THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM SOUTH CAROLINA WORKERS COMPENSATION COMMISSION

APPELLATE CASE NO. 2013-001564

WILLIAM E MILLER, JR., EMPLOYEE, CLAIMANT, APPELLANT,

v.

OWEN STEEL COMPANY INC. EMPLOYER AND GREAT AMERICAN INSURANCE GROUP C/O STRATEGIC COMP SERVICES, CARRIER, RESPONDENTS.

APPELLANT'S FINAL BRIEF

RECEIVED
APR 28 2014
SC Court of Appeals

April 28, 2014

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STATEMENT OF THE CASE

Appellant, William Miller appeals the South Carolina Workers Compensation Commission's (hereinafter referred to as "Commission") Order finding no coverage under the Act based on a finding that the August 15 incident and trauma was not the cause of the his neck injury and the following required cervical spine surgery. A single commissioner hearing was conducted on December 10th of 2012 pursuant to a Form 50 filed by Claimant's attorney and a Decision and Order was filed on January 31, 2013. (ROA P. 36-51) Claimant filed a request for a Commission Panel Appeal and arguments were made on April 16, 2013. The Commission issued its Decision and Order on July 2, 2013. (ROA P. 1-35) Appellant noticed this appeal on July 22, 2013.

The basic facts in this matter are that Appellant/Claimant William Miller was an eight year employee of Employer, Owen Steel. On August 15, 2012, William Miller was in an altercation with a co-worker and, after being pushed into a wall, heard and felt his neck "pop." Claimant reported the incident and injury immediately and then requested medical attention in the days after the event as the symptoms worsened. Although his supervisor indicated the Company would send him to a doctor, he was not sent to a physician by the Employer and Mr. Miller then sought medical treatment on his own through his primary physician. His (Appellant/Claimant's) primary physician wrote him out of work, prescribed him medication and an MRI was scheduled. After the MRI, he (Appellant Miller) was referred by his primary physician to a neurosurgeon who recommended immediate surgery due to a dislodged bone fragment in Claimant's neck. Surgery was performed, the dislodged bone removed and a radical discectomy performed.

The sole issue in dispute in this matter is whether the altercation and concurrent push into the wall by a three hundred and forty pound co-worker (Steve Raulerson), during which Mr. Miller hit the wall and heard his neck pop, most likely caused the acute injury to his cervical spine. Appellant Miller was previously diagnosed with spinal stenosis which weakens the spine in addition to creating other symptoms and issues. Appellant Miller's pre-existing issues with his cervical spine had been diagnosed more than a year prior to the trauma and seven or eight months prior to this incident. The neurosurgeon notes in the record that the Claimant (Miller) had a previously diagnosed stenosis (narrowing) of the cervical spine and both the treating physician and surgeon expressly state in their records and signed statement that the altercation/incident was the likely cause of the acute trauma to the Claimant's cervical spine requiring the immediate surgical intervention. The neurosurgeon's opinion testimony is made to a reasonable degree of medical certainty and there is no medical evidence or testimony in the record which contradicts or questions the findings of the neurosurgeon (Dr. Boyd) or the internist, Dr. Levinson.

FACTS

A. GENERAL FACTS:

Appellant, William Miller, was an eight year employee of Owen Steel. (ROA P. 59 L. 2-3) Miller and his lead man (Steve Raulerson), a 340 lb man, had an altercation on August 15, 2012. (ROA P. 59, 60) Miller[1] was pushed against a wall during this altercation and all witnesses to this incident agree that, during the altercation, Raulerson pushed Miller against the

[1] Claimant had been diagnosed with spinal stenosis over a year prior to this event and had several bouts of symptoms related to his neck and back. (ROA 291, 292)

wall. (ROA P. 380-387, 143, 181, 182) Upon impact with the wall, Claimant heard his neck pop.[2] The incident was reported by Miller and he informed his supervisor that his neck was hurting. (ROA P. 73 L.4-10) Both Mr. Miller (Appellant) and the other employee (Raulerson) involved in the altercation were suspended and during this time Appellant's neck began to swell and he experienced shooting pain and brain freeze along with other symptoms. On his return, August 22, 2013, Miller reported to his direct supervisor (Sloan) that he had been hurt in the altercation and the symptoms were worsening. (ROA 74-76) Appellant asked at that time (his first day back) for the Company to send him to a doctor and his supervisor (Sloan) said he would take care of that request. (ROA P. 73) The employer, however, did not send him to a physician. After a few days of severely worsening symptoms and with no word from the Company about sending him to a doctor, Claimant went to his physician, Dr. Levinson, on August 27, 2013. Dr. Levinson gave Claimant a work excuse (APA P. 361), prescribed medication (for pain and other symptoms) and prescribed an MRI diagnostic. (APA P. 330) Mr. Miller's wife drove him to the workplace the following morning prior to his shift where Mr. Miller delivered the leave slip and his statement of the events and spoke with his supervisor and the safety manager about the situation. (ROA . 80) Both managers stated that they would assist him. (ROA P. 81, 82) Claimant was then terminated two days later by phone, while on medical leave, and such termination was stated to be effective on the 27th of August. (ROA P. 82, 83)

After the MRI results, Dr. Levinson referred Claimant to a neurosurgeon, Dr. Scott B. Boyd. The neurosurgeon saw Appellant in mid September of 2012 and reviewed the MRI

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[2] Although the facts of the versions of altercation are basically similar, the Claimant and Raulerson differ on the exact chronology of events.

ordered by Dr. Levinson. Dr. Boyd specifically compared it to the former MRI of Claimant's neck done in February of 2012 (ROA P. 291) and he recommended surgery immediately for fear of paralysis absent the surgical procedure. (APA P. 292). Surgery was performed on Sept. 26, 2012 (ROA P. 293-296) and Dr. Boyd specifically stated he found a fresh bone fragment in Claimant's neck and opined to a reasonable degree of medical certainty that the recent trauma was the most likely cause of the acute neck issue. (APA P. 358, 359)

The Hearing was to determine compensability only and was conducted on December 10, 2012. Employer/carrier argued that Compensability should be denied. The central focus of the Employer's argument was an allegation that Claimant intended harm and benefits should be barred pursuant to S.C. Code Ann. §42-9-60 as set forth in its pre-hearing brief. (APA P. 437) Employer/Carrier offered no medical evidence from opposing physicians in the record related to causation. The Hearing Commissioner determined that the evidence did not support a finding of intended injury to himself or others pursuant to S.C. Code Ann. §42-9-60. (ROA P. 47, 51) However, the Hearing Commissioner ruled that the Claimant's (Appellant's) injuries were not caused by the altercation, stating his review of the MRIs seemed very similar. (ROA P. 47, 51, 52) A review of the record as a whole demonstrates that there is no medical evidence or opinion which supports the Commission's finding and neither is there supporting non-medical evidence which would support a finding of no causation. The only evidence in the record, both factual and medical, overwhelmingly supports causation.

The undisputed chronology of events in this matter and set forth in the record are as

follows: - 2004: William Miller was hired by Employer. (ROA P. 59)[3]

- 2011: Claimant is diagnosed with spinal (foraminal) stenosis and disc herniation. Caused intermittent pain, shooting sensations other symptoms. (ROA 77-79) (ROA P. 397-420)

- January 2012: Claimant given a 7% merit promotion and the manager's statement: "Billy is a very good mechanic..." (ROA P. 202: Oxendine)

- August 15 2012: Altercation with acting lead man. (Steve Raulerson) Miller (Appellant) pushed against a wall and heard his neck "pop." Claimant punched Raulerson at end of altercation. Both men suspended.

- August 16 through 21st, 2012: Claimant suspended 4 work days. Claimant's neck became worse with numbness in hands, leg, brain freeze and shooting pain. (ROA P. 72 L. 5-19) Claimant's wife observes symptom manifestations independently tries to get Claimant to go to the Doctor. (ROA P. 128 L. 16-25; ROA P. 129 L. 1- 10)

- August 22nd, 2012: Claimant returned to work and again informed his supervisor (Sloan) that his neck had been hurt in the incident and asked his supervisor to send him to a doctor. Sloan stated he would "take care of it." (ROA P. 73 L. 4-20) Claimant not sent to the doctor.

- August 23rd - August 26th: Claimant returned the following day but stayed out that weekend and the pain and lack of movement increased to the point that Claimant decided, along with his wife, that he would have to see a doctor that Monday (27th Aug). (ROA P. 74) (ROA P. 80 L. 1- 19)

- August 27 2012: Claimant's wife made an appointment Monday (27th Morning) for 1:00 pm that day (27th) with Dr. Levinson. (ROA P. 130) Claimant told his supervisor (Sloan) that he was going to leave work early to go to the doctor. (ROA P. 75 L. 1-7) Claimant went to the physician and he (Dr. Levinson) prescribed medications and an MRI and wrote Claimant out of work. (ROA P. 330-333)(ROA P. 130 L. 23, 24)

- August 29, 2012. Claimant contacted by employer and he was told by HR he was terminated effective August 27, 2012 for insubordination. (ROA P. 82, 83)

Mr. Miller continued with treatment as prescribed by Dr. Levinson, his primary physician. The medical chronology from his initial visit after the accident was as follows:

- August 27, 2012: Dr. Levinson (Family physician) "He (Claimant) **presents with neck**

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[3]Subsequent to his hire, in 2009 and early 2011 there is evidence of two disciplinary actions involving verbal arguments with co-workers. These are set forth in the record.

pain as a result of his assistant supervisor pushing him against the wall.." - - "Additionally, he presents with history of neck pain. The location of discomfort is posterior." .... "The pain is characterized as severe, stabbing, and patient states it feels like a knife is slicing doen (sic) his neck. Initial onset was two weeks ago. ... His assistant manager pushed him up against the wall and patient felt and heard a pop in his neck. .... He (Claimant) also states he has the sensation of a "brain freeze" as a result of this." (ROA P. 330) "Out of work until I see him back in 8 days." (ROA P. 332, 333, 360, 361)(emphasis added)

- September 4, 2012: Dr. Levinson follow up visit: Pain medication **prescribed and magnetic resonance imaging, spinal canal and contents, with and without contrast, cervical prescribed**. (ROA P. 297, 300) Palmetto Imaging MRI study conducted. (ROA P. 322)(emphasis added)

- September 13, 2012: Dr. Levinson follow up visit: record states. "Bill (Claimant) presents with diagnosis of cervical disc extrusion. **This was diagnosed 09/05/2012.** The course has been progressively worsening. It is of severe intensity. Prior work-up has included a Cervical spine without contrast MRI (results: central disc extrusion at C6-7 causing severe central canal stenosis with cord compression). **The left central/foraminal component has contracted in the interval since prior study**. There is no residual left neural foraminal stenosis." (ROA P. 322) Recommend neurosurgical evaluation / Boyd. (ROA P. 294) (emphasis added)

- September 19, 2012: Dr. Boyd initial visit. "Mr. Miller is a 46 year old heavy equipment operator who stated that on August 15th he was pushed against the wall by his supervisor. He felt an immediate pop in his neck. He states that shortly after that he had severe neck pain and stiffness and began developing numbness, tingling and weakness in his arms. This has progressed since the incident. He has constant numbness in his hands. He can not move his neck because of severe stiffness." "... He (Claimant) states that in the past he has been diagnosed with cervical stenosis and probably also has degenerative disc disease. .... He states that he was doing fine with his neck until this incident ...." (ROA P. 291) (Boyd Continued) "MRI of the cervical spine done at Palmetto Imaging shows a large C6-7 disc herniation with **extruded fragment** that has migrated slightly cephalad. This causes significant central canal stenosis and cord compression. I believe on the T2 weighted sagittal images there is some suggestion of high signal in the cord. **This is compared to a February 18 (sic) 2012** (ROA 291) **study that apparently showed a left central and foraminal disc protrusion at C6-7 but that has contracted since the previous study**." (ROA P. 291, 292) "He (Claimant) has a disc herniation with **extruded fragment** causing cord compression and I believe some signal change in his cord. .... He (Claimant) is hesitant to consider surgery and I have been careful to explain the risks of not doing surgery which would include paralysis." (ROA P. 292)(emphasis added)

- October 8, 2012: Dr. Levinson follow up visit. (ROA P. 318)

- October 22, 2012: Dr. Boyd follow up visit. (ROA P. 293)

- November 11, 2012: Dr. Boyd reports through a questionnaire that the patient (67-69) Claimant/Appellant reported that he had an altercation and heard a pop in his neck and this report of trauma was consistent with the injury to his cervical spine which required surgery. (ROA. P. 358) Further, the Neurosurgeon states specifically in the record that based on his review of the records, the radiographic study of 9/4/12, information gained during the surgery and the discussions with and statements by the patient (Miller) that **the injury most probably occurred as a result of recent trauma to the neck/spine**. Dr. Boyd included a statement that he found a **"very large, fresh/acute disc fragment compressing (the) spinal cord."** (ROA P. 358, 359) Dr. Boyd stated his opinions to a reasonable degree of medical certainty. (ROA P. 359)(Emphasis added)

Although a great part of the record and almost all defense witness testimony relates only to the facts associated with the altercation itself, the Hearing Commissioner ruled that Claimant was not excluded from benefits pursuant to S. C. Code Ann. §42-9-60[4] as he did not find that Claimant intended to injure himself or others. (ROA P. P. 52, 48)[5] The altercation was spontaneous and occurred between co-employees lasting from one to two minutes. The Commissioner did not find compensability, however, based on his reading of two MRI reports, stating that they were nearly identical.(ROA P. 52, 47, 48) The Hearing Commissioner found that, based on the medical records he could not speculate that the altercation caused the neck surgery and related physical issues. The Appellate Panel affirmed the single

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[4]The Hearing Commissioner did provide for the drafting of the Decision/Order that he (Commissioner) found that the Claimants version of the altercation (that Claimant swung and punched the other employee) after hearing his neck pop was not credible. (ROA P. 52)

[5]The Hearing Commissioner's Order findings state "when I review the 2 MRIs (the one prior to the alleged accident and the one after the alleged accident), they strike me as nearly identical. I can not speculate that this incident caused the Claimant's current problems." (ROA P. 52, 47)(emphasis added)

Commissioner's Order. (ROA P. 1-35)

ARGUMENTS

I. THE COMMISSION'S FINDING THAT THE APPELLANT'S NECK TRAUMA ON AUGUST 15, 2012 HAD NO NEXUS TO THE CERVICAL INJURY AND THE NECESSARY NECK SURGERY WAS MADE ABSENT SUBSTANTIAL EVIDENCE WHEN THERE WAS NO MEDICAL OR FACTUAL EVIDENCE SUPPORTING THE FINDING AND THE ONLY MEDICAL AND FACTUAL EVIDENCE IN THE RECORD RELEVANT TO THE ISSUE SUPPORTED CAUSATION

To obtain benefits under the Workers Compensation Act, an injured employee must provide a preponderance of evidence that his injury was caused by an accident arising "out of and in the course of the employment." S. C. Code Ann. §42-1-160 (Law Co-op 2005 Supp) The single commissioner hearing on December 10, 2012 was almost exclusively related to Employer/Carrier's argument that Mr. Miller intended harm in the altercation and therefore he should be precluded from compensation under S. C. Code Ann. §42-1- 60 (Law Co-op 2005 Supp).[6] The hearing Commissioner did not find for the Employer on that issue, however, citing that there was no evidence of intent in the record. The single Commissioner instead found that the impact with the wall and the following neck surgery were unrelated and therefore not arising out of a work related accident.

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[6] Employer argued that S.C. Code Ann §42-9-60 barred Mr. Miller from benefits under the law. The seminal case interpreting this defense is *Youmans v. Coastal Petroleum Co.*, 508 S.E.2d 43 (SC Ct. App. 1998); see also: *Zieglar v. South Carolina Law Enforcement Div.*, 157 S.E.2d 598, 599 (SC 1967); *Reeves v. Carolina Foundry & Machine Works et al*, 9 S.E.2d 919 (SC1940) The affirmative defense pursuant to S.C. Code Ann §42-9-60 is applicable only when "the acts of the employee are so serious and aggravated as to evince a willful intent to injure." *Youmans* at 47*; citing: Zieglar v. South Carolina Law Enforcement Div.*, 157 S.E.2d 598, 599 (SC 1967)

The Employer/Respondent as well as the Appellant/Claimant did introduce evidence of a pre-existing condition to Mr. Miller's neck prior to the August 15 altercation and trauma. It is not and has never been disputed that Appellant had been previously diagnosed with spinal stenosis, a narrowing through the spine or portions of the spine,[7] and had symptoms related to this condition /diagnosis. Appellant (Miller) did in fact have an MRI of his neck in February 2012, seven months prior to the altercation. It is not disputed that Miller's prior condition created pain and symptoms prior to the accident. (ROA P. 76-79) In a workers compensation action, a work related accident which aggravates or accelerates a pre-existing condition, infirmity or disease is also compensable. *Mullinax v. Winn Dixie Stores, Inc.*, 458 S.E.2d 76 (SC App. 1995) Despite the prior condition, William Miller undisputedly came into work each day prior to the altercation received merit raises, and, although he did have back and neck pain in the year prior and had sought treatment for those symptoms, he was managing the issue. (ROA P. 290-350)

Although there were some factual disputes in the testimony about the event chronology of the altercation between Mr. Raulerson and Appellant,[8] it is not disputed in the record that Mr. Miller was in an altercation on August 15, 2012. It is not disputed in the record by any witness that Appellant was pushed backward against a wall by Raulerson, a very large man, and Appellant impacted the wall. There is no disputing testimony that Appellant at that point heard and felt his neck pop. There is no evidence in the record to support any supposition that Appellant had no workplace trauma to his head and neck during the altercation.

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[7]It is common medical knowledge that stenosis of the spine creates greater risk of spine injury.

[8]Appellant did in fact strike Mr. Raulerson during this altercation.

The accident and injury was reported immediately after the event and both men were suspended. Just after the altercation and the day of his return from suspension (August 22), and well prior to his termination, it is undisputed that Appellant Miller told his supervisor (Sloan) that he had been hurt in the scuffle (altercation) and his neck was in great pain. (ROA P. 73) He (Appellant) asked for the supervisor (Sloan) to send him to a doctor and it is not disputed that Sloan (Miller's supervisor) stated he would take care of it. (ROA P. 73) The stiffness, numbness, brain freeze and pain in addition to other symptoms got worse while Appellant waited for the Employer to send him to its doctors. (ROA P. 73-76)

Although suggested by Employer, it is in fact not in dispute that Appellant Miller in fact did inform his neurosurgeon of the prior diagnosis and issues with his neck. The suggestion that Miller hid a prior neck or other medical issue from any physician is in no way supported in the record. In fact, Appellant's notice to the surgeon of this issue is plainly noted in the evidentiary medical records of the neurosurgeon himself, Dr. Boyd. (APA. P. 291-293) Dr. Boyd specifically notes that Mr. Miller informed him of prior neck issues and diagnoses and a prior MRI. Dr. Boyd specifically and expressly compared the two images and also states this in his notes. (ROA 291-293) Further, Mr. Miller's primary physician (Dr. Levinson) was the physician diagnosing the issue prior to and after the workplace accident.

The Employer never did send Appellant to a doctor and, over the weekend of August 25 and 26, William Miller and his wife decided to make an appointment with their family doctor, internist Dr. Levinson. (ROA P. 74-75) It is undisputed that Mr. Miller went to work that morning, August 27th, and told his supervisor (Sloan) that he needed to leave early for a doctor's appointment. (ROA P. 75 L. 1-10) It is undisputed that Mr. Miller went to the appointment and was prescribed medications and given an "out of work slip." (ROA P. 330, 360, 361-363)

Miller was prescribed an MRI of his cervical spine at that time. (ROA P. 330, 331, 294)(ROA P. 76, 77) It is further not disputed that Appellant's wife drove him to work the following morning and he gave the physician's excuse to the safety manager (ROA P. 80, 81) and his direct supervisor, Sloan, along with his (Appellant's) written statement of what happened during the incident. (ROA P. 80, 81) There is no disputing evidence that Sloan, his direct supervisor, stated that he was glad Bill (Appellant) was going to the doctor.[9] Two days later[10] Claimant was informed he was terminated effective the prior Monday, August 27, 2012. (ROA P. 82)(ROA P. 390)

The Hearing Commissioner in his initial ruling, affirmed by the Appellate Panel, by note stated as follows:

> "This case turns mainly on the medical reports. When I review the 2 MRIs (the one prior to the alleged accident and the one after the accident), they strike me as nearly identical. I cannot speculate that this incident cause the Claimant's current problems."

(ROA P. 47, 48, 52 /Commissioner note)

In essence, the Hearing Commissioner interpreted two reports of MRI imaging to determine that there was no causation contrary to both the treating internist's medical notes and the treating surgeon's records and specific independent expert opinion as to causation. In essence, the Commissioner used two interpretive reports of a prior and post injury MRI to determine that no nexus existed between the August workplace trauma and the acute injury and need for spine

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[9] Employer's manager Oxendine stated that Appellant/Claimant was angry that day and assumed it was because he was treated differently than the other employee in the altercation. However, Oxendine had no knowledge that Mr. Miller had been asking about going to a physician and was angry that the Company had not sent him to a doctor. (Hearing Tr. P. 149 L. 17-25, P. 150 L. 1-12)

[10] The Employer witness statements were all taken later on the 28th of August.

surgery. Although the Hearing Commissioner did indicate in the Order that he found Appellant's version of the chronology of the altercation to be not credible, there was never any testimony that the altercation and trauma did not occur. The Respondent Employer/Carrier did not provide a medical opinion regarding the MRI's or causation nor did they provide an expert opinion from a physician of any kind that the trauma on August 15 was not the likely cause of the acute injury requiring the need for surgery.

The actual MRI images were not part of the record and the Hearing Commissioner could not have and did not view the images themselves to make an actual medical comparison. Again, it is not disputed that Mr. Miller, prior to any knowledge of his termination, informed his physicians (including Dr. Boyd) of his prior neck issues but also stated that his neck had been doing relatively well prior to the incident on August 15th 2012. Each physician specifically notes the incident and this account in his own medical records. (ROA P. 330, 331-336 / Levinson)(APA P. 291, 292/ Boyd)

The only two physicians who saw the Appellant/Claimant after the incident also reviewed and contrasted the two MRIs, both the actual images and the reports. They both note this in their medical records and notes. Dr. Levinson (internist) saw and treated Mr. Miller both before and after the August accident. On Mr. Miller's third visit on September 13, 2012, after the August workplace trauma, Dr. Levinson stated:

"Bill (Appellant/Claimant) presents with diagnosis of cervical disc extrusion. **This was diagnosed 09/05/2012 (2nd visit after altercation).** The course has been progressively worsening. It is of severe intensity. Prior work-up has included a cervical spine without contrast MRI (results: central disc extrusion at C6-7 causing severe central canal stenosis with cord compression). **The left central/foraminal component has contracted in the interval since prior study**. (ROA P. 322, 323, 294)(emphasis added)

Dr. Levinson had ordered and reviewed the first MRI in February 2012. After reviewing the

September (post incident) MRI, he referred Mr. Miller to a neurosurgeon, Dr. Boyd, and specifically states above the specific extrusion notes was "diagnosed 09/05/2012." Appellant went to Dr. Boyd and Levinson states in the records:

"He (Appellant/Claimant) **presents with neck pain as a result of his assistant supervisor pushing him against the wall.." - - "Additionally, he presents with history of neck pain.** The location of discomfort is posterior." .... "The pain is characterized as severe, stabbing, and patient states it feels like a knife is slicing doen (sic) his neck. **Initial onset was two weeks ago.** ... His assistant manager pushed him up against the wall and patient felt and heard a pop in his neck. .... He (Claimant) also states he has the sensation of a "brain freeze" as a result of this." (ROA P. 330) "Out of work until I see him back in 8 days." (ROA 360, 361, 328) (emphasis added)

Some of Claimant's symptoms existed intermittently in the past and Appellant did report these symptoms to his physician well prior to the incident. However, the Appellant consistently stated that the symptoms were much worse after the altercation and neck trauma and many of the post altercation symptoms were new, never before felt or articulated by Mr. Miller (Appellant) prior to the incident such as brain freeze for example. After Dr. Levinson referred Mr. Miller to a neurosurgeon; Dr. Boyd. Boyd in his first interview states as follows:

"Mr. Miller is a 46 year old heavy equipment operator who stated that on August 15th he was pushed against the wall by his supervisor. He felt an immediate pop in his neck. He states that shortly after that he had severe neck pain and stiffness and began developing numbness, tingling and weakness in his arms. This has progressed since the incident. He has constant numbness in his hands. He can not move his neck because of severe stiffness." "... He **(Claimant) states that in the past he has been diagnosed with cervical stenosis** and probably also has degenerative disc disease. .... He **states that he was doing fine with his neck until this incident** ...." (ROA P. 291)

As is apparent in the medical notes, Appellant informed Dr. Boyd about prior diagnoses and neck issues but states also that his neck had been doing fine recently until this incident. There was no testimony or evidence of any kind which contradicts the records or medical notes as set forth above.

The Hearing Commissioner, as he stated in the pre order note and the Decision and Order, therefore ruled solely on his comparison of the two MRI reports. Dr. Boyd specifically discusses his comparison of the two actual images in his notes;1) the prior image in February of 2012 and 2) the recent post accident MRI taken in September 2012. The Neurosurgeon compares these images as follows:

" MRI of the cervical spine done at Palmetto Imaging (*Sept. 2012*) shows a large C6-7 disc herniation with **extruded fragment** that has migrated slightly cephalad. This causes significant central canal stenosis and cord compression. I believe on the T2 weighted sagittal images there is some suggestion of high signal in the cord. **This is compared to a February 18 (sic) 2012** (ROA P. 429, 430) **study that apparently showed a left central and foraminal disc protrusion at C6-7 but that has contracted since the previous study**." (ROA P. 291, 292)(emphasis added)

It is clear that the neurosurgeon actually viewed the MRI and compared the two images, not just the reports, and it is not disputed that Dr. Boyd states that the MRI images are not identical. The Hearing Commissioner simply compared two written reports of the MRI (pre and post accident) without the images and made a medical conclusion. Both treating physicians including Dr. Boyd reviewed both the images and reports and Dr. Boyd immediately prescribed a neck cast/brace to completely limit Claimant's head movement and recommended surgery stating that time was of the essence and informed Appellant that failure to undergo surgery could result in paralysis. (ROA P. 292) Even if there were no difference in the levels of experience and expertise between the neurosurgeon and the Hearing Commissioner concerning this information, the surgeon and internist both had an opportunity to view the actual images. They had the actual data upon which to make a determination and come to an opinion.

In this matter, Claimant provided expert opinion evidence, to a reasonable degree of medical certainty, that the push against the wall by his supervisor, when Claimant felt/heard his

neck pop, was the most likely trauma that created the acute injury to the neck requiring surgery. (ROA P. 358, 359 / Dr. Boyd) The initial treating physician (Dr. Levinson) also notes that the injury was caused by the altercation in his records. Further, and perhaps most importantly, the Neurosurgeon (Dr. Boyd) actually performed surgery and had an opportunity to view the cervical spine and the bone fragment. The Hearing Commissioner was only able to view two reports. The surgeon viewed the reports, the actual images and was able to go in and view the actual cervical spine during surgery. The surgeon had vastly superior information and data even if there were no difference in expertise in the area of neurosurgery.

Absent opposing evidence in the record, expert medical opinion from a treating physician or physicians are entitled great deference and should only be dismissed if there is other competent evidence in the record. *Lorick v. S.C. Elec. & Gas Co.*, 141 S.E.2d 662 (SC 1965)(medical causation should be established with expert opinion in all but simple cases); *Ballenger v. Southern Worsted Corp.*, 40 S.E.2d 681 (SC 1946). Further, expert testimony is necessary when the subject matter falls outside of the realm of the general public. *5 Star, Inc. V. Ford Motor Co., Inc.*, 718 S.E.2d 220 (SC App. 2011) Claimant had neck issues prior to the injury and he been diagnosed with spinal stenosis, making his spine more susceptible to injury. *Hargrove v. Titan Textile Co.*, 599 S.E.2d 604 (SC Ct. App. 2004)(employer takes the employee as it finds him or her); *Brown v. R.L. Jordan Oil Co.*, 353 S.E.2d 280 (SC 1977)(a work related accident which aggravates or accelerates a pre-existing condition, infirmity or disease is compensable)

Again, there were no expert diagnoses, opinions or records of any type which suggested the August 15 trauma was not the most likely cause of the acute injury requiring surgery. The Hearing Commissioner either ignored or did not consider the fact that the Respondent Employer

did not provide a medical opinion in the record which in any way disputed causation. The only credible and admissible evidence as to the medical cause of the injury was through the physician records, notes and hearing testimony and each treating physician stated that Claimant's condition was subsequent to the recent trauma in the altercation in which Claimant heard/felt a "pop" in his neck.

For purposes of judicial review of an administrative agency's decision, substantial evidence is not a mere scintilla of evidence, nor the evidence viewed blindly from one side of the case. It is evidence which, considering the record as a whole, would allow reasonable minds to reach the conclusion the administrative agency reached in order to justify its action. *Hargrove v. Titan Textile Co.*, 599 S.E.2d 604 (SC App. 2004); *Alexander v. Forklifts Unlimited*, 618 S.E.2d 307 (SC App. 2005); *Camp v. Spartan Mills*, 396 S.E.2d 121 SC App. 1990)(substantial evidence to support an order of the Workers Compensation Commission, is that evidence which would allow reasonable minds to reach the conclusion the Commission reached) The record evidence in this matter does not support a conclusion that there was a lack of causation or nexus between the altercation and the need for neck surgery. The only factual evidence in the record which would be relevant to causation is the undisputed testimony[11] that Mr. Miller was pushed

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[11] All witnesses for the Employer testified that Mr. Miller (Appellant) was in fact pushed against a wall by Raulerson. 1) Mr. Miller (Claimant) and others were discussing whether power would be out in the plant that weekend when Raulerson came up.
Miller: (ROA P. 60) Steve (Raulerson) walked up asked if there was a problem. Miller said they were talking about power being on or off and Raulerson initially disagreed and then agreed. Miller said "Huh" and walked toward the bathroom. Raulerson followed him.
Raulerson agrees that he walked in toward the end of the conversation about power. He states Miller said something under his breath and Miller went toward the bathroom and he, Raulerson, followed him asking what his (Miller's) problem was. Raulerson: (ROA P. 160, 161)
3) Miller: Claimant stated that he went out of the bathroom and his back was to the wall in the hallway. (ROA P. 65 L. 1-3) Miller testified that Raulerson then shoved him into the wall and he felt and heard his neck pop. Raulerson then appears to want to lunge at him again and he

against a wall forcefully at work by a heavy co-worker. There was no evidence through testimony, statements or documentation that Mr. Raulerson did not push Miller against the wall. In fact all witnesses to the altercation stated that there was a push by Raulerson of Miller into the wall. Appellant then heard his neck pop after the push. It is undisputed that Mr. Miller put this in his statement to the Employer and specifically stated this to his supervisor well prior to his termination. To come to this conclusion, a fact finder would need to determine that this was all made up by Mr. Miller, even prior to learning he was losing his job, as well as come to the determination that his physician and surgeon were either incompetent or in complete error about his condition and the diagnosis. There is not substantial evidence in this record supporting the determination in this case and reasonable minds could not come to this conclusion based on the facts and evidence in this record.

The Commissioner need not speculate about the cause of the spinal condition after the injury as both physicians diagnosed it as an acute condition from August trauma which had changed the Appellant/Claimant's condition for the worse, after the altercation, requiring surgery. The neurosurgeon stated to a reasonable degree of medical certainty that the August trauma was the most likely cause of the immediate condition of the spine necessitating surgery. The only conclusion which could be drawn from the evidence in the record is that the workplace

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punches him. (ROA P. 65) Raulerson: Stated that Miller was in fact on the wall facing him from the doorway. (ROA P. 164 L. 19-24) Raulerson then stated that he pushed Miller against the wall with both hands. (ROA P. 166 L. 9-11) Brian Ingle stated in his statement that "Steve and Bill" were pushing each other. In Hearing Ingle testified that the pushing and shoving was before the punch. (ROA P. 149 L. 10-18): Jackie Osborne stated that "I turn to see Steve Raulerson and Bill Miller face to face yelling at each other. Bill Miller stated quit pushing me I've got a bad back and neck while bellying up to Steve pushing each other a couple more times.(ROA P. 380) Jason Frye stated, "..Steve shoved Bill (Miller) back. Raulerson pushed Bill (Appellant Miller) into the wall from the restroom door and he (Miller) hit the wall. (ROA P. 182 L. 7-15)

altercation was the cause of the break or further dislodgement of the bone fragment requiring surgery.

II. THE COMMISSION COMMITTED AN ERROR OF LAW IN MAKING A MEDICAL DETERMINATION WHICH WAS NOT IN THE SCOPE OF GENERAL KNOWLEDGE AND REQUIRED EXPERT MEDICAL OPINION AND WHEN SUCH DETERMINATION WAS CONTRARY TO THE ONLY MEDICAL OPINIONS AND MEDICAL EVIDENCE IN THE RECORD

Specific facts which are outside of the common knowledge or expertise of a fact finder should generally be presented through qualified expert witnesses. Although medical testimony need not be automatically accepted as conclusive of the issue or issues it addresses, a factfinder must evaluate such testimony and weigh it along with any other relevant evidence. However, a factfinder's rejection of uncontradicted expert evidence, without a reasonable explanation, may constitute an abuse of discretion. *Kiel v. Texas Employers Insurance Association*, 679 S.W.2d 656, 659 (TX Ct. App. 1984)(a finding contrary to the un-rebutted testimony of a physician in a workers compensation matter regarding causation was "so against great weight and preponderance of evidence as to be manifestly unjust); see: *Loughan v. Slutz Seiberling Tire and Sentry Claims Service*, 483 So. 2d 1389 (Fla Dist Ct. App. 1986). Although the establishment of all medical determinations such as standard of care or causation do not always require expert testimony, many complex medical issues do require expert opinion as the basis of knowledge to make such a determination is outside of the general knowledge of the specific fact finder. *Burnette v. City of Greenville*, 737 S.E.2d 200 (SC Ct. App. 2012)(case on loss of use indicated that expert testimony may be required to determine issue of fact if such issue is so technically complicated as to require exclusively testimony of expert)

In this case, the issue of causation or nexus between the August workplace trauma and the condition of Appellant's cervical spine required specific expertise including reading and interpretation of MRI images as well as making clinical interpretations of symptoms. In addition, there is only one witness, Dr. Boyd, who was able to analyze and testify with benefit of direct information of the Appellant's spine gained through surgery. Further, the fact that Appellant had pre-existing spinal issues including spinal stenosis and related symptoms rendered the medical determination even more complex. It would be hard to argue that the issue of causation in this matter did not require technical and complex interpretation.

Simply stated, the Hearing Commissioner determined that the August 15 altercation and neck trauma as described by Mr. Miller and not disputed by any witness, did not injure, damage, exacerbate or change the condition of Mr. Miller's cervical spine in any way. This finding was despite the claimant's testimony and his wife's testimony regarding his condition after the trauma.

> Q. During the six days you were out, "cause I guess three two weekend days during that time - - -
>
> A. Yes sir.
>
> Q .....how was your neck?
>
> A. Progressively worse, My neck hurt. It was pretty bad.
>
> Q. Okay.
>
> A. I couldn't sleep. There was numbness in my hands, my leg, pain shooting down into my shoulders.

(ROA P. 72 L. 10-15 Bill Miller)

> Q. Okay, How – from your observations, how was his condition after that?
>
> A. After he went back to work after the four day suspension, he - - his - - it was a lot worse after those two days. Wednesday and Thursday or Thursday and Friday. Im not sure which days, but it - - it was a lot worse, and over that weekend I begged him go to the emergency room.

(ROA P. 129 / Mrs. T. Miller)

This determination was also contrary to the statements in the physician notes, the medical records and neurosurgeon's causation statement. The Hearing Commissioner apparently discounted the undisputed fact that Appellant asked for medical attention after the trauma and, getting none, sought it on his own. Appellant, after going to the doctor on his own and prior to any issue of termination, delivered the physician work excuse to the Employer and two days later Appellant was then terminated.

Only days later, the Appellant was diagnosed by a neurosurgeon, who was referred by Appellant's long time internist, with an acute spinal injury which if not surgically treated immediately could lead to paralysis. Appellant had the spine surgery. The neurosurgeon (Dr. Boyd) specifically gave an opinion in the record that the August trauma was the most likely cause of the acute injury and specifically referred to the finding of a "fresh" bone fragment recovered from the spine during the surgery. (ROA P. 291-299) Respondent/s did not seek independent review of the opinions of Dr. Boyd or Dr. Levinson and did not provide any evidence, through deposition, cross examination or otherwise, that would allow a fact finder to find fault or contest their methods or interpretations.

The Hearing Commissioner stated that he relied solely on the medical records, the MRI reports in particular. (ROA P. 47, 52 / Comm. note:) The legal issue here is whether a non expert fact finder can make what is in essence a medical interpretation of complex medical information and images which is contrary to the medical interpretation of the treating surgeon based solely on a portion of the medical information. There are no factual issues that would be relevant solely to an interpretation of MRI reports and, again, the facts are not disputed that Mr.

Miller had prior cervical spine issues (stenosis and other issues) but he was working fine and only having intermittent symptoms prior to the trauma. The Appellant was in fact pushed into the wall and this is corroborated by all the fact witnesses with knowledge of the issue. Appellant's feeling and hearing a neck "pop" is not disputed and Appellant stated this fact verbally and placed it in his statement prior to any knowledge that he would be terminated or workers compensation would be denied. The Hearing Commissioner's determination is stated to be and could only be based on his interpretation of MRI reports.

It is also a critical issue that the Commissioner did not have all the information that the physicians did in coming to the opposite conclusion; finding the trauma was most likely caused by the recent workplace neck trauma. (ROA P. 290-293):(ROA P. 358, 359 / questionnaire ¶. 1-3) The neurosurgeon, in addition to having the medical knowledge, also had the actual images in hand to interpret, not just the reports of the MRI. Finally, the neurosurgeon also did the surgery itself and was the only person to have the opportunity to view the spine and the "fresh" and "acute" bone fragment removed. (Id)

It was an error of law for the Commission to make a contrary finding solely on evidence more ably determined by medical experts especially when the expert neurosurgeon in this case was the only person, regardless of medical qualification, with access to all the information needed to make a full interpretation. Although medical evidence is not the only evidence a fact finder can rely on, when no other facts dispute causation and the only relevant evidence is complex medical information, a fact finder must accord it at least great weight especially if such evidence is not re-butted in the record.

III. THE COMMISSION COMMITTED AN ERROR OF LAW IN NOT GIVING CONTROLLING WEIGHT TO THE UN-REBUTTED EXPERT TESTIMONY FROM APPELLANTS TREATING PHYSICIAN IN THE RECORD.

In federal disability matters, the medical opinion of a treating physician is entitled to controlling weight if it is supported by medically acceptable clinical and diagnostic technics and it is not inconsistent with other substantial evidence in the record. *Edwards v. Astrue*, 2009 WL 764 (D.SC 2009) A treating physician is at least entitled to great weight in any administrative action and the discounting of a medical interpretation by the only treating surgeon would require significant countervailing evidence. The South Carolina Supreme Court articulated, within a concurring opinion in *Doe v. South Carolina Dept. Health and Human Services*, 727 S.E.2d 605 (SC Ct. App. 2011), its thoughts on an agency's failure to consider the opinion of a treating physician absent any other contradicting medical evidence. It stated that "if a treating physician's diagnosis has not been called into question or there are no competing diagnoses, not giving it controlling weight may be arbitrary and capricious and an abuse of discretion."(Id at. 618 Fn. 16)

In this case, there were two treating physicians and each viewed and interpreted the MRI reports cited by the Hearing Commissioner. Each specifically identified that there were in fact differences in the MRIs from prior to and after the trauma on August 15, 2012. The internist (Dr. Levinson) expressly stated in his records that the extrusion as it appeared in the September (post trauma) MRI was diagnosed at that time, September 5, 2012. This physician was the referring physician and actually prescribed and interpreted the prior MRI in February and the September MRI. It would be difficult to suggest this physician was somehow mislead by the Appellant. The neurosurgeon (Dr. Boyd) specifically contrasted the two MRIs in his medical notes.(ROA P. 291-293) Dr. Boyd notes also that Mr. Miller (Appellant) has had prior neck

issues and states he was told this by the patient himself as well as actually having the prior MRI to review prior to surgery. Dr. Boyd operated on Appellant and was able to view the spine and subsequently gave his medical opinion that the recent trauma to his neck in August was the most likely cause of the injury and need for spinal surgery to a reasonable degree of medical certainty. The opinion of the treating neurosurgeon should be given great weight or controlling weight in this case as the surgeon had access to the most important medical information and, as a neurosurgeon, was better equipped to make an informed determination of medical causation.

CONCLUSION

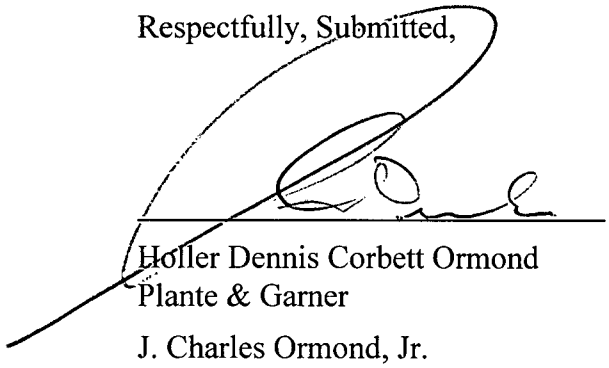
The Commission's Decision finding that the August trauma to the Appellant was not compensable, as there was no nexus between the injury/ trauma and the resulting surgery, was without substantial supporting evidence in the record. The determination was stated by the Hearing Commissioner, and affirmed by the Appellate Panel, to be his own interpretation of the prior and post trauma MRI reports in the medical records. There is no relevant factual evidence in the record upon which the Commission could have used to base a decision that the neck trauma suffered by Appellant during the altercation of August 15, 2012 was not the cause of his acute need for immediate neck surgery. The Hearing Commissioner simply interpreted the MRI reports differently than either of the two treating physicians and did so without the actual images or the advantage of knowledge gained from surgery.

A determination of a complex medical issue based on the non expert fact finder's own interpretation of complex medical information is against the substantial weight of the evidence as

a matter of law. This is especially true if the fact finder does not have all of the medical information that the expert physician had access to in coming to that physician's expert opinion. An un-rebutted treating physician's expert opinion and diagnosis, if no contrary medical diagnosis or opinion is in the record, should be given either great weight or controlling weight when no other evidence diminishes or contradicts the opinion.

THEREFORE, for the reasons stated above, this Court should reverse the Order of the Commission finding that the Appellant did not suffer a work related injury.

Respectfully, Submitted,



April 28, 2014

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THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM SOUTH CAROLINA WORKERS COMPENSATION COMMISSION

APPELLATE CASE NO. 2013-001564

WILLIAM E MILLER, JR. ..... APPELLANT,

v.

OWEN STEEL COMPANY INC. EMPLOYER AND
GREAT AMERICAN INSURANCE GROUP C/O
STRATEGIC COMP SERVICES, CARRIER, DEFENDANTS..... RESPONDENTS.

PROOF OF SERVICE

I certify that I have served three (3) copies of the **Appellant's Final Brief** on Respondents (Great American Insurance Group c/o Strategic Comp. Services, by **(Hand Delivery)**, on April 28, 2014, its/their attorney/s of record, Helen Hiser, Esq., Weston Adams, III, Jason Lockhart McAngus Goudelock & Courie,. LLC, P.O. Box 12519, Columbia, SC 29211. Meridian Building, Columbia, SC. 29201.

April 28, 2014

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