APPELLATE PANEL
DECISION AND ORDER
OF THE
SOUTH CAROLINA WORKERS' COMPENSATION COMMISSION
W.C.C. FILE NO.: 1203594

JAMES B. NEFF, EMPLOYEE .... CLAIMANT/RESPONDENT

VS.

LEAR'S WELDING & FABRICATION, INC., EMPLOYER,

AND

BRIDGEFIELD CASUALTY INSURANCE COMPANY
C/O SUMMIT HOLDINGS, INC., CARRIER .... DEFENDANTS/APPELLANTS.

Appellate Panel Review Hearing
held in Columbia, South Carolina,
on September 15, 2014, per notices
timely and properly served upon
all parties of interest.

Appellate Panel Decision and Order
filed, December 3rd, 2014

APPEARANCES: CLAIMANT/RESPONDENT represented by Everett Hope Garner, Esquire, of Columbia, South Carolina; and

DEFENDANTS/APPELLANTS represented by Nicolas L. Haigler, Esquire, of Columbia, South Carolina.

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STATEMENT OF THE CASE

This is an appeal by Lear's Welding & Fabrication, Inc., and Bridgefield Casualty Insurance Company c/o Summit Holdings, Inc. ("Appellants" or "Defendants") from the Decision and Order of Commissioner Gene McCaskill filed on April 17, 2014.

This claim was before the South Carolina Workers' Compensation Commission pursuant to the Form 50 filed by the claimant on June 17, 2013, and the Form 21 filed by the defendants on June 19, 2013. It is the position of the claimant that he is entitled to additional casually-related medical treatment and/or evaluation for his left clavicle and head as such treatment will tend to lessen his period of disability; and continued temporary total disability benefits until such time as the claimant reached maximum medical improvement (MMI).

It is the position of the defendants that the claimant's current problems, both orthopedic and neurological, are not causally-related to his admitted accident but are the result of non-compliance with medical treatment and/or an intervening accident(s). The defendants assert the medical non-compliance and/or intervening cause occurred on or before October 11, 2012, and that the claimant is not entitled to any benefits under the Act after this date. Moreover, the defendants request a credit for temporary total disability benefits paid after October 11, 2012. In addition, defendants contend the claimant has not sustained any causally-related permanent partial disability with regard to any of his compensable injuries under Section 42-9-30. Finally, the defendants requested the Hearing Commissioner make a determination as to the credibility of the claimant.

The Hearing in this matter was held on November 14, 2013, in Rock Hill, South Carolina, before Commissioner Gene McCaskill ("Hearing Commissioner"). By way of Decision and Order filed on April 17, 2014, the Hearing Commissioner determined the claimant sustained compensable injuries to his left wrist, left elbow, neck, ribs, concussion and left clavicle; has reached MMI for his left wrist, left elbow and neck as of October 11, 2012, with no permanent partial disability sustained to these body parts; has not reached

MMI with regard to his left clavicle and head (concussion); that the claimant's current medical problems are not the result of an intervening accident/cause and/or non-compliance with medical treatment; that the claimant is entitled to additional medical treatment which will tend to lessen his period of disability, including treatment with Dr. Schiffern and a neurological evaluation and treatment with a physician of the defendants' choosing; that the claimant's testimony was lacking in credibility and unbelievable; and that temporary total disability benefits shall continue until such time as the claimant reaches MMI.

Within the statutory period, the defendants filed an Application for Review in the case setting forth their reasons, copies of which were furnished to all interested parties, prior to oral argument presented before the Full Commission Appellate Panel ("Appellate Panel") on September 15, 2014. All proffered testimony has been taken. Such, together with all documentary evidence, has been delivered by oral argument to the undersigned members of the Appellate Panel and has since been under study and consideration. Specifically, the defendants respectfully requests the Appellate Panel to reverse the Decision and Order of the Hearing Commissioner based upon the following grounds:

1. Did the Hearing Commissioner err in his Finding of Fact #7, wherein he found as a fact that there is no simple way to answer the question of whether claimant's non-compliance resulted in an intervening accident which caused the plate to break; said error being this finding is not supported by the greater weight of the evidence in the record, specifically but not limited to the testimony of Dr. Lehman, concurred with by Dr. Schiffern, that more likely than not the break in the plate was caused by the claimant's non-compliance?

2. Did the Hearing Commissioner err in his Finding of Fact #12, wherein he found as a fact that neither doctor definitively answered the question of whether not wearing the sling and deer hunting caused the plate to break; said error being this finding is not supported by the greater weight of the evidence in the record, specifically but not limited to the testimony of Dr. Lehman, concurred with by Dr. Schiffern, that more likely than not the break in the plate was caused by the claimant's non-compliance?

3. Did the Hearing Commissioner err in his Finding of Fact #12, wherein he found as a fact that Dr. Schiffern opined that the claimant's non-compliance had limited impact of the failure of the hardware or the non-union in this case; said error being this finding is inconsistent with the actual testimony of Dr. Schiffern?

4. Did the Hearing Commissioner err in his Finding of Fact #12, wherein he found as a fact that Dr. Schiffern opined that the claimant's non-compliance had limited impact on the failure of the

FINDINGS OF FACT

After careful review of the evidence presented by the parties, including the Hearing testimony of the claimant, the deposition testimony of William L. Lehman Jr., M.D., and Shadley Schiffern, M.D., M.D., and the medical records and exhibits submitted through the APA, WE FIND AS A FACT THAT:

1. All parties to the proceeding are subject to and bound by the terms of the South Carolina Workers' Compensation Act with James B. Neff as employee, Lear's Welding & Fabrication, Inc., as employer, and Bridgefield Casualty Insurance Company c/o Summit Holdings, Inc., as carrier.

2. We find the claimant suffered an injury by accident to his left wrist, left elbow, neck, ribs, head (concussion), and left clavicle within the course and scope of his employment on April 12, 2012, resulting from an explosion on his job. The defendants have provided medical care and treatment for all body parts listed above with William L. Lehman, Jr., M.D., being the initial and primary authorized treating orthopedist.

3. We find the claimant has reached MMI with regard to the injuries to his left wrist, left elbow, neck, and ribs on May 30, 2012, with no permanent impairment sustained to any of these body parts. This Finding is based upon the deposition of Dr. Lehman. See Deposition of Dr. Lehman, pp. 7-11.

4. We find the claimant did not sustain any permanent partial disability to his left wrist, left elbow, neck or ribs as a result of his accident on April 12, 2012. This Finding is based upon the greater weight of the evidence the record.

5. We find Dr. Lehman initially undertook conservative treatment of the left clavicle, but healing of the non-union did not occur as expected. The lack of healing required Dr. Lehman to perform surgery on July 25, 2012, wherein he inserted a plate made of titanium. Dr. Lehman also ordered a bone stimulator on August 24, 2012. This Finding is based upon the medical records and deposition testimony of Dr. Lehman.

6. We find the greater weight of the evidence supports the claimant's surgically repaired left clavicle was healing prior to October 11, 2012. On August 2, 2012, Dr. Lehman reported that an x-ray of the left clavicle revealed "satisfactory placement of the hardware" and "[t]he **gap at the nonunion is less than I would have expected**." On September 14, 2012, Dr. Lehman reported x-rays of the clavicle showed "a comminuted piece of the fracture at this point which seems to be incorporating perhaps a little bit." Dr. Lehman testified **the fracture appeared to be partially healing with the hardware and plate still intact.** See Claimant's APA #1, p. 19, 25; Deposition of Dr. Lehman, p. 17.

7. We find Dr. Lehman advised the claimant on several occasions after surgery to protect his left clavicle. Specifically, Dr. Lehman advised the claimant on August 2, 2012, to continue "extreme protection" of the clavicle. Dr. Lehman subsequently testified the use of the sling is important to prevent non-union of the fracture post-surgery, and that he instructed the claimant to use the sling until he instructed otherwise. Dr. Lehman further confirmed that as of September 14, 2012, the claimant should still have been using the sling as instructed. Importantly, Dr. Schiffern, the claimant's IME physician, agreed with Dr. Lehman recommendations regarding protecting the clavicle. See Claimant's APA #1, p. 20; Deposition of Dr. Schiffern, pp. 27-28, 31; Deposition of Dr. Lehman, p. 13, 18.

8. We give greater weight to the medical reports and deposition testimony of Dr. Lehman as opposed to Dr. Schiffern. Dr. Schiffern evaluated the claimant on only two occasions, both occurring several months after the alleged act of non-compliance. More importantly, Dr. Schiffern's opinions were predicated upon a lack of information and inconsistent with the indisputable medical evidence in the record. Specifically, Dr. Schiffern testified the claimant's clavicle never showed any signs of healing after surgery, which is contrary to the post-surgery records and x-rays of Dr. Lehman. Dr. Schiffern was then asked about the report of Dr. Lehman from September 14, 2012, *a report he testified he reviewed*. Dr. Schiffern admitted Dr. Lehman reported the x-ray revealed the claimant's clavicle **was healing**. Dr. Schiffern then admitted his affidavit was inconsistent with the x-ray and report of September 14, 2012. Dr. Schiffern subsequently admitted that since he did not review the x-ray scan he would have to rely on Dr. Lehman's interpretation that the clavicle was healing just prior to the October 11, 2012, report revealing the non-compliance. Dr. Schiffern then admitted, despite initially testifying to the contrary, that he may not have reviewed the October 11, 2012 report of Dr. Lehman documenting the claimant's non-compliance or the deposition testimony of Dr. Lehman that the claimant's non-compliance was more likely than not the cause of the claimant's condition. See Deposition of Dr. Schiffern, pp. 10-11, 33, 46-47.

9. We find the claimant admitted being noncompliant with the post-surgery instructions from Dr. Lehman. Specifically, the claimant admitted going deer hunting between the appointments with Dr. Lehman on September 14, 2012, and October 11, 2012. In fact, the claimant admitted he went deer hunting on the morning of his appointment with Dr. Lehamn on October 11, 2012. See H.T., pp. 24-25, 43-44, 48, 53.

10. We find the claimant's admitted non-compliance with the medical instructions of Dr. Lehman is the direct intervening cause of the plate breaking and his current left clavicle condition. This finding is based upon the medical records and deposition testimony of Dr. Lehman, whose opinion is given the most weight. On October 11, 2012, Dr. Lehman reported the claimant **"still is not in the sling and admits to not using it. He told my assistant that he had been out deer hunting."** During his examination of the claimant Dr. Lehman reported **"he is not protecting his left shoulder or arm whatsoever."** At the conclusion of his report, Dr. Lehman

noted, "**<u>Mr. Neff has been completely non-compliant with treatment ever since the surgery, not using his sling, going deer hunting, etc., despite my concerns voice[d] day one regarding the potential of continued non-union and fracture of the plate. I have admonished Mr. Neff regarding his non-adherence to protocol and his non-compliance.</u>**" Moreover, Dr. Lehman testified to a reasonable degree of medical certainty (more likely than not) that the claimant's non-compliance with treatment, specifically deer hunting and not using his sling, caused the plate in his clavicle to break resulting in his current condition. <u>See</u> Claimant's APA #1, pp. 31-32 (emphasis added); Deposition of Dr. Lehman, pp. 23, 27-28.

11. Though not dispositive in this matter, we find Dr. Schiffern, the claimant's expert, could not state to a reasonable degree of medical certainty that additional surgery would benefit claimant. <u>See</u> Deposition of Dr. Schiffem, pp. 26-27, 48-49.

12. We find the greater weight of the evidence supports the claimant's non-compliance with medical treatment resulted in an intervening cause sufficient to break the chain of causation between his accident on April 12, 2012, and his current left clavicle condition. As such, we find the claimant is no longer entitled to benefits under the Act. This Finding is based upon the greater weight of the evidence in the record and <u>Sanders v. Wal-Mart Stores, Inc.</u>, 379 S.C. 554, 559, 666 S.E.2d 297, 300 (Ct. App. 2008) (<u>citing</u> <u>Whitfield v. Daniel Constr. Co.</u>, 266 S.C. 37, 40-41, 83 S.E.2d 460, 462 (1954) ("every natural consequence which flows from a compensable injury, unless the result of an independent intervening cause sufficient to break the chain of causation, is compensable")).

13. We find the claimant's authorized treating ENT, Dr. Goldberg, advised him on August 27, 2012, to "avoid loud noise exposure and wear hearing protection in noisy environments." <u>See</u> Claimant's APA #5, p. 130.

14. We find the claimant unequivocally admitted that he did not wear hearing protection as instructed by Dr. Goldberg during the alleged two occasions he was hunting in September and October of 2012. <u>See</u> H.T., p. 62.

15. We find the claimant's violation of clear medical restrictions pertaining to his alleged neurological symptoms resulted in an intervening cause sufficient to break the chain of causation between his accident on April 12, 2012, and his current alleged neurological condition. As such, we find the claimant is no longer entitled to benefits under the Act. This Finding is based upon the medical records submitted by the claimant and the Hearing testimony of the claimant, and <u>Sanders</u>.

16. In addition, we also find the claimant's neurological problems, if any, resolved by June 20, 2013. This Finding is based upon the medical records of Dr. Schiffern, who on June 20, 2013, reported the claimant was no longer having dizziness, and did not find any other neurological abnormalities during his exam. <u>See</u> Claimant's APA #6, p. 134.

hardware or the non-union in this case; said error being this finding is not supported by the greater weight of the evidence in the record?

5. Did the Hearing Commissioner err in his Finding of Fact #13, wherein he found as a fact that Dr. Schiffern testified to a reasonable degree of medical certainty that "[the claimant's] bone wasn't healing"; said error being this finding is not supported by the greater weight of the evidence in the record?

6. Did the Hearing Commissioner err in his Finding of Fact #13, wherein he found as a fact that Dr. Schiffern testified to a reasonable degree of medical certainty that "[the claimant's] bone wasn't healing"; said error being this finding is based upon speculation and conjecture as Dr. Schiffern admitted under oath that he did not even review the claimant's x-rays, which showed healing of the bone prior to the break of the plate?

7. Did the Hearing Commissioner err in his Finding of Fact #15, wherein he found as a fact the proper consideration for whether the claimant is entitled to another surgery is whether that surgery would tend to lessen the claimant's disability, and defers to both doctors who unequivocally and without dispute indicate claimant would benefits from another surgery; said error being this finding is not supported by the greater weight of the evidence in the record?

8. Did the Hearing Commissioner err in his Finding of Fact #15, wherein he found as a fact the proper consideration for whether the claimant is entitled to another surgery is whether that surgery would tend to lessen the claimant's disability, and defers to both doctors who unequivocally and without dispute indicate claimant would benefits from another surgery; said error being this finding is contrary to the testimony of Dr. Schiffern that the claimant has at best a 50% chance of another surgery being successful?

9. Did the Hearing Commissioner err in his Finding of Fact #15, wherein he found as a fact the proper consideration for whether the claimant is entitled to another surgery is whether that surgery would tend to lessen the claimant's disability, and defers to both doctors who unequivocally and without dispute indicate claimant would benefits from another surgery; said error being the determination of whether an additional procedure will tend to the lessen the claimant's period of disability is not stated to a reasonable degree of medical certainty as required by Section 42-15-60?

10. Did the Hearing Commissioner err in his Finding of Fact #15, wherein he found as a fact the proper consideration for whether the claimant is entitled to another surgery is whether that surgery would tend to lessen the claimant's disability, and defers to both doctors who unequivocally and without dispute indicate claimant would benefit from another surgery; said error being this finding ignores the testimony from both doctors that the claimant's need for a second surgery is not causally-related to his admitted accident but the result of an intervening accident?

11. Did the Hearing Commissioner err in his Finding of Fact #16, wherein he found as a fact that Dr. Schiffern reviewed the medical notes and deposition of Dr. Lehman; said error being this finding is not supported by the greater weight of the evidence in the record?

12. Did the Hearing Commissioner err in his Finding of Fact #17 and Conclusion of Law #5, wherein he found as a fact and concluded as a matter of law that the greater weight must be given to the opinion of Dr. Schiffern because he is a specialist to whom Dr. Lehman would refer claimant; said error being this finding and conclusion is arbitrary and capricious and is not supported by the greater weight of the evidence in the record?

13. Did the Hearing Commissioner err in his Finding of Fact #18, wherein he found as a fact that the claimant has not reached maximum medical improvement with regard to his clavicle and is entitled to additional medical care and treatment with Dr. Schiffern; said error is that this finding is not supported by the greater weight of the evidence in the record?

14. Did the Hearing Commissioner err in his Finding of Fact #21, wherein he found as a fact that the claimant has not reached maximum medical improvement with regard to his neurological issues and is entitled to additional medical care and treatment; said error is that this finding is not supported by the greater weight of the evidence in the record?

15. Did the Hearing Commissioner err in his Finding of Fact #21, wherein he found as a fact that the claimant has not reached maximum medical improvement with regard to his neurological issues and is entitled to additional medical care and treatment; said error is that this finding fails to consider whether the claimant's non-compliance with medical treatment rendered by the authorized treating neurologist constitutes an intervening accident sufficient to break the chain of causation?

16. Did the Hearing Commissioner err in his Finding of Fact #22, wherein he found as a fact that temporary total disability benefits shall continue unabated; said error is that this finding is not supported by the greater weight of the evidence in the record, specifically the Commissioner's failure to properly consider the claimant's intervening accident which resulted from gross non-compliance with medical treatment?

17. Did the Hearing Commissioner err in failing to award defendants with credit for temporary total disability benefits paid after October 11, 2012, the date on which the intervening accident caused by gross medical non-compliance was discovered?

18. Did the Hearing Commissioner err in failing to issue a Conclusion of Law that the additional medical treatment will tend to lessen the claimant's period of disability under Section 42-15-60 of the Act?

After careful review in the instant case of all grounds raised, the evidence in the record, and oral arguments from both counsel, the Commission finds that, by unanimous vote, the Decision and Order of the Hearing Commissioner must be Reversed in its entirety.

17. We find the claimant to be lacking in credibility. This Finding is supported by the deposition and Hearing testimony of the claimant. When questioned about why he was violating his restrictions from Dr. Lehman, he testified "no one told me I could not hunt." In addition, he admitted in his deposition that he stopped deer hunting because a neighbor told him his activities were being investigated. He denied giving this testimony during the Hearing. The claimant then denied Dr. Lehman ever told him to wear his sling after surgery; he later retracted the statement during cross-examination. The claimant also testified that Dr. Schiffem's report that the claimant stopped using the sling two or three weeks before the September 14, 2012 visit "[is] a lie." This is the same physician the claimant relied on as an expert. See H.T., pp. 33, 42-44, 48, 50-52; Deposition of claimant, p. 53.

18. We find the claimant's entitlement to temporary total disability benefits terminated on October 11, 2012, the date on which Dr. Lehman discovered the claimant's non-compliance with medical treatment, which was sufficient to break the chain of causation between his accident on April 12, 2012, and his alleged continued left clavicle and neurological conditions. This Finding is based upon the greater weight of the evidence in the record and Sanders.

19. We find the defendants are entitled to credit and repayment of all temporary total disability benefits paid to the claimant after October 11, 2012.

20. We find the claimant is not entitled to further benefits under the Act. This finding is based upon the greater weight of the evidence in the record and Section 42-15-60 of the Act.

CONCLUSIONS OF LAW

Based upon the foregoing Findings of Fact, and as provided by the Code of Laws of South Carolina, § 42-17-40, it is the determination of the Commission that:

1. Under § 42-1-130, claimant was a covered employee at the time in question.

2. Under § 42-1-140, defendant-employer was a covered employer under the Act.

3. Under § 42-1-160, claimant sustained an injury by accident to his left wrist, left elbow, neck, ribs, concussion and left clavicle within the course and scope of his employment on April 12, 2012.

4. Under § 42-9-30, claimant did not sustain any permanent partial disability to his left wrist, left elbow, neck or ribs.

5. Under Sanders v. Wal-Mart Stores, Inc., 379 S.C. 554, 666 S.E.2d 297 (Ct. App. 2008), claimant sustained an intervening cause/accident on or about October 11, 2012, sufficient to break the chain of causation between his accident of April 12, 2012, and his alleged current left clavicle and neurological problems.

6. Under § 42-9-260, claimant is not entitled to temporary total disability benefits after October 11, 2012.

7. Under § 42-15-60, claimant is not entitled to further medical treatment.

ORDER

IT IS, THEREFORE, ORDERED, that the Decision and Order of the Hearing Commissioner filed in the above-captioned matter on April 17, 2014, is hereby REVERSED.

IT IS FURTHER ORDERED that claimant is not entitled to further benefits under the Act for his compensable neurological and left clavicle injury, as he sustained an intervening accident/cause on October 11, 2012.

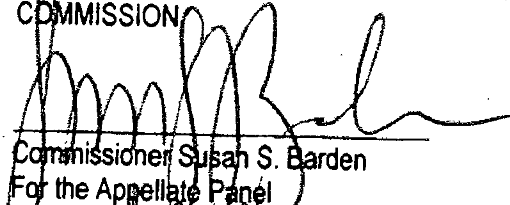
IT IS FURTHER ORDERED that claimant reached MMI on May 30, 2012, with no permanent partial disability to his left wrist, left elbow, neck or ribs.

IT IS FURTHER ORDERED that claimant is not entitled to any further medical treatment for his left wrist, left elbow, neck or ribs.

IT IS FURTHER ORDERED that defendants are entitled to credit and reimbursement from the claimant for all temporary total disability benefits paid after October 11, 2012.

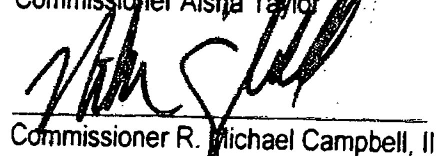
AND IT IS SO ORDERED.

SOUTH CAROLINA WORKERS' COMPENSATION COMMISSION



Commissioner Susan S. Barden
For the Appellate Panel

Commissioner Aisha Taylor



Commissioner R. Michael Campbell, II

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 Kim Falls on December 3, 2014