total and permanent disability under the Scheduled Member Statute for the functional loss of USE OF his back to do work requiring the use of his back, which is greater than 50% of the functional use of his back. Under the Dictionary of Occupational Titles Physical Demand Classification System, does not even qualify, based on the objective testing of the Functional Capacity Evaluation that the Claimant does not even qualify for light duty work, the lowest physical demand classification of jobs under the Dictionary of Occupational Titles Physical Demand Classification System. Therefore he is excluded on a physical basis alone due to the injury to his back from at least 60% of the jobs available in the American economy.

- b. Whether the Claimant is at maximum medical improvement and whether he is entitled to further treatment for his thoracic spine and neck pain, to include physical therapy sessions, possible trigger point and epidural steroid injections; and an MRI without contrast to assess his low back and injury/pain; and/or

The Claimant's entitlement to lifetime medical care due to being totally and permanently disabled due to his injury.

- c. Lump sum of Award requested.

5. LEGAL ISSUES INVOLVED:

- a. 1. Under S.C. Code §42-1-120 and §42-9-10 based on the Claimant's age, education, background and experience and the physical facts of the injury the jobs which the Claimant can perform are so limited in quality, quantity or dependability that a reasonably stable job market for them does not exist and thus the Claimant is entitled to an Award for total and permanent disability under the Act for loss of earning capacity-wage loss. Coleman v. Quality Concrete Products, Inc., 245 S.C. 645, 142 S.E.2d 43 (1965); Colvin v. E.I. Dupont De Nemours Co., 227 S.C. 465, 88 S.E.2d 581 (1955); Stephenson v. Rice Services, 323 S.C. 113, 473 S.E.2d 699; and/or

2. Under S.C. Code 42-9-30(21), the Claimant is entitled to an Award of 500 weeks of compensation due to the character of the injury for having lost more than 50% of the functional use of his back to do work requiring the use of his back under the substantial evidence in the Record. The

Award under The Scheduled Member statute is based solely on the character of the injury and not upon the earnings or the earning capacity of the injured worker. G.E. Moore Company v. Walker, 232 S.C. 320, 102 S.E.2d 106 (1958). McCullum v. Singer Co., 300 S.C. 103, 386 S.E.2d 471 (S.C. App. 1989).

There is no need or necessity to prove nor is it pertinent as to whether or not the Claimant has actually lost earnings.

"loss of earnings is not required for recovery under 42-9-30; compensation is based on the character of the injury." Bateman v. Town and Country Furniture, 287 S.C. 158, 336 S.E.2d 890 (S.C. App. 1985), Lyles v. Quantum Chemical Co., 315 S.C. 440, 434 S.E.2d 292 (S.C. App. 1993) (Reh. Denied, Cert. Denied.)

Where the substantial evidence in the Record establishes that the Claimant has lost 50% or more of the functional use of his back to do work requiring the use of his back, the Claimant is entitled to an Award for the maximum Award under a Scheduled Member Award which is the equivalent of a permanent and total disability Award for loss of use of the back. Clemmons v. Lowe's Home Centers, Inc.-Harbison, 420 S.C. 282, 803 S.E.2d 268 (2018).

Due to the position being taken by some defendants and some indications from some Commissioners that the Commission or some members of the Commission believe that after the 2007 amendments that wage loss has been infused into a determination and as evidence to be considered concerning an Award under S.C. Code §42-9-30(21) for loss of use of the back, the following memorandum is submitted:

AWARD IS PAID FOR CHARACTER OF THE INJURY.

While the presumption under SC Code §42-9-30 (19) was always rebuttable, the 2007 amendment was to simply set that out in Statutory Language. The effect of any presumption under our Law was and is as is stated in SC Rules of Evidence §301:

"In all civil actions..., a presumption imposes on the party against whom it is directed the burden of going forward with evidence to rebut or meet the presumption, but does not shift to such party the burden of proof in the sense of the risk of

non-persuasion which remains throughout the trial upon the party on whom it was originally cast."

In other words the Claimant had, has and will always have the burden of proof to put forth evidence, either lay, medical and/or otherwise, that the injured worker has lost 50% or more of the functional use of the worker's back to do work requiring the use of the worker's back which must be sufficient to prove that fact by a preponderance of the evidence.

The misperception that the Claimant has to prove wage loss or loss of earning capacity has been around long before the 2007 amendments and has been put to rest repeatedly by our Appellate Courts in the cases of Bateman, McCollum, and Lyles, supra:

"The Workers' Compensation Commission properly ruled that a Claimant is entitled to benefits even though the injury did not affect his performance in his subsequent job because compensation is based on the character and extent of the injury and not whether the Claimant lost earnings or is otherwise employable in another occupation". Lyles, supra.

A worker is entitled to an award for total and permanent disability for loss of earning capacity under SC §42-9-10 (A).

The pertinent part of S.C. Code §42-9-30 (21) (as Amended 2007) (the scheduled member back section) reads:

"where there is fifty percent or more loss of use of the back the injured employee shall be presumed to have suffered total and permanent disability and compensated under §42-9-10 (B).
(Emp. Add.)

S.C. Code §42-9-10 (B) provides the loss of both hands, arms, feet, legs, or vision in both eyes or any two thereof, constitutes total and permanent disability to be compensated according to the provisions of this section.

An Award under Section (B) of §42-9-10 like an Award under §42-9-30 (21) are paid due to the character of the injury, not wage loss.

"Compensation depends on the functional loss rather than the loss of earnings." Dykes v. Daniel Construction Co., 262 S.C. 98, 202 S.E.2d 646.

Therefore, Awards under §42-9-30 (21) are not paid nor have they ever been paid for wage loss as under §42-9-10 (A). They are paid for the functional loss of use without any consideration of wage loss. A left-handed lawyer is entitled to total and permanent disability if he loses his right foot and right hand and the same is true if he loses 50% of the use of his back.

- b. Under S.C. Code §42-15-60 and under a PTD Award, the Claimant is entitled to lifetime medical care for all causally related medical care which will affect a cure or provide relief from the Claimant's disabling symptoms stemming from his work-related injury.
- c. Claimant's entitlement to a lump sum award pursuant to S.C. Code § 42-9-301 and R. 67-1605 with language in the award that such lump sum as awarded by the Commission is being ordered to be paid in lieu of the Claimant's entitlement to payments of compensation being made on a per week basis spread over the Claimant's lifetime (as established by the South Carolina Mortality Table, S.C. Code of Laws §19-1-150) which payment method the Commission may order under SC Code of Laws §42-9-240:

"The first installment of compensation payable under the terms of an award...shall become due seven days from the date of such an award Thereafter compensation shall be paid in installments weekly, except when the Commission determines that payment shall be made monthly OR in some other manner."

Respectfully submitted,



Preston F. McDaniel
McDANIEL LAW FIRM
1315 Elmwood Avenue
Columbia, SC 29201
(803) 771-7211

and

Don C. Gibson
GIBSON LAW FIRM, LLC
Post Office Box 60669
North Charleston, SC 29419
(843) 744-1887

Attorneys for the Claimant

April 14, 2021

CERTIFICATE OF SERVICE

Evaristo Verdugo Morales v. Insulation by Cohen's &
Spray Foam by Cohen's, LLC

WCC File No. 1921668

I HEREBY CERTIFY that on this date:

I emailed a copy of the AMENDED Pre-Hearing Brief to:

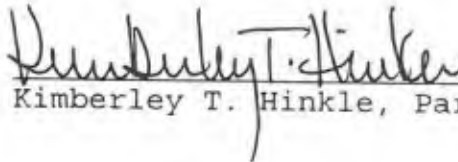
VIA eCASE UPLOAD

Commissioner Aisha Taylor
SC Workers' Compensation Commission
Post Office Box 1715
Columbia, South Carolina 29202

And I mailed a copy of the AMENDED Pre-Hearing Brief to:

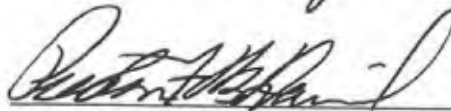
VIA FIRST CLASS MAIL

E. Courtney Gruber, Esquire
CLEMENT RIVERS
Post Office Box 993
Charleston, SC 29402



Kimberley T. Hinkle, Paralegal

SWORN TO BEFORE ME this
14th day of April, 2021.



(L.S.)
Notary Public for South Carolina

My Commission Expires: 10/25/28



CLEMENT RIVERS LLP

ATTORNEYS AT LAW

E. Courtney Gruber
Partner

Direct Dial: (843) 720-5410
Direct Fax: (843) 579-1304
E-mail: cgruber@ycrlaw.com

April 15, 2021

Via WCC eCase Upload

Honorable Aisha Taylor
S.C. Workers' Compensation Commission
P. O. Box 1715
Columbia, SC 29202-1715

Re: Evaristo Verdugo Morales v. Insulation By Cohen's & Sprayfoam by Cohen's, LLC
WCC File Number: 1921668
Claim Number: WCV001062422
Date/Accident: 10/10/2019
YCR File: 10857-20200118

Dear Commissioner Taylor:

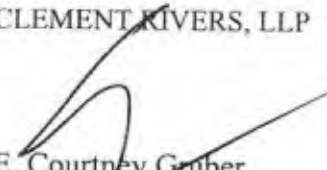
The above-referenced matter is scheduled for a hearing before you on 4/26/2021. Accordingly, please find enclosed the original Second Amended Pre-Hearing Brief and Supplemental Notice of Witnesses/Evidence on behalf of the employer/carrier.

I am, by copy of this letter, providing the claimant's counsel with a copy of the Second Amended Pre-Hearing Brief, Supplemental Notice of Witnesses/Evidence and all submissions pursuant to the Administrative Procedures Act.

With kindest regards, I am

Sincerely,

CLEMENT RIVERS, LLP



E. Courtney Gruber

ECG/dah
Enclosures

cc: Don C. Gibson, Esquire, Gibson Law Firm, LLC
Preston F. McDaniel, Esquire, McDaniel Law Firm
Janey Wilson, Builders Mutual Insurance Company

25 CALHOUN STREET, SUITE 400, P.O. BOX 993, CHARLESTON, SC 29402 • (843) 577-4000 • www.ycrlaw.com

Charleston • Columbia

ROA 397

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

Signature: 

Email: cgruber@ycrlaw.com

Date of hearing: 4/26/2021

Time needed for hearing: 1 hour

Questions about the use of this form should be directed to the Jurisdictional Commissioner. Refer to Regulations 67-204 through 67-211 and Regulations 67-601 through 67-15; as well as Regulation 67-1801. File this form and proof of service on the opposing party according to R.67-611 and R.67-212. Do not send medical reports. * Commissioners reserve the right to admit expert witnesses at hearings.

WCC Form # 58
Rev. 7/15

58

2nd AMENDED PRE-HEARING BRIEF

STATE OF SOUTH CAROLINA)
COUNTY OF COLLETON)
EVARISTO VERDUGO MORALES,)
Claimant,)
vs.)
INSULATION BY COHEN'S & SPRAYFOAM BY)
COHEN'S, LLC,)
Employer,)
BUILDERS PREMIER INSURANCE COMPANY,)
Carrier,)
Defendants.)

BEFORE THE
SOUTH CAROLINA WORKERS'
COMPENSATION COMMISSION

WCC FILE NO. 1921668

SUPPLEMENTAL NOTICE OF WITNESSES
AND WRITTEN REPORT(S)/PHYSICIAN OR
OTHER EVIDENCE TO BE INTRODUCED ON
BEHALF OF DEFENDANTS

To: South Carolina Workers' Compensation Commission

YOU ARE HEREBY NOTIFIED that the Defendants, pursuant to the provisions of the South Carolina Workers' Compensation Act and S.C. Code Ann. §1-23-330, (1985), herewith submits the following reports/physician or other evidence on behalf of the Defendants, to wit:

<u>Name Of Report/Physician or Other Evidence</u>	<u>Date of Report(s)</u>	<u>Pages</u>
1. Trident Orthopaedic Specialists Supplemental filing: Trident Orthopaedic Specialists	10/23/19-1/12/21 10/15/20-11/18/20	1-20
2. CORA Physical Therapy	12/24/20	21-22
3. Trident Health System	10/10/19-10/12/19	23-59

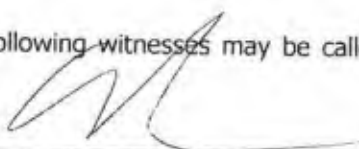
Exhibits:

A. Deposition of claimant	3/13/20	60-72
B. Decision & Order	1/11/21	73-82

YOU ARE FURTHER HEREBY NOTIFIED that you have the right of cross-examination; and, should you desire to exercise said right, you are to forthwith schedule the deposition(s) of any of the physicians or other person(s) whose reports are submitted, for the purposes of cross-examination.

YOU ARE FURTHER HEREBY NOTIFIED that the originals of the documents referred to herein, or photocopies received from said physicians/others, will be submitted at the Hearing before the South Carolina Workers' Compensation Commission, for insertion in the file of the South Carolina Workers' Compensation Commission and inclusion into evidence on behalf of the Defendant.

YOU ARE FURTHER HEREBY NOTIFIED that the following witnesses may be called on behalf of the Defendants.
Claimant



E. Courtney Gruber
Attorney for Employer/Carrier

April 15, 2021

GIBSON LAW FIRM, LLC

Attorney Don C. Gibson

Telephone: (843) 744-1887

Facsimile: (843) 744-3320

STREET ADDRESS:
5422 Rivers Avenue
North Charleston, SC 29406

WEBSITE:
www.dgibsonlaw.com

October 15, 2020

Via First Class Mail & Fax (843)764-1731

Douglas Stofko, M.D.
Attn: Custodian of Medical Records
9239 Medical Plaza Drive
Charleston, SC 29406

RE: Claimant: Evaristo Verdugo Morales v. Employer, Insulation By Cohen, LLC & Spray Foam By Cohen, LLC and its Carrier, Builders Premier Insurance Company
Date of Injury: 10/10/2019
WCC File No.: 1921668
Carrier File No.: WCV001062422

Dear Dr. Stofko:

I represent Mr. Evaristo Verdugo Morales (DOB: 10/26/1965) in the above-referenced workers compensation case. On October 10, 2019, Mr. Verdugo Morales fell unimpeded from atop a 4 ft. ladder, landing on concrete onto his back and suffered a T-12 fracture.

On October 11, 2019, you performed interval posterior spinal fusion from T11 through L1 procedure to repair his T-12 fracture. The T-11 - T-12-L-1 percutaneous fusion required the implementation of hardware; he had eight (8) screws and two (2) rods implanted.

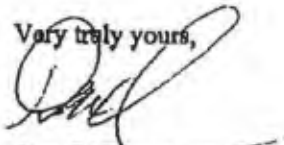
On July 22, 2020, Claimant was seen by you again for another follow-up. He presented to your office for an evaluation of neck pain, low back pain and lower extremity radiation. As noted in your medical notes, Claimant was last seen on January 8, 2020 with X-rays prior to that appointment; Claimant was sent for physical therapy. According to your medical notes, Claimant was told to return to your office if he has any new or worsening symptoms or if he has any questions or concerns. (emphasis added). Claimant presented on 7/22/2020 complaining of pain in the neck and upper back into the bilateral shoulders. He also complained of low back pain with radiation in the bilateral lower extremities into the bottom of the feet and also complained of radiating pain in the left anterior thigh. Claimant denied numbness, tingling, weakness or bowel or bladder dysfunction; however, he did complain of muscle spasms in his low back, which you noted he has not had any conservative treatment for this.

In addressing his cervical pain, you suggested starting with physical therapy for conservative treatment of his pain. Additionally, you called in a muscle relaxer, Flexeril, to his pharmacy. In addressing his lumbar radiculopathy, you recommended obtaining an MRI of the lumbar spine without contrast for further assessment of his low back pain with bilateral lower extremity radiation. Further, because he does have a radicular component to this pain with bilateral lower extremity radiation, you noted it would be likely that he be sent to physical therapy for this, as well.

A Consent Order was entered into on behalf of myself as counsel for the Claimant and attorney Courtney Gruber on behalf of the Employer/Insurance Carrier, and you were designated as Claimant's authorized treating physician. Via same Consent Order, Claimant reserved the right to pursue other body parts as part of this claim; however, the Defendants admitted compensability only for the back. Further, Defendants agreed to "provide all casually related medical treatment until such time as the Claimant has reached maximum medical improvement in the opinion of his treating doctor."

I am requesting that you respond to the enclosed medical questionnaire regarding Mr. Evaristo Verdugo Morales (DOB: 10/26/1965). If there is a charge for the completion of this medical questionnaire, please forward the invoice to my office. Should you need anything further, do not hesitate to contact me. I appreciate your consideration and attention on behalf of Mr. Evaristo Verdugo Morales.

Very truly yours,



Don C. Gibson

DCG/emd

Enclosures: as stated

cc: Ms. Courtney Gruber, Esquire (w/ enclosures)

GIBSON LAW FIRM, LLC

Attorney Don C. Gibson

Telephone: (843) 744-1887

Facsimile: (843) 744-5320

STREET ADDRESS:

5422 Rivers Avenue
North Charleston, SC 29406

WEBSITE:

www.dgibsonlaw.com

October 27, 2020

Urgent Request

Via First Class Mail & Fax (843)764-1731

Douglas Stofko, MD

Trident Orthopaedic Specialists

Attn: Missy Dixon and/or Records Custodian

9300 Medical Plaza Dr., Ste. B

Charleston, SC 29406

RE: Claimant: Evaristo Verdugo Morales

Date of Injury: 10/10/2019 ~ Carrier: Builders Premier Ins. Co.

Claim No.: WCV001062422

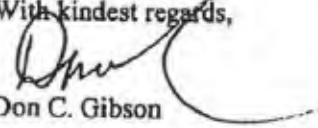
Dear Ms. Dixon:

Pursuant to my paralegal's telephone conversation today with Amanda, I am attaching correspondence which was previously sent on October 15, 2020 pertaining to a questionnaire directed to Dr. Stofko as it relates to my client, and his patient, Mr. Evaristo Verdugo Morales. Additionally, a check in the amount of \$70.00 will be mailed to your office at the direction listed above for payment of the associated fee.

Please present Dr. Stofko with the questionnaire. Once complete, please either fax or email (wc@dgibsonlaw.com) the completed questionnaire to my office. Any assistance with expediting this request would be greatly appreciated. Should you need any additional information, please do not hesitate to call my office.

Thank you for all your assistance in this matter. I look forward to hearing back from you.

With kindest regards,


Don C. Gibson

cc: Ms. Courtney Gruber, Esquire (via fax w/ enclosures)

IF YOU DO NOT RECEIVE ALL INDICATED PAGES (6) PLEASE CALL SENDER AT (843) 744-1887

THE INFORMATION CONTAINED IN THIS FACSIMILE IS ATTORNEY PRIVILEGED AND CONFIDENTIAL INFORMATION, INTENDED ONLY FOR THE USE OF THE INDIVIDUAL OR ENTITY NAMED ABOVE. IF THE READER OF THIS MESSAGE IS NOT THE INTENDED RECIPIENT, YOU ARE HEREBY NOTIFIED THAT ANY DISSEMINATION, DISTRIBUTION OR COPY OF THIS COMMUNICATION IS STRICTLY PROHIBITED. IF YOU HAVE RECEIVED THIS COMMUNICATION IN ERROR, PLEASE IMMEDIATELY NOTIFY US BY TELEPHONE AND RETURN THE ORIGINAL MESSAGE TO US AT THE ABOVE ADDRESS VIA THE U.S. POSTAL SERVICE. THANK YOU.

RE: PATIENT: EVARISTO VERDUGO MORALES
Evaristo Verdugo Morales v. Employer Insulation By Cohens, LLC & Spray Foam by Cohens,
LLC and its Carrier, Builders Premier Insurance Company
WCC File No.: 1921668
DOI: 10/10/2019
Carrier File No.: WCV001062422

1. I have been providing medical treatment to Mr. Verdugo Morales for his back related with his work injury of October 10, 2019 including lumbar spine fusion (from T-11 to L-1) surgery on October 11, 2019.

YES X NO _____

If no, please explain:

2. Mr. Evaristo Verdugo Morales, who has presented with complaints of pain in the neck and upper back into the bilateral shoulders, to a reasonable degree of medical certainty, are casually related to his October 10, 2019 accident.

AGREE _____ DISAGREE X

If disagree, please explain: *These symptoms/complaints not present @ 3 month FU. Presented 9 months S/P fall with these issues.*

3. Mr. Evaristo Verdugo Morales, who has presented with complaints of low back pain with radiation into the bilateral lower extremities into the bottom of the feet and complaints of radiating pain in the left anterior thigh since his worked related fall of October 10, 2019, to a reasonable degree of medical certainty, are causally related to his work injury?

AGREE _____ DISAGREE X

If disagree, please explain:

See #2

4. On July 22, 2020, I recommended he start physical therapy for his cervical pain and lower back pain.

YES X NO _____

If no, please explain:

UPON COMPLETION PLEASE FAX TO (843)744-5320

5. Mr. Verdugo Morales' cervical pain, to a reasonable degree of medical certainty, is casually related to his work accident.

AGREE _____ DISAGREE X

If disagree, please explain: see # 2

6. On July 22, 2020, I diagnosed him with lumbar radiculopathy and recommended he obtain an MRI of the lumbar spine without contrast for further assessment of his low back pain with bilateral lower extremity radiation.

YES X NO _____

If no, please explain:

7. Mr. Verdugo Morales' lumbar radiculopathy, to a reasonable degree of medical certainty, is casually related to his work accident.

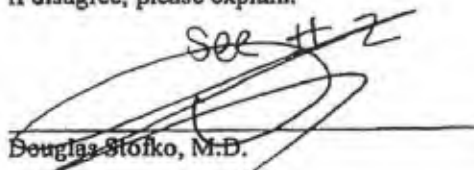
AGREE _____ DISAGREE X

If disagree, please explain:
see # 2

8. It is my opinion, to a reasonable degree of medical certainty, that Mr. Verdugo Morales' need for MRI of lumbar spine without contrast for assessment of his low back pain is casually related to his work related accident and T11-L1 percutaneous fusion which was performed for T12 fracture after fall from ladder on October 10, 2019?

AGREE _____ DISAGREE X

If disagree, please explain:
see # 2



Douglas Stofko, M.D.

11/18/2020
Date

UPON COMPLETION PLEASE FAX TO (843)744-5320

STATE OF SOUTH CAROLINA
BEFORE THE SOUTH CAROLINA WORKERS' COMPENSATION COMMISSION
WCC FILE NUMBER 1921668

EVARISTO VERDUGO MORALES
Employee,

-versus-

CERTIFICATE OF SERVICE

INSULATION BY COHEN'S & SPRAYFOAM BY COHEN'S, LLC
Employer,

and

BUILDERS PREMIER INSURANCE COMPANY
Carrier.

I HEREBY CERTIFY that on April 15, 2021 I uploaded a copy of the **Amended Pre-Hearing Brief and Supplemental Notice of Witnesses only** to:

S.C. Workers' Compensation Commission
Honorable Aisha Taylor
P. O. Box 1715
Columbia, SC 29202-1715

VIA WCC eCase Upload

And

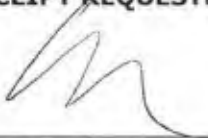
I e-mailed a copy of the **Amended Pre-Hearing Brief, Supplemental Notice of Witnesses/Evidence and all APA Submissions** to:

Gibson Law Firm, LLC
Don C. Gibson, Esquire
P. O. Box 60669
North Charleston, SC 29419-0669

McDaniel Law Firm
Preston F. McDaniel, Esquire
1315 Elmwood Avenue
Columbia, SC 29201

VIA FIRST CLASS MAIL

VIA CERTIFIED MAIL RETURN RECEIPT REQUESTED



E. Courtney Gruber

McDANIEL LAW FIRM
ATTORNEYS AND COUNSELORS AT LAW
1315 ELMWOOD AVENUE
COLUMBIA, SOUTH CAROLINA 29201

Proudly representing injured workers
for over 35 years.

Preston F. McDaniel

Matthew Robertson

Telephone (803) 771-7211

Facsimile (803) 252-0709

December 15, 2021

VIA EMAIL - rsmith@wcc.sc.gov

& USMAIL

Commissioner Aisha Taylor
SC Workers Compensation Commission
Post Office Box 1715
Columbia, South Carolina 29202

IMMEDIATE ATTENTION
REQUESTED PLEASE ON
ON THE RECORD
CONFERENCES REQUESTED

**RE: Evaristo Verdugo Morales vs. Insulation by Cohens,
LLC & Spray Foam by Cohens, LLC
WCC File No. 1921668
Request to take Depositions**

Dear Commissioner Taylor:

It has now been almost nine months since the hearing, and we have not received either a decision on our Motion to be allowed to take the deposition of the PA made on the Record at the hearing when the PA did not appear pursuant to the subpoena and, subject to that Ruling, a Ruling on the matters at issues before you at the hearing.

Since it has been almost nine months since the hearing, in fairness to all parties, I would propose the following:

1. That we have an on the Record hearing concerning our Motion to be allowed to take the depositions of the PA and Dr. Stofko; and
2. Subsequent to a decision on the Motion, and once the Record is finalized that we hold another on the Record conference with you so that the parties may go over their positions and summarize the evidence already submitted and any new evidence that is before you for consideration. We of course at that subsequent hearing on the Record would have our client available for any update evidence occurring since the hearing and/or any examination requested by you, Ms. Gruber, or offered by us.

Commissioner Aisha Taylor

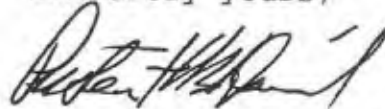
December 15, 2021

Page 2

I know that Ms. Gruber has written you numerous times concerning whether or not you have reached a decision, however we have reframed from doing that and I believe that the above course of action is what would be fair to all parties concerned and limit the issues created by this situation. I am absolutely convinced that much of this is due to the entire Covid situation, which has resulted in tremendous delay and backlog in many cases that we have.

I look forward to hearing from you and I do not mean to put a time limit on a response, but I hope that I can hear from you within 14 days of the date of this request. By copy of this letter sent via email, I am notifying Ms. Gruber of the submission of this proposal, on how to move forward in this case.

Sincerely yours,



Preston F. McDaniel

PFM/rmt

cc: E. Courtney Gruber, Esq. (via email)
Don Gibson, Esq. (via email)

Preston F. McDaniel

From: Taylor, Aisha <ataylor@wcc.sc.gov>
Sent: Wednesday, February 23, 2022 4:06 PM
To: 'CGruber@ycrlaw.com'; Preston F. McDaniel
Cc: Smith, Renee
Subject: ORDER INSTRUCTIONS: Evaristo Verdugo Morales v. Insulation by Cohen, LLC WCC File No.: 1921668

Importance: High

Evaristo Verdugo Morales v. Insulation by Cohen, LLC WCC File No.: 1921668

Please note these are general Order Instructions/Directives only. The drafting attorney is instructed to compose proposed Findings of Fact and Conclusions of Law consistent with and in support of the directives below. Please cite the APA Submissions, Deposition Transcripts and/or the Hearing Transcript where appropriate. Also, please correct any scrivener's errors.

Please let me know if there are any questions.

1. Defendants' Motion to Compel the vocational evaluation of the Claimant is denied. *See Tedder v. Darlington County Comm. Action Ctr.*
2. To the extent that Claimant is requesting compensability or additional medical treatment for his shoulders, neck, or lumbar spine, I find those issue were adjudicated by way of Commissioner James' Decision and Order dated January 11, 2021 and are res judicata. Specifically, in Finding of Fact # 20, Commissioner James found "Claimant has failed to meet his burden of proof to show that the shoulder, neck, and lumbar spine were injured or that those injuries were causally related to the accident." This Order was unappealed and is the law of the case.
3. Notwithstanding the finding of res judicata above, I find the medical opinion of Dr. Stofko unequivocally states Claimant's complaints of pain in his neck, shoulders, lumbar spine, and lumbar radiculopathy are not causally related to his October 10, 2019 work injury. (Defendants APAs PP. 19-19).
4. Claimant's oral Motion to Postpone or Leave the Record Open to take the deposition of Alana Cole, PA is denied. Although PA Cole did see the Claimant for follow-up medical appointments after his surgery, PA Cole's last visit with the Claimant was on July 22, 2020 and those records were properly before Commissioner James at the September 13, 2020 hearing on compensability for which there is already an unappealed Order of the Commission. Although PA Cole did sign a Form 14-B on January 12, 2021, I give this Form 14B little to no weight when viewing the evidence

as a whole as this is a Commission Form, which requires the signature of a physician, as opposed to a PA. In addition, PA Cole's supervising physician, Dr. Stofko, completed a medical questionnaire and an identical impairment rating was issued by CORA Physical Therapy in their report.

5. Claimant did send a Form 27 Subpoena to PA Cole for her attendance at the hearing; however, counsel did not make personal service upon PA Cole and could not confirm that PA Cole resided within the 50 mile requirement to enforce the subpoena.
6. I find Claimant is at maximum medical improvement for his work-related injury to his thoracic spine as of January 8, 2020, when he was released by the authorized treating physician and cleared to return to work without restriction. Although Claimant continued to treat with PA Cole after this date, it was for other alleged injuries not related to his work injury, per prior Order of the Commission.
7. I find Claimant has sustained 20% permanent partial disability to his back as a result of his injury to his thoracic spine, specifically, T-12 fracture. This finding is based on the preponderance of the evidence as a whole including the permanent impairment rating issued by CORA Physical therapy and Dr. Stofko's medical opinion that Claimant's additional complaints to the cervical spine and the lumbar spine are not causally related to his work injury, and Claimant's testimony regarding overall disability resulting from his injury.
8. Claimant is entitled to receipt of his award in a lump-sum.
9. Claimant is not entitled to any additional medical treatment as none has been recommended as causally related and tending to lessen Claimant's period of disability.
10. Defendants are entitled to terminate temporary total disability benefits and are entitled to a credit for overpayment of all benefits beyond maximum medical improvement.
11. Claimant has an AWW of \$1,302.27, which yields a compensation rate of \$845.74.
12. No hearing costs are assessed.

INSTRUCTIONS: Order to be written by Attorney Courtney Gruber within 45 days of receipt of these Order Instructions. Please let our office know if you have difficulty obtaining a transcript or cannot complete the order within this timeframe. Draft the Order consistent with the above substance of the preceding Order Instructions; however, you may add additional Findings of Fact consistent with the above ruling. The Order should also include biographical information, information regarding the Claimant's work history and previous medical history, if relevant to the case.

If you need a transcript, order it *immediately* from the court reporter, or contact my assistant, Reneé Smith, via e-mail at rgsmith@wcc.sc.gov. Provide a copy of the proposed Order to opposing counsel or *pro se* claimant before or at the same time one is submitted to the Commission. When submitting the proposed Order, please e-mail it to rgsmith@wcc.sc.gov, in Word format.

Matters To Include In The Order:

1. APA Submissions
2. Stipulations
3. Statement of the Case (contentions of the parties, stated concisely)
4. Evidence of the Case (synopsis of the evidence, including testimony and medical reports)
5. Findings of Fact – numbered (Do NOT delete any of the above findings, however, the prevailing party may add to support the decision, except regarding credibility, unless I have instructed you to)
6. Conclusions of Law (cite applicable statutory sections and case law)
7. Award

Do not address credibility in the Order, unless it has been addressed in the preceding Order Notes.

CONFIDENTIAL & PRIVILEGED

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McDANIEL LAW FIRM
ATTORNEYS AND COUNSELORS AT LAW
1315 ELMWOOD AVENUE
COLUMBIA, SOUTH CAROLINA 29201

Proudly representing injured workers
for over 35 years.

Preston F. McDaniel

Matthew Robertson

Telephone (803) 771-7211

Facsimile (803) 252-0709

March 24, 2022

VIA EMAIL - rsmith@wcc.sc.gov

AND US MAIL

Commissioner Aisha Taylor
SC Workers Compensation Commission
Post Office Box 1715
Columbia, South Carolina 29202

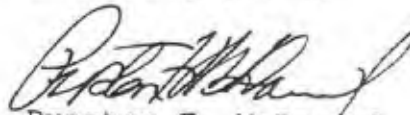
RE: Evaristo Verdugo Morales vs. Insulation by Cohens,
LLC & Spray Foam by Cohens, LLC
WCC File No. 1921668

Dear Commissioner Taylor:

Please find attached Plaintiff's Request for Reconsideration in the above-referenced matter along with the required filing fee. By copy of this letter, I am notifying and serving counsel for the Defendants, as well as forwarding a copy to the Judicial Director.

I hope this is sufficient for filing, and should you require anything additional, please let me know.

Sincerely yours,



Preston F. McDaniel

PFM/kth
Enclosure

cc: Don Gibson, Esquire (via email and US Mail)
Amy Bracy, Judicial Director (via email and US Mail)
E. Courtney Gruber, Attorney at Law (via email and US Mail)

STATE OF SOUTH CAROLINA)
COUNTY OF CHARLESTON)
EVARISTO VERDUGO MORALES,)
Claimant/Employee,)
v.)
INSULATION BY COHENS, LLC)
& SPRAY FOAM BY COHENS, LLC,)
as Employer,)
BUILDERS PREMIER INSURANCE)
COMPANY,)
as Insurance Carrier,)
Defendants.)

BEFORE THE SOUTH CAROLINA
WORKERS' COMPENSATION COMMISSION
WCC FILE NO.: 1921668

CLAIMANT'S
REQUEST FOR RECONSIDERATION

TO: COMMISSIONER AISHA TAYLOR, SOUTH CAROLINA WORKERS'
COMPENSATION COMMISSION AND E. COURTNEY GRUBER, ATTORNEY
AT LAW, ATTORNEY FOR THE DEFENDANTS:

The Claimant would respectfully request reconsideration of the Order of the Commissioner issued on and filed March 22, 2022, pursuant to Commission Regulations concerning reconsideration. The Claimant would respectfully submit that:

1. This is an accepted case and the Claimant both in response to the Form 21 and in his Form 50 requested a determination that he was entitled to an Award for total and permanent disability both for wage loss under SC Code §42-9-10 and for having lost 50% or more of the functional use of his back to do work requiring the use of the back under SC Code §42-

9-30(21) and/or for additional medical care. In this case, under the facts the Defendants should not be granted a credit. In the case of Sanders v. Meadwestvaco Corp., 371 SC 284, 638 S.E.2d 66 (SC App. 2006), the Court of Appeals affirmed the granting of a credit to the Defendants under the evidence presented for two reasons and on two bases which do not apply here and the difference in the evidentiary serves as basis as to why a credit should not be given and your decision should be reconsidered. First, in Sanders it was stipulated that the Claimant had reached maximum medical improvement. Because of this was a stipulated fact the Court said it was improper to only give a credit for temporary total paid after the date of the hearing. To the contrary, in this case the Claimant was specifically requesting medical care for the cervical spine, lumbar spine and the shoulder and for further medical evaluation concerning the screws and rods in his back and there was testimony and evidence presented that he needed further medical care. Thus the issue of maximum medical improvement could not be determined to apply until at least the day of the hearing. Second in Sanders, the insurance carrier and employer were entitled to a credit because the delay in holding a hearing and thus a decision based on the evidence presented, was at the fault of both parties, both parties having asked for a continuance. The Hearing Commissioner had found that the Claimant should not be penalized due to the delay in holding

a hearing and having a decision entered but the Court reversed, again because the delay in part was caused by the Claimant. This does not apply in this case because the delay was not in holding the hearing but was in having a decision rendered almost a year after the date of the hearing. Thus under the reasoning of the Court, the Claimant should not be penalized for the delay in the decision being entered in this matter. Our appellate law is ripe with decisions holding, in reference to the payment of disability benefits during the pendency of an appeal, that the employer and its carrier are not entitled to a credit because of the social policy to provide swift and sure benefits to the injured worker and that the burden of any overpayment should be placed on the backs of the insurance industry, not the injured worker. The delay in a decision in this matter was at no fault of the Claimant and he should not be penalized in whatever Award this Commission determines to which he should be entitled. Commissioner, you should grant reconsideration on the credit issue.

2. The Claimant made a claim for total and permanent disability on the basis of both wage loss under SC Code §42-9-10(A) and on the basis of having lost 50% or more of the functional use of his back to do work requiring the use of the back. No where in the Findings of Fact nor in the Conclusions of Law, nor in the Notes for decision is the issue of whether or

not the Claimant, based on his age, education, background and experience, and the physical facts of the injury, is entitled to an Award for total loss of earning capacity or permanent partial loss of earning capacity under the facts of the case. This Commission is duty bound to make Findings of Fact and Conclusions of Law on every essential issue presented to the Commission for decision. The objective functional capacity evaluation evidence; the expert vocational evaluation evidence; the testimony of the Claimant; and the medical opinion evidence all established that the Claimant has had a total loss of earning capacity. As the Supreme Court has held, the inability to do common labor for one that is not qualified for anything otherwise, is entitled to an award for total and permanent disability. (Citations omitted.) We would ask you to set forth any evidence in the Record that Mr. Morales, who does not speak English, was ever qualified for anything other than common labor. You must set forth a review of this evidence on this essential issue and after review you should grant reconsideration of your Award and make an Award based on total wage loss.

Next, the Claimant requested an Award for total and permanent disability for having lost 50% or more of the functional use of his back to do work requiring the use of this back. Thus one of the "essential" issues for decision before

you was the functional loss of use, not impairment and not disability, to use the Claimant's back to do work requiring the use of the back and Clemmons v. Lowes Home Improvement is the last decision on the issue. This Commission is duty bound to apply the law and just like in Clemmons the only testimony and evidence presented concerning the essential issue before the Commission for decision was the Claimant's testimony that he had lost more than 50% of the use of his back to do work requiring the use of his back. The opinions of two (2) qualified medical doctors stated that in their opinion he had lost 50% or more of the functional use of his back to do work requiring the use of his back; and an objective functional capacity evaluation actually ordered by the treating physician and which was provided to him established that this man from a physical standpoint was qualified for no more than light duty work. The vocational evidence established that vocationally he was physically disqualified for more than 50% of the jobs in the economy. Like Clemmons, there is absolutely no testimony or evidence concerning the essential issue before you for decision, which is the loss of use, not impairment and not disability; under SC Code §42-9-30(21) the issue is one, and one issue only, the loss of use to use the body part involved to do work requiring the use of that body part, organ or member; in this case the back. Under the Findings of Fact and Conclusions of

Law and under the Notes for decision the issue of loss of use and the testimony and evidence presented concerning "loss of use" are not even referred to. The Claimant would respectfully request reconsideration of the evidence submitted and your decision made in this case.

3. Commissioner you should grant reconsideration or at least hold a hearing to hear arguments on multiple issues, procedural in nature, which denied the Claimant substantive due process. Before the hearing was held the Claimant requested a Subpoena be issued by the Commission pursuant to its authority under SC Code §42-3-140 on which no decision was made. There is actually nothing in the Record establishing why that request was not granted. Issuance of a Commission Subpoena, of course, is discretionary but a Commissioner's discretion cannot be based on surmise, speculation or innuendo or for a capricious or arbitrary reason. The reason for the request for a Commission Subpoena not being granted should be set out. Further, in that same request for a Commission Subpoena, Counsel advised that Counsel was going to issue a Subpoena for the attendance of the Physician Assistant at the hearing which was done. The Physician Assistant did not appear. When the Physician Assistant did not appear at the hearing you will recall appropriate procedure was followed to ensure the Physician's Assistant had not appeared; after which the Claimant requested as he had in

the letter requesting the Commission to issue a Commission Subpoena requiring the attendance of the Physician's Assistant for purposes of cross-examination and cited again the case of Morgan v. JPS. That case specifically dealt with the right of a claimant to conduct a deposition and specifically cited the fact that the Claimant is entitled to substantive due process and an opportunity to present his case and to have the Record left open to present that evidence. The US Supreme Court has held that where a request is made in an administrative proceeding that a Subpoena be issued by the administrative body so that the litigant may exercise his right of cross-examination that is a denial of due process to submit a written report of that expert into evidence. Commissioner, your entire decision was based on the written records of Physician Assistant Cole and the Form 14B that it was and you agreed that she completed; and you must in all fairness grant reconsideration or at least a hearing so that these points may be argued.

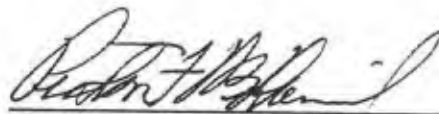
4. A Motion to leave the Record open for the deposition of Physician Assistant Cole for the purposes of cross-examination was not decided at the hearing as the Order implies but was taken under advisement. The first notice that the Motion had been denied, and again the Claimant would reiterate the first notice that he had that the Motion had been denied, was approximately a year after the hearing when your Notes for

decision were issued. This dilatory delay and lack of decision must be reconsidered as it is a denial of due process due to allowing unreasonable delay to occur and for the Claimant to not be granted that opportunity.

5. Commissioner, the Claimant would request reconsideration for all the reasons set forth in the email sent to your office on March 21st, which is attached hereto and incorporated herein by reference.

WHEREFORE, the Claimant would respectfully request reconsideration or that the Order be withdrawn and a hearing be held to argue these issues before you. In fairness to both parties due to the delay, the parties should be granted a hearing to argue the law and facts or a de novo hearing should be granted.

Respectfully submitted,



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Attorneys for the Claimant

March 24, 2022

Kim Hinkle

From: Preston F. McDaniel
Sent: Tuesday, March 22, 2022 10:40 AM
To: Gruber, Courtney; Taylor, Aisha
Cc: Smith, Renee; dgibson@dgibsonlaw.com; Don Gibson (Law2@dgibsonlaw.com); Kim Hinkle
Subject: RE: ORDER INSTRUCTIONS: Evaristo Verdugo Morales v. Insulation by Cohen, LLC WCC File No.: 1921668

Commissioner Taylor,

By way of brief reply to Ms. Gruber's reply to my email, I agree whole heartedly that she followed your instructions to the tee. However, in bullet point fashion, I think the following items must be addressed.

1. There should be reference to all the evidence presented from both sides, even though you chose to rely on the evidence submitted by the defense. I know you reviewed it but I think it should be included.
2. In reference to the credit, there must be an explanation of the delay between the date of the hearing on the 21 and the date of the decision, which the Courts have held as determinative and definitive as to whether or not a credit is due.
3. An accurate and complete procedural history and when we were notified of your decision on our Motion.
4. A statement of all of the essential, "issues" presented to you for decision.

Most respectfully submitted.

Sincerely,

Preston F McDaniel
Attorney at Law

From: Gruber, Courtney <CGruber@ycrlaw.com>
Sent: Monday, March 21, 2022 1:19 PM
To: Preston F. McDaniel <preston@pfmcdlaw.com>; Taylor, Aisha <ataylor@wcc.sc.gov>
Cc: Smith, Renee <rgsmith@wcc.sc.gov>; dgibson@dgibsonlaw.com; Don Gibson (Law2@dgibsonlaw.com) <law2@dgibsonlaw.com>; Kim Hinkle <kim@pfmcdlaw.com>
Subject: RE: ORDER INSTRUCTIONS: Evaristo Verdugo Morales v. Insulation by Cohen, LLC WCC File No.: 1921668

Commissioner Taylor-

I will certainly add Don Gibson as attorney of record- I apologize for that oversight which was wholly unintentional on my part- As to the rest of Atty McDaniels objections, I would point out that I followed your instructions to the letter- I would also point out that Atty McDaniel and I obviously have vastly different writing styles- I drafted this proposed Order as I always do, with an eye towards succinctly and clearly addressing salient points and avoiding extraneous ones, which I find to often "muddy the water." That being said, I will be happy to make any changes you direct-

Courtney

E. Courtney Gruber
Partner
(843) 720 5410
cgruber@ycrlaw.com





CLEMENT RIVERS, LLP

25 Calhoun Street • Suite 400 • Charleston, SC 29401
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From: Preston F. McDaniel <preston@pfmcdlaw.com>
Sent: Monday, March 21, 2022 12:19 PM
To: Taylor, Aisha <ataylor@wcc.sc.gov>; Gruber, Courtney <CGruber@ycrlaw.com>
Cc: Smith, Renee <rgsmith@wcc.sc.gov>; dgibson@dgibsonlaw.com; Don Gibson (Law2@dgibsonlaw.com) <law2@dgibsonlaw.com>; Kim Hinkle <kim@pfmcdlaw.com>
Subject: RE: ORDER INSTRUCTIONS: Evaristo Verdugo Morales v. Insulation by Cohen, LLC WCC File No.: 1921668

Dear Commissioner Taylor,

Thank you for the time due to my family emergency to be able to respond or go over the proposed Order submitted by Ms. Gruber. While the Order is basically in accordance with your Findings of Fact, there are numerous corrections, additions and/or changes that need to be made in the Order to properly reflect the pre-hearing and procedural history, the Hearing, the evidence and the aftermath, and your decisions made at the Hearing versus at Chambers.

First, on the cover page, my co-counsel Mr. Don Gibson is not listed as appearing on behalf of the claimant that day, that needs to be added.

In the **STATEMENT OF THE CASE**, it is inaccurate in that you did not deny our Motion for the deposition at the Hearing as the Statement of the Case appears to state, and the Statement of the Case needs to be amended to reflect that you took our Motion to take the deposition of PA Cole under advisement and the first notice er had that it was denied was as part of your order instructions issued on February 23, 2022. In addition, the statement should reflect that we made numerous inquires following the Hearing concerning a decision concerning our request to take the deposition of PA Cole for her failure to appear at the Hearing, and also I believe it would be proper to amend the Statement of the Case to properly reflect the position taken by the defendants at the hearing in reference to PA Cole. I do not remember any objection being filed by the defendants that PA Cole was not properly served, nor do I remember any position stated by the defendants on the Record challenging whether or not PA Cole resided within 50 miles of the hearing site. Actually, neither defense counsel nor we can take a position for PA Cole and proper service would only come into play if you Ruled her in for contempt.

Also, and very importantly, your note concerning PA Cole and the Record being left open for the deposition is addressed under your Notes for Decision #4 and #5 and in your Order under Finding of Fact #13. First, if you will compare your note #4 and #5 to Finding of Fact #13, there is absolutely no mention in Finding of Fact #13 or your factual findings in Note 5 in reference to personal service and the 50 mile requirement. Also, in your Conclusions of Law, there are no Conclusions of Law in reference to the Code Sections that apply to subpoena's and the Commission, and/or Case Law and Rules in reference to Morgan v JPS or any other Case Law referencing the due process right of a claimant to present evidence and to have the Record left open to present that evidence where it is in existence at the time of the Hearing. Morgan dealt specifically with leaving the Record open for a deposition.

Next, under the **STATEMENT OF THE CASE** there is absolutely no reference to the numerous requests for decision entered by the defendants between the date of the Hearing and the date of your notes, which notes were issued on February 23, 2022. It must be referenced in the Statement of the Case as to when your decision was made or at least when your review was completed and you advised the parties of your decision.

Next, in reference to the Statement of the Case, you will recall that there was a substantial issue as to whether or not this matter should have been heard at all because of the mandatory requirement for mediation in an accepted case. The claimant was alleging total and permanent disability and had entered into a voluntary Consent Order which the defendants submitted and then withdrew before your signature. Our response to the Form 21 alleges that Mr. Morales was entitled to an Award for total and permanent disability due to his injuries. Either in the Findings of Fact or Conclusion of Law there is absolutely no reference to the mandatory requirement for mediation in that context.

Also, Commissioner as you know before I was informally involved Mr. Gibson was suffering from Covid causing major heart problems and I had contacted the Commission without even knowing what cases were on the docket, but to which the Commission kindly granted us assistance and after that I filed a formal notice by association. It is after that that the defendants withdrew from the agreement to mediate, and asked that you not sign the Consent Order that had been presented to you and was on your desk at the time that they withdrew from mediation. Within hours of the request to withdraw and set for hearing being made, this matter was reset for Hearing while Mr. Gibson was still suffering from severe heart problems caused by Covid. We requested that it be moved and it took over a week before we could get a response to it being moved. You kindly granted that request and moved it to a later date.

Finally, in the Statement of the Case, which I believe is very important to a review of the Record, is the fact that the defendants filed, not only a pre-hearing brief, but filed an amended pre-hearing brief, and then filed a second amended pre-hearing brief. The defendants were the moving party having asked for the Hearing based on their 21, making their pre-hearing brief and all APA submissions due 15 days, not mailed, but noticed to the claimant 15 days ahead of the Hearing. The second amended pre-hearing brief was not served by mail until April 15th, 11 days before the Hearing, and Commissioner most respectfully., the Regulation requires notice and I mean notice, not mailing at least 15 days before the Hearing, but even the mailing of this document was not until 11 days before the Hearing. In and not until the Second Amended Pre-Hearing Brief is when the defendants submitted both Mr. Gibson's letters and the questionnaire relied on by you in making your decision in reference to Dr. Sofko. Of course, none of this is addressed in the Findings of Fact and Conclusions of Law.

Next, as to the section entitled, EVIDENCE OF THE CASE, while there is reference to the note of Alana Cole on January 8, 2020 indicating a need and recommendation for physical therapy, but also a return to work without restrictions, nowhere in the Statement of the Case, nor the Findings of Fact is the Functional Capacity Evaluation performed by Grace Physical Therapy at the referral of Dr. Douglas Sofko, MD and paid for by insurer Builders Mutual/Bardavon, which was sent to Dr. Sofko and which found that he was only qualified for light duty work and noting specifically that "return to prior work installing insulation is not recommended given the positional requirements for access to attics, lofts or crawl ways, need for frequent ladder management, dynamic balance requirements and potential material handling requirements. Concern for safety are present with material handling loads greater than those identified/mentioned". Of course, there is also no reference to any of the evidence actually presented by the claimant and there is only 1 reference to the fact that the fusion was from the T11 through and including the L1, which is the first level of the lumbar spine section of the back. There is also no recordation in the Evidence Of The Case that the claimant has retained hardware involving rods and 4 screws in his thoracic spine or the pictures that were presented to you.

Next, other than mentioning the names of the evaluating doctors, there is no reference to their opinions, nor is there any reference to the opinion of the claimant concerning the loss of use of his back to do work requiring the use of his back.

Finally Commissioner, in the Statement of the Evidence, there is no reference to the fact that was brought out at hearing, and one of the reasons we wanted to take the deposition of Ms. Alana Cole, that there was no interpreter provided at any of the appointments prior to the last appointment with Alana Cole, and you will recall that his 12 and 14 year old bilingual relatives were used by the doctor's office to interpret what he was reporting.

In all fairness to the claimant, based on your Finding that he did not report his problems, it needs to be clearly set out that he is non-English speaking, there was an interpreter at the hearing and the fact that the report of whatever problems he was having was being translated by and through (after the hospital) a 12 and 14 year old child.

Commissioner Taylor, also in reference to the subpoena, you will recall that in my April 8th letter to you, we did not know the date and location of the hearing, but at that time I requested that the Commission issue a Commission subpoena for Ms. Cole to appear and testify, I never received a decision on that request and I believe that it would be required for you to make Findings of Fact and also Conclusions of Law noting the receipt of that request for a Commission subpoena, and a ruling on it not being granted. In that same letter I notified the Commission that baring a decision to issue a subpoena I was intending to issue a subpoena for Ms. Cole to attend the Hearing. Also, in that same letter I put the Commission on notice that it was our intent to ask that the Record be left open for the purposes of cross-examination, to exercise our due process rights for cross-examining her and cited the case of Morgan v JPS.

Finally, in neither the Evidence Presented nor in the Statement of the Case sections of the Order, is there any reference to our position, wherein we requested an Award for total and permanent disability either under §42-9-10 for wage loss, or under §42-9-30(21) for having loss 50% or more of the functional use of his back to do work requiring the use of his back. The Act under §42-9-5 and Case Law requires you to make detailed Findings of Fact and Conclusions of Law on every, "essential issue" before you heard for decision. There is absolutely no Findings of Fact or Conclusions of Law concerning our request for a wage loss Award.

Next, as to your Findings of Fact:

First, Finding of Fact # 3 needs to be amended as you will actually find in the "Stipulations", and it is agreed, that the claimant sustained injury to his back; no where is it limited as to what was injured being only the thoracic spine. While I do not understand, but I acknowledge that your ruling is that while the fusion involved the L1 first vertebrae of the lumbar spine, as to the lumbar spine and the cervical spine and the shoulders, you are not ordering any further medical care for any of those body parts. No one contest that he originally injured and was provided treatment for all of his back, including his neck, thoracic spine and lumbar spine. Even the defendants APA submissions contain reference to the evaluations that were performed because of his problems when he fell from the ladder involving diagnostic tests, including diagnostic tests of the cervical spine, thoracic spine, lumbar spine and head. There is NO evidence those body parts were not AFFECTED by the injury.

In reference to Findings of Fact 5,6,7 and 9,10 and 11 those are basically in accordance with your order instructions.

However, Findings of Fact 9,10 and 11 deal with, and first #9 is based on, the questionnaire that was placed into evidence through the second amended pre-hearing brief filed 11 days before the hearing.

As to #10, while it properly reflects your notes for decision, in fairness to the claimant, if you are going to base this on Commissioner James order, which you will recall we discussed the difference between her order instructions and the written order that was submitted and signed, importantly according to her order, the only issue before Commissioner James for decision was the claimant's request for additional medical care or medical care in reference to the lumbar and cervical spine and the shoulder. Commissioner James in reference to that request specifically based her decision on the fact that at that time no medical evidence was presented stated to a reasonable degree of medical certainty. In fairness to the claimant, you should also site to Finding of Fact #14, and you should quote in your order her Finding of Fact #15, "that the Commission cannot order medical treatment (10) weeks beyond the accident date without an opinion to a reasonable degree of medical certainty" (emphasis added). Also, in reference to all of those Findings of Fact concerning that issue, while it was clear that the defendants position that that issue was already decided, if the defendants argued the legal concepts of Res judicata and Law the Case, those references from the transcript should be clearly set out.

Next, as to Findings of Fact #12, there is no reference to your complete note in which you site the case of Tedder v Darlington County Commission Action Center in support of that decision. That was your note, that was your finding and that should be set out, although I do not remember Ms. Gruber arguing that case to you and of course as to all Findings of Fact and legal concepts, your decision as the fact-finder must be limited to the arguments and positions argued to you by counsel for the parties and the facts presented to you in the evidence and as part of the Record.

Next and very importantly, as to Findings of Fact #13, we reiterate our objections made to other Findings of Facts in reference to an opinion from Dr. Sofko, but I do not remember these specific objections and factual notations being argued to you as justification for denying our Motion to Postpone and I believe that there should be citations to the Record in reference to any factual statements made as part of the Findings of Fact, in addition to those you cite in reference to various APA submissions. Again, you will recall that Dr. Sofko's completion of the questionnaire was only submitted in the second amended pre-hearing brief. There MUST be included a ruling on its admissibility.

Next, in reference to Finding of Fact #14, while it is in accordance with your notes basically, it is contradictory to your Finding of Fact #13 in that in #13 you state that you give little or no weight to the Form 14B completed by PA Cole, but yet in Finding of Fact #14 you state that the rating of 5% impairment to the, "back" is supported by the 14B as well as the impairment rating issued by Cora Physical Therapy. Commissioner, as I know you are aware per the AMA Guides, a physical therapist may conduct an impairment evaluation, but unless it is supported by medical opinion evidence, I don't believe it is considered valid by the AMA Guides. So, if you take away the Form 14B there is no medical opinion evidence concerning a 5% impairment to the whole person or the back. The next error that needs to be corrected in #14 is the fact that the impairment evaluation that was assigned was not 5% impairment to the back, it was a 5% impairment to the whole person. As you know, in all the Supreme Court decisions and specifically in the decision of Clemmons v Lowes Home Improvement, the Courts recognized and the AMA Guides provide a conversion of a whole person impairment to the spine. Under the conversion table found at page 427 of the 5th Edition, a 5% whole person thoracic spine rating converts to 25% to the thoracic spine, as a spinal rating. That Finding of Fact needs to be corrected as in reference to an Award to the back, at a minimum according to Case Law which this Commission is required to apply, the lowest Award even on impairment not loss of use would be 25%.

Also, in reference to Finding of Fact #15, that needs to be corrected as agreed under the stipulations and otherwise the injury was to the back. It is also redundant to other findings and unnecessary.

As to Finding of Fact #16, here again this is based on the questionnaire completed by Dr. Sofko that was part of the second amended pre-hearing brief submitted 11 days before the Hearing.

As to Finding of Fact #17, it is in accordance with your decision to Award 20% partial loss of disability (of course the actual issue before you is loss of use). However, it is based upon the impairment rating from Cora, which again is not supported by any medical opinion, and part of the finding references, "the claimants testimony regarding overall disability resulting from his injury", which is contrary to his testimony. It is actually not a Finding of Fact nor is it based on the evidence submitted. It is not in accord with the claimants testimony in reference to the problems with his back and loss of use of his back to do work requiring the use of his back.

Also, importantly to Finding of Fact #17 and in actuality the entire order, there is absolutely no reference to his retained hardware, including the 4 screws and plates that are in his back. You will recall that at the Hearing, and I believe this should be included in a Finding of Fact that we pointed out that the screws are actually backing out and he has knots in his back over the screwheads.

While in accordance with you notes, I object to and believe it is improper to include a Finding of Fact, and I do not believe it is a proper basis under Finding of Fact #18 for discounting the opinions of doctors based on "independent medical evaluating" physicians versus "authorized treating" physicians. In fact, the exact is true. As you know as a Commissioner, the insurance industry gets to choose the medical providers, in other words, the authorized treating physicians are the providers that are chosen by the insurance industry. If you are going to make that finding you need to note the inherent bias that involves, and also you need to set out a factual basis for that, otherwise the Finding of Fact is the subject of being arbitrary and capricious.

As to Finding of Fact #20, here again I believe there needs to be a notation that he has pedicle screws and rods in his back, as noted on the Form 14B. It also needs to be noted that Alana Cole PA in the Form 14B recommended as part of medical care that the claimant quoting from the Form 14B needs as a result of the injury for an additional time that will tend to lessen the period of disability or maintain the current level of function:

"MRI lumbar spine ordered for assessment". I know that smacks in the face of the defendants position and your decision based on the previous order denying further medical care. But, if you are going to base your decision on the questionnaire it needs to be included that Dr. Sofko had responded in the questionnaire that he had provided medical treatment for the work-related accident of October 10, 2019, "including lumbar spine fusion" and recommended that he start physical therapy for the lower back.

In reference to Finding of Fact #21, Commissioner as you know under Case Law and in the Statutes, in addition to finding maximum medical improvement, there must be a finding that the disability to perform work has ended; and that a job within his residual capacity has been offered to the claimant; and that the defendants have the burden of proof to prove that the disability has ended; and there must be a finding based on evidence in the Record to support that. As to a credit, the evidence based on the authorized treating physicians FCE alone is that the claimant is restricted to light duty work and there is no evidence in the Record that he has been offered or procured any job within his residual capacity by the employer or the insurance carrier. This is needed if the defendants are going to be entitled to any credit prior to the time of your decision in review of the evidence submitted.

Finally as noted above, we requested a decision for total and permanent disability based on both wage loss under §42-9-10 and an Award for total and permanent disability for having loss 50% or more of the use of his back to do work requiring the use of his back under §42-9-30(21). There is absolutely no Findings of Fact in reference to loss of earning capacity based on under the Supreme Court decisions or based on the evidence. There must be Findings of Fact on both of those issues; disability or in other words the loss of earning capacity; and on the other essential issue for decision, functional loss use of the back to do work requiring the use of the back. There are neither in the notes or in the order.

Next under Conclusions of Law, there is no reference to the Regulations in reference to stop payment, nor is there any reference to §42-9-10(A) under which all weekly compensation benefits are paid, nor is there any reference to SC Code §42-1-120 which defines disability, or in other words the loss of wage earning capacity. There is no reference to the Commissions Regulations concerning mandatory mediation. There is no reference to subsection (21) of §42-9-30 and the issue of loss of use. There is no reference or Conclusions of Law set out as to the denial of our Motion to leave the Record open. There is no reference to total loss of earning capacity under §42-9-10 or any of the Case Law concerning wage loss. There is no reference to the Case Law that requires the defendants to prove that the disability has ended under §42-1-120 or their requirement to procure or offer him a job within his residual capacity under §42-9-190.

Commissioner, also most respectfully, since this hearing was held on April 26, 2021 and your notes for decision were not issued until February 23, 2022, under the Case Law and specifically Sanders vs Meade Westvaco Corporation, 371 S.C. 284, 638 S.E. 2d 66, (S.C. App 2006) wherein the defendants were allowed a credit because the delay in holding the Hearing fell on both the shoulders of the claimant and the employer. That is not the case here, and if the defendants were going to be given a credit, there has to be a decision under Law addressing that.

Of course, as to the Order part, we would submit that it is contrary to Law and contrary to the facts and evidence presented.

I hope upon reflection that you will require a Proposed Order be submitted addressing all these issues, so your decision on each of these will be clearly set forth in the Record for purposes of the appeal.

Sincerely yours,

Preston F McDaniel
Attorney at Law

From: Taylor, Aisha <ataylor@wcc.sc.gov>
Sent: Wednesday, February 23, 2022 4:06 PM
To: 'CGruber@ycrlaw.com' <CGruber@ycrlaw.com>; Preston F. McDaniel <preston@pfmcdlaw.com>
Cc: Smith, Renee <rgsmith@wcc.sc.gov>
Subject: ORDER INSTRUCTIONS: Evaristo Verdugo Morales v. Insulation by Cohen, LLC WCC File No.: 1921668
Importance: High

Evaristo Verdugo Morales v. Insulation by Cohen, LLC WCC File No.: 1921668

Please note these are general Order Instructions/Directives only. The drafting attorney is instructed to compose proposed Findings of Fact and Conclusions of Law consistent with and in support of the directives below. Please cite the APA Submissions, Deposition Transcripts and/or the Hearing Transcript where appropriate. Also, please correct any scrivener's errors.

Please let me know if there are any questions.

1. Defendants' Motion to Compel the vocational evaluation of the Claimant is denied. *See Tedder v. Darlington County Comm. Action Ctr.*
2. To the extent that Claimant is requesting compensability or additional medical treatment for his shoulders, neck, or lumbar spine, I find those issue were adjudicated by way of Commissioner James' Decision and Order dated January 11, 2021 and are res judicata. Specifically, in Finding of Fact # 20, Commissioner James found "Claimant has failed to meet his burden of proof to show that the shoulder, neck, and lumbar spine were injured or that those injuries were causally related to the accident." This Order was unappealed and is the law of the case.
3. Notwithstanding the finding of res judicata above, I find the medical opinion of Dr. Stofko unequivocally states Claimant's complaints of pain in his neck, shoulders, lumbar spine, and lumbar radiculopathy are not causally related to his October 10, 2019 work injury. (Defendants APAs PP. 19-19).
4. Claimant's oral Motion to Postpone or Leave the Record Open to take the deposition of Alana Cole, PA is denied. Although PA Cole did see the Claimant for follow-up medical appointments after his surgery, PA Cole's last visit with the Claimant was on July 22, 2020 and those records were properly before Commissioner James at the September 13, 2020 hearing on compensability for which there is already an unappealed Order of the Commission. Although PA Cole did sign a Form 14-B on January 12, 2021, I give this Form 14B little to no weight when viewing the evidence as a whole as this is a Commission Form, which requires the signature of a physician, as opposed to a PA. In addition, PA Cole's supervising physician, Dr. Stofko, completed a medical questionnaire and an identical impairment rating was issued by CORA Physical Therapy in their report.

5. Claimant did send a Form 27 Subpoena to PA Cole for her attendance at the hearing; however, counsel did not make personal service upon PA Cole and could not confirm that PA Cole resided within the 50 mile requirement to enforce the subpoena.
6. I find Claimant is at maximum medical improvement for his work-related injury to his thoracic spine as of January 8, 2020, when he was released by the authorized treating physician and cleared to return to work without restriction. Although Claimant continued to treat with PA Cole after this date, it was for other alleged injuries not related to his work injury, per prior Order of the Commission.
7. I find Claimant has sustained 20% permanent partial disability to his back as a result of his injury to his thoracic spine, specifically, T-12 fracture. This finding is based on the preponderance of the evidence as a whole including the permanent impairment rating issued by CORA Physical therapy and Dr. Stofko's medical opinion that Claimant's additional complaints to the cervical spine and the lumbar spine are not causally related to his work injury, and Claimant's testimony regarding overall disability resulting from his injury.
8. Claimant is entitled to receipt of his award in a lump-sum.
9. Claimant is not entitled to any additional medical treatment as none has been recommended as causally related and tending to lessen Claimant's period of disability.
10. Defendants are entitled to terminate temporary total disability benefits and are entitled to a credit for overpayment of all benefits beyond maximum medical improvement.
11. Claimant has an AWW of \$1,302.27, which yields a compensation rate of \$845.74.
12. No hearing costs are assessed.

INSTRUCTIONS: Order to be written by Attorney Courtney Gruber within 45 days of receipt of these Order Instructions. Please let our office know if you have difficulty obtaining a transcript or cannot complete the order within this timeframe. Draft the Order consistent with the above substance of the preceding Order Instructions; however, you may add additional Findings of Fact consistent with the above ruling. The Order should also include biographical information, information regarding the Claimant's work history and previous medical history, if relevant to the case.

If you need a transcript, order it *immediately* from the court reporter, or contact my assistant, Reneé Smith, via e-mail at rgsmith@wcc.sc.gov. Provide a copy of the proposed Order to opposing counsel or *pro se* claimant before or at the same time one is submitted to the Commission. When submitting the proposed Order, please e-mail it to rgsmith@wcc.sc.gov, in Word format.

Matters To Include In The Order:

1. APA Submissions
2. Stipulations
3. Statement of the Case (contentions of the parties, stated concisely)
4. Evidence of the Case (synopsis of the evidence, including testimony and medical reports)
5. Findings of Fact – numbered (Do NOT delete any of the above findings, however, the prevailing party may add to support the decision, except regarding credibility, unless I have instructed you to)
6. Conclusions of Law (cite applicable statutory sections and case law)
7. Award

Do not address credibility in the Order, unless it has been addressed in the preceding Order Notes.

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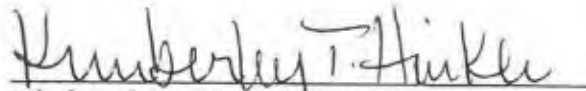
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I hereby certify that I have on this day, March 24, 2022, served a copy of the document described below in the matter of Evaristo Verdugo Morales v. Insulation by Cohens, LLC & Spray Foam by Cohens, LLC, addressed as follows:

TO: VIA EMAIL - cgruber@ycrlaw.com
AND US MAIL
E. Courtney Gruber, Attorney at Law
Clement Rivers, LLP
Post Office Box 993
Charleston, South Carolina 29402

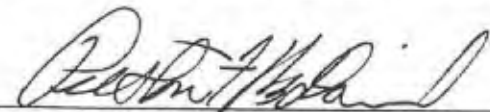
DOCUMENT: Claimant's Request for Reconsideration

DATE OF MAILING: March 24, 2022



Kimberley T. Hinkle, Paralegal

SWORN TO BEFORE ME this
24th day of March, 2022.



Notary Public for South Carolina (L.S.)
My Commission Expires: 10/25/28

371 S.C. 284
Court of Appeals of South Carolina.

Kenneth W. SANDERS, Respondent,
v.
MEADWESTVACO CORPORATION,
Self-Insured Employer, Appellant.

No. 4157.
|
Heard June 14, 2006.
|
Decided Oct. 2, 2006.
|
Rehearing Denied Dec. 20, 2006.
|
Certiorari Granted Oct. 19, 2007.

Synopsis

Background: Employer sought to stop payment of temporary total disability benefits and for a credit for any overpayment after workers' compensation claimant's date of maximum medical improvement (MMI). A single commissioner determined that claimant's depression and anxiety were not causally related to his work-related injury, he was entitled to future medical treatment, he had a 40% loss of use of his back, and that employer was entitled to terminate temporary total disability compensation, and the Appellate Panel affirmed. Employer appealed. The Circuit Court, Newberry County, Wyatt T. Saunders, Jr., J., affirmed. Employer appealed.

Holdings: The Court of Appeals, Cureton, Acting Judge, held that:

^[1] award of benefits to claimant for "permanent loss of the use of the lumbar spine and sacroiliac joint (SI joint)" was not reversible error;

^[2] evidence was sufficient to establish that claimant suffered a 40% loss of use of his back;

^[3] Appellate Panel could not base claimant's award of a 40% impairment rating of the back upon a potential need for future surgery; and

^[4] employer was entitled to credit for overpayment of temporary total benefits.

Affirmed in part, reversed in part, and remanded.

West Headnotes (11)

[1] **Workers' Compensation**—Questions of Law and Fact

In workers' compensation cases, the Appellate Panel is the ultimate fact finder.

5 Cases that cite this headnote

[2] **Workers' Compensation**—Questions of Law and Fact

In workers' compensation cases, the Appellate Panel is specifically reserved the task of assessing the credibility of the witnesses and the weight to be accorded evidence.

1 Cases that cite this headnote

[3] **Workers' Compensation**—Weight of evidence and credibility of witnesses

The Court of Appeals, in a workers' compensation case, cannot substitute its judgment for that of the Appellate Panel as to the weight of the evidence on questions of fact.

4 Cases that cite this headnote

[4] **Workers' Compensation**—Back injuries

Award of benefits to workers' compensation claimant for "permanent loss of the use of the lumbar spine and sacroiliac joint (SI joint)" was

not reversible error, even though statute that provided for compensation for an injury to the back did not specifically mention the lumbar spine or the SI joint; the order and record reflected that claimant's injury and subsequent disability was to his back. Code 1976, § 42-9-30(19).

2 Cases that cite this headnote

- [5] **Workers' Compensation**—Injury to the body as a whole
Workers' Compensation—Back injuries

Evidence was sufficient to establish that workers' compensation claimant suffered a 40% loss of use of his back, even though physician stated that claimant had an impairment of 22% to the whole person; claimant testified at length about the character and extent of his back injury and the restrictions the injury placed on his physical activities, he also stated that he had pain in the lower back, he had trouble sitting, he took pain medication to walk normally, his pain affected his sleep, and that since the accident he was no longer an active person. Code 1976, § 42-9-30.

1 Cases that cite this headnote

- [6] **Workers' Compensation**—Medical impairment; impairment ratings

While an impairment rating in a workers' compensation case may not rest on surmise, speculation or conjecture, it is not necessary that the percentage of disability or loss of use be shown with mathematical exactness.

6 Cases that cite this headnote

- [7] **Workers' Compensation**—Credibility and conflict with other evidence
Workers' Compensation—Amount and Period

of Compensation

The Appellate Panel in a workers' compensation case is not bound by the opinion of medical experts and may find a degree of disability different from that suggested by expert testimony.

5 Cases that cite this headnote

- [8] **Workers' Compensation**—Nature and extent of disability

Unless the question of the extent of partial loss of use under the workers' compensation disability schedule is so technically complicated as to require exclusively expert testimony, lay testimony is admissible. Code 1976, § 42-9-30.

1 Cases that cite this headnote

- [9] **Workers' Compensation**—Back injuries

The Appellate Panel could not base workers' compensation claimant's award of a 40% impairment rating of the back upon a potential need for future surgery; there was no evidence that surgery would be needed to alleviate claimant's symptoms. Code 1976, § 42-9-30.

- [10] **Workers' Compensation**—Treatment to relieve from effects of permanent injury

The fact that a workers' compensation claimant has reached maximum medical improvement (MMI) does not necessarily preclude a finding that additional medical treatment may be needed if the medical treatment would tend to improve the claimant's quality of life but not further improve the medical condition.

[11] **Workers' Compensation**—Particular cases

Employer was entitled to credit for overpayment of temporary total benefits; the delay in having a timely hearing fell on both employer and claimant, since each had requested rescheduling of the hearing. Code 1976, §§ 42-9-210, 42-9-260.

1 Cases that cite this headnote

Attorneys and Law Firms

**67 Kirsten Leslie Barr, of Mt. Pleasant, for Appellant.

Ben C. Harrison, of Spartanburg, for Respondent.

Opinion

CURETON, A.J.:

*286 In this workers' compensation action, MeadWestvaco Corporation (Westvaco) appeals **68 the circuit court's order affirming the Appellate Panel of the Workers' Compensation Commission (Appellate Panel) awarding Kenneth Sanders (Sanders) a 40% permanent partial disability to his lumbar spine and sacroiliac joint (SI joint). Westvaco also appeals the circuit court's failure to find it was entitled to credit for overpayment *287 of temporary total disability from the date Sanders reached maximum medical improvement. We affirm in part, reverse in part, and remand.

FACTS

Sanders, a chip mill operator employed by Westvaco, was injured on March 16, 2001, when a front-end loader flung a piece of wood that struck Sanders in his knee. Sanders was taken immediately to the emergency room where he was treated for the injury.

Several months later Sanders began to complain about lower back pain that radiated into his right hip and buttock region. On August 27, 2001, Dr. Phillip Milner noted that Sanders was having a "palpable snap" of the right SI joint, occurring repetitively when he turned his leg or lifted his leg, which he described as a "very consistent and a noticeable finding." After an MRI scan showed a herniated disc at L4/5 with right L5 root involvement, Dr. Milner referred Sanders to Dr. Charles Hughes for an epidural injection.

Dr. Hughes attempted to treat Sanders' herniated disc with several epidural steroid injections, followed by a right SI joint block injection procedure. He believed, as did Dr. Jacquelyn Van Dam, who was consulted to perform an EMG study, that the herniated disc was not a reasonable source of Sanders' back pain and that surgery would not benefit him. When conservative treatment failed to make a notable difference, Dr. Hughes referred Sanders to Dr. William Felmly at the Moore Orthopedic Clinic for another surgical opinion.

After meeting with Sanders on a single occasion, Dr. Felmly concluded Sanders had a chronic SI joint problem but surgery was not warranted. Dr. Felmly opined Sanders had a 2% permanent partial impairment of the SI joint. After reviewing Dr. Felmly's report, Dr. Hughes found Sanders had reached maximum medical improvement (MMI) and had a 12% impairment of the SI joint and a whole person impairment of 2%. Further, Dr. Hughes believed, as did Dr. Felmly, that Sanders was limited by his own subjective complaints.

Sanders then saw Dr. Samuel Seastrunk. After an independent medical evaluation of Sanders, Dr. Seastrunk stated Sanders had: (1) an L4/5 disc herniation with significant *288 involvement of the L5 nerve root and radiculitis, and (2) a complex problem with SI instability. Dr. Seastrunk, in sharp contrast with previous doctors, rated the impairment of the lumbar spine at 18%, and an impairment of 22% to the whole person.

On September 26, 2002, Westvaco filed a Form 21 Hearing Request seeking to stop payment of temporary total disability benefits. Moreover, Westvaco sought a credit for any overpayment beyond Sanders' date of MMI, which both parties stipulated occurred on August 21, 2002. Also, Westvaco questioned the compensability of Sanders' claim of anxiety and depression as well as the extent of his disability. Sanders contended he was permanently and totally disabled and sought additional medical care.

After a hearing, the single commissioner concluded Sanders did not meet his burden of proving his depression and anxiety were causally related to his work-related injury. The single commissioner also found that Sanders had a 13% loss of use of his right leg due to the accident. Further, the single commissioner found:

After considering the opinion of Dr. Seastrunk and his impairment rating of 22%, and after considering the opinions of Dr. Hughes, Dr. VanDam, and Dr. Felmly suggesting that the Claimant's subjective complaints are out of proportion with his objective physical findings ... and after considering the opinions [of all of the doctors] indicating that the Claimant did not need surgery or other invasive treatment as a result of the March 16, 2001 accident; and notwithstanding the Dr. Hughes's and Dr. Felmly's opinion that Claimant sustained only a 2% impairment, I find that **69 the Claimant is credible and has a 40% loss of use of his lumbar spine and SI Joint as a result of chronic pain and a potential need for surgery to these areas.

Accordingly, the single commissioner found Sanders was entitled to future medical treatment "for medication, pain management, his TENS unit, and SI belt" to lessen his period of disability. The single commissioner granted Westvaco's request to terminate temporary total disability compensation but found Westvaco was only entitled to a credit for overpayment *289 for the period after January 16, 2003, which was the day before the hearing.

The Appellate Panel affirmed the single commissioner, adopting the single commissioner's findings in full. Following a hearing on the matter, the circuit court affirmed the decision of the Appellate Panel, finding the decision was supported by substantial evidence in the record and that Sanders' testimony alone provided substantial evidence to support the finding that he had 40% loss of use of his back. This appeal followed.

STANDARD OF REVIEW

¹¹ ¹² The Administrative Procedures Act establishes the standard of review for decisions by the Appellate Panel. *Lark v. Bi-Lo, Inc.*, 276 S.C. 130, 134-35, 276 S.E.2d 304, 306 (1981). In workers' compensation cases, the Appellate Panel is the ultimate fact finder. *Shealy v. Aiken County*, 341 S.C. 448, 455, 535 S.E.2d 438, 442 (2000). The Appellate Panel is specifically reserved the task of assessing the credibility of the witnesses and the weight to be accorded evidence. *Id.*

¹³ On appeal from the Appellate Panel, this court may reverse or modify a decision if the findings or conclusions of the Appellate Panel are "clearly erroneous in view of the reliable, probative and substantial evidence on the whole record." S.C.Code Ann. § 1-23-380(A)(6)(e) (2005). This court cannot substitute its judgment for that of the Appellate Panel as to the weight of the evidence on questions of fact. *Shealy*, 341 S.C. at 455, 535 S.E.2d at 442. A finding is supported by substantial evidence "unless there is no reasonable probability that the facts could be as related by a witness upon whose testimony the finding was based." *Lark*, 276 S.C. at 136, 276 S.E.2d at 307.

LAW/ANALYSIS

I. Section 42-9-30 Analysis

¹⁴ On appeal, Westvaco first argues that section 42-9-30 of the South Carolina Code (1985) permits disability awards based on degrees of medical impairment to specified body parts, and the circuit court erred in affirming an award of benefits based upon impairment to functional units of the *290 back, i.e., the lumbar spine and SI joint which are not scheduled for compensation under section 42-9-30. We disagree.

The Appellate Panel concluded Sanders was entitled to compensation under section 42-9-30(19) for "permanent loss of use of the lumbar spine and SI joint." Section 42-9-30(19) provides for compensation for injury to the back as follows:

For the total loss of use of the back, sixty-six and two-thirds percent of the average weekly wages during three hundred weeks. The compensation for partial loss of use of the back shall be such proportions of the periods of payment herein provided for total loss as such partial loss bear to total loss

In affirming the Appellate Panel, the circuit court interpreted the Appellate Panel's order to have awarded benefits based on injuries to the back. The circuit court concluded "[a] review of the record reflects that these injuries and disabilities were clearly to the back." Westvaco's argument that because the Appellate Panel's order was too specific in identifying the regions of the back where Sanders' loss of use occurred and that these regions are somehow separate from the back itself is

without merit.

Accordingly, even though the SI joint and lumbar spine are not specifically mentioned in section 42-9-30, we find no reversible error in the manner in which the Appellate Panel characterized Sanders' injuries.¹ A review **70 of the Appellate Panel's order and the record reflects Sanders' injury and subsequent disability was clearly to his back. This approach is consistent with our policy of liberally construing the Workers' Compensation Act in favor of coverage. *Schulknicht v. City of N. Charleston*, 352 S.C. 175, 178, 574 S.E.2d 194, 195 (2002); see also *Mgmt. Recruiters v. R.J.R. Mech., Inc.*, 304 S.C. 399, 401, 404 S.E.2d 908, 909 (Ct.App.1991) (finding when construing a judgment, the determinative factor is the "intent *291 of the officer who wrote it, as gathered not from an isolated part of the judgment, but from all parts thereof").

II. Impairment Rating

Next, Westvaco argues the evidence was insufficient to establish Sanders suffered a 40% loss of use of his back. Westvaco's contentions are twofold: (1) the medical testimony established, at most, a 22% impairment rating; and (2) the circuit court erred in affirming an award based upon the potential need for future surgery.

A. Evidence of Impairment

¹⁵¹ Westvaco argues Sanders is not entitled to benefits because the evidence was insufficient to establish he suffered a 40% loss of use of his back. Westvaco contends only the opinion of medical experts can be used to assess Sanders' impairment. We disagree.

Westvaco argues that since Sanders was awarded disability under § 42-9-30, *Wigfall v. Tideland Util., Inc.*, 354 S.C. 100, 580 S.E.2d 100 (2003), should be controlling regarding the impairment rating. After reviewing the *Wigfall* court's decision, we agree that this case falls within the *Wigfall* medical model encompassed in § 42-9-30, 354 S.C. at 107, 580 S.E.2d at 103. We do not agree that a determination of impairment under this section mandates that only medical evidence may be considered by the Commission in determining the degree of disability.

¹⁶¹ While an impairment rating may not rest on "surmise,

speculation or conjecture ... it is not necessary that the percentage of disability or loss of use be shown with mathematical exactness." *Roper v. Kimbrell's of Greenville*, 231 S.C. 453, 461, 99 S.E.2d 52, 57 (1957) (citations omitted); see also *Linen v. Ruscon Constr. Co.*, 286 S.C. 67, 68-69, 332 S.E.2d 211, 212 (1985) (finding that although expert testimony found claimant suffered from a 20-30% impairment to his back, testimony of vocational expert and claimant provided substantial evidence to affirm Appellate Panel's decision finding claimant's impairment exceeded 50%); *Lyles v. Quantum Chem. Co.*, 315 S.C. 440, 445-46, 434 S.E.2d 292, 294-95 (Ct.App.1993) (finding, pursuant to section 42-9-30, that while expert testimony suggested claimant suffered only a 35% impairment to his back, testimony of claimant and others *292 provided substantial evidence that claimant's impairment exceeded 50%).

¹⁷¹ ¹⁸¹ Further, the Appellate Panel is not bound by the opinion of medical experts and "may find a degree of disability different from that suggested by expert testimony." *Lyles*, 315 at 445, 434 S.E.2d at 295 (citations omitted). Expert medical testimony is merely intended to aid the Appellate Panel in coming to the correct conclusion. *Corbin v. Kohler Co.*, 351 S.C. 613, 624, 571 S.E.2d 92, 98 (Ct.App.2002) (citing *Tiller v. Nat'l Health Care Ctr.*, 334 S.C. 333, 513 S.E.2d 843 (1999)). "Unless the question of the extent of partial loss of use under [section] 42-9-30 is so technically complicated as to require exclusively expert testimony, lay testimony is admissible." *Linen*, 286 S.C. at 68, 332 S.E.2d at 212.

Although Dr. Seastrunk found Sanders' impairment was at 22% to the whole person, Sanders testified at length to the character and extent of his back injury and the restrictions the injury has placed on his physical activities. Sanders testified he has pain in the lower back shooting down into his right buttock and into his leg stopping just above his knee. He utilizes a TENS unit for pain **71 as well as a sacroiliac belt that he wears daily. He has trouble sitting because he must constantly change positions to keep weight off his right buttock. He takes pain medication in order to walk normally. His pain affects his sleeping, allowing him to sleep only five hours a night. He can no longer walk up the steps in the front of his house and now must enter through the back. Sanders testified he used to play tennis three times a week and enjoyed fishing, hunting, and horseback riding. He even built his own home. He testified since his work-related accident, he is no longer an active person and cannot even tie his own shoes.

Although some of the medical evidence may suggest Sanders is not impaired by his back injury, "it is not for

this court to balance objective against subjective findings of medical witnesses, or to weigh the testimony of one witness against that of another.” *Roper*, 231 S.C. at 461, 99 S.E.2d at 57. That function belongs to the Appellate Panel alone. *Id.* Further, the Appellate Panel correctly considered both medical and lay testimony in arriving at its decision. See *Linen*, 286 S.C. at 68, 332 S.E.2d at 212.

*293 A review of the Appellate Panel’s order reveals it considered, in detail, all expert and lay testimony before making its ruling. Important to the Appellate Panel’s decision was Sanders’ testimony, which the Appellate Panel found credible. Accordingly, the circuit court did not err in affirming the Appellate Panel’s consideration of both lay and medical testimony in arriving at its decision.

B. Award Based on Potential Need for Surgery

⁹⁹ Although we agree with Sanders that the Appellate Panel may utilize lay testimony to reach an impairment rating higher than that testified to by the medical experts, we find that the Appellate Panel erred as a matter of law in basing its award of a 40% impairment of the back on a potential need for surgery.

¹⁰⁰ As we stated in *Bass v. Kenco Group*, 366 S.C. 450, 467, 622 S.E.2d 577, 585 (Ct.App.2005), “[m]aximum medical improvement is a term used to indicate that a person has reached such a plateau that in the physician’s opinion there is no further medical care or treatment which will lessen the degree of impairment.” (citations omitted). However, the fact that a claimant has reached MMI does not necessarily preclude a finding that additional medical treatment may be needed if the medical treatment would tend to improve the claimant’s quality of life but not further improve the medical condition. See *Pearson v. JPS Converter & Indus. Corp.*, 327 S.C. 393, 398, 489 S.E.2d 219, 221 (Ct.App.1997) (citing *O’Banner v. Westinghouse Elec. Corp.*, 319 S.C. 24, 459 S.E.2d 324 (Ct.App.1995) (“Continued treatment of prescriptive medicine did not preclude a finding of maximum medical improvement, because the medication could temporarily alleviate claimant’s symptoms but not further improve his medical condition.”)).

In the instant case, the parties stipulated Sanders reached MMI on August 21, 2002, and as such was entitled to future medical care that would tend to alleviate his symptoms but not further improve his medical condition. Moreover, Westvaco has not appealed the Appellate Panel awarding Sanders future treatment for pain as future medical care. However, the Appellate Panel incorrectly

premised its award of 40% loss of use of the back on a potential need for surgery. Sanders has not pointed to any case law, statute or regulation that would *294 allow the Appellate Panel to base an impairment rating under section 42–9–30 upon a potential need for surgery, where no evidence suggests that the surgery would be needed to alleviate Sanders’ symptoms as opposed to further improving his medical condition. Accordingly, we reverse and remand to the Appellate Panel to determine how much of its award was based upon its conclusion that Sanders may need surgery in the future and to recalculate, if appropriate, Sanders’ degree of impairment.

III. Overpayment of Temporary Total Benefits

¹⁰¹ Westvaco argues the Appellate Panel erred in limiting its credit for overpayment to the period commencing the day preceding **72 the hearing before the single commissioner. We agree.

Credit for overpayment of temporary total benefits is governed by section 42–9–210 (1985) of the South Carolina Code:

Any payments made by an employer to an injured employee during the period of his disability, or to his dependents, which by the terms of this Title were not due and payable when made may, subject to the approval of the Commission, be deducted from the amount to be paid as compensation; *provided*, that in the case of disability such deductions shall be made by shortening the period during which compensation must be paid and not by reducing the amount of the weekly payment.

In the case of *Hendricks v. Pickens County*, 335 S.C. 405, 414, 517 S.E.2d 698, 703 (Ct.App.1999), we held that “[o]nce the [Appellate Panel] affirmed that (employee) had reached MMI, it was then appropriate to terminate TTD benefits in favor of either permanent partial or permanent total disability benefits, if warranted by substantial evidence in the record.” (citations omitted). See also *Smith v. S.C. Dept. of Mental Health*, 335 S.C. 396, 399, 517 S.E.2d 694, 696 (1999) (“The rationale for ceasing temporary benefits upon a finding of MMI is to permit entry of a permanent award. Clearly, if an employee has reached MMI and remains disabled, then his injury is permanent ... This is precisely the reason to terminate temporary benefits in favor of permanent benefits upon a finding of MMI.”).

It is undisputed MMI was reached on August 21, 2002, and the hearing before the single commissioner was on

January *295 16, 2003. The Appellate Panel found that due to the fact the hearing was rescheduled "several times," Westvaco was only entitled to credit for overpayments for the period after January 16, 2003. The Respondent admitted at oral argument that the hearing had been rescheduled twice, once at the request of the employer, and once at the request of Sanders. Under section 42-9-260, Westvaco was entitled to have its request to terminate temporary total benefits heard within 60 days of filing the request. Here, the delay in having a timely hearing falls squarely on both parties. Thus, we find no substantial evidence supporting the Appellate Panel's decision to overpay benefits to Sanders. Therefore, we remand this issue to the Appellate Panel for a determination as to the appropriate date for crediting Westvaco with overpayments.

The decision of the circuit court affirming the Appellate Panel is reversed and this case is remanded to the Appellate Panel for a determination of the degree of impairment Sanders suffered to his back as a result of his injury on March 16, 2001. We also remand for a determination of the appropriate period Westvaco should receive credit for the overpayment of temporary total benefits.

AFFIRMED IN PART, REVERSED IN PART, AND REMANDED.

HEARN, C.J., and GOOLSBY, J., concur.

All Citations

371 S.C. 284, 638 S.E.2d 66

CONCLUSION

Footnotes

- ¹ We note the Appellate Panel's finding of impairment to the lumbar spine and SI Joint is premised on Dr. Seastrunk's impairment rating of 22% to the back which can be equated to the whole person. At oral argument, both Sanders and Westvaco agreed the whole person and the whole back are equivalent in terms of disability under the AMA Guidelines. Stated differently, both agreed that impairment to the whole back is equal to impairment of the whole person.