

THE STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

APPEAL FROM SOUTH CAROLINA
WORKERS' COMPENSATION COMMISSION

W.C.C.FILE NO.: 1008485
APPELLATE CASE NO.: 2014-001503

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SC Court of Appeals

Rusty Lowery, Claimant.....Appellant,

v.

Pioneer Associates, Employer, and
Chartis Casualty Co., Carrier.....Respondent.

INITIAL BRIEF OF APPELLANT

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STATEMENT OF ISSUES ON APPEAL

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STATEMENT OF THE CASE

This is a lifetime benefits workers' compensation case involving physical brain damage. Rusty Lowery (hereinafter referred to as "Claimant" or "Rusty") sustained an admitted injury by accident on July 9, 2010 while working for Williams Electric Company.

Claimant filed his Employee's Notice of Claim on February 12, 2013. (ROA p. ____; 2/12/13 Form 50). He alleged injuries to his "brain, neck and back" and requested compensation for permanent and total disability stemming from his July 9, 2010 accident. The Defendants Pioneer Associates and Chartis Casualty Company filed their WCC Form 21 on March 19, 2013 and their Form 51 on May 1, 2013. (ROA p. ____; Form 21 & 51).

Claimant filed his WCC Form 58-Pre-Hearing Brief and APA Submissions on April 24, 2013. (ROA p. ____; Claimant's Form 58 & APA Submissions). Claimant filed Supplemental APA Submissions on _____. (ROA p. ____; Claimant's Supplemental APAs). Claimant filed his Second Supplemental APA Submissions on April 29, 2013 as well. (ROA p. ____; Claimant's Second Supplemental APAs).

Defendants filed their WCC Form 58 and APA Submissions on April 29, 2013 as well. (ROA p. ____; Defendant's Form 58 & APA Submissions).

In response to a motion filed by the Defendants, Claimant filed a Reply to Defendants' Motion in Limine on May 17, 2013. (ROA p. ____; Reply to Defendants' Motion in Limine).

The single commissioner heard the case on May 22, 2013 even though Claimant was not present. (ROA p. ____; Transcript of 5/22/13 hearing). By Decision and Order filed September 26, 2013, the single commissioner found that Claimant sustained an admitted injury by accident on July 9, 2010 injuring his face, head and neck. (ROA p. ____; Single Commissioner Order p. 14, Finding of Fact No. 9). The single commissioner further found that Claimant sustained only a "mild and not

severe” brain injury resulting in permanent partial wage loss in the amount of \$728.80 per week. The single commissioner denied Claimant’s request for a finding of permanent and total disability accompanied by physical brain damage with lifetime benefits. The single commissioner expressly considered and relied upon the deposition of Claimant even though the deposition transcript was never made part of the record. (ROA ___p. Single Commissioner Order p. 2-4).

Both parties appealed. (ROA p. ___; WCC Form 30s). Both parties filed briefs with the Appellate Panel in support of their position. (ROA p. ___; Brief of Claimant/Appellant; Brief of Defendants/Appellants).

The appeal was heard by the Appellate Panel of the South Carolina Workers’ Compensation Commission on March 17, 2014. (ROA p. ___; Transcript of 3/17/14 hearing). By Appellate Panel Decision and Order of the South Carolina Workers’ Compensation Commission filed June 16, 2014, the Appellate Panel affirmed the Decision and Order of the single commissioner but did not reference the deposition of Claimant. (hereinafter “Appellate Panel Order”).

Claimant filed its Notice of Appeal on July 14, 2014. (ROA p. ___; Notice of Appeal received by Ct. App. July 14, 2014). The Defendant did not appeal.

STATEMENT OF FACTS

Prior to July 9, 2010, Claimant was a pretty healthy man and a pleasant, hardworking employee.

As of February 13, 2007, Claimant had a clean bill of health per Dr. Stephen McPhail. (ROA p. ___; APA No.1). Claimant had no history of any significant health problems. (ROA p. ___; APA p. 1).

Claimant’s family doctor was Dr. Henry Shugart at Carolina Medical Affiliates in Spartanburg, South Carolina. (ROA p. ___; APA No. 2). Claimant was examined by Carolina

Medical Affiliates six times during the period leading up to the accident. These examinations revealed no chronic health problems except for Claimant's ongoing struggle with his weight.

Claimant did not report vision problems during his examinations by Carolina Medical Affiliates. (ROA p. ____; APA. p. 9, 14, 17, 20, 23, 26).

Claimant did not report any memory problems leading up to the July 9, 2010 accident. (ROA p. ____; APA p. 9, 11, 15, 18, 21, 24, 27).

Claimant also did not report any depression, anxiety or agitation leading up to the July 9, 2010 accident. (ROA p. ____; APA p. 9, 11, 15, 18, 21, 24, 27).

Claimant did not report any problems with his neck or upper back leading up to the July 9, 2010 accident. (ROA p. ____; APA p. 1, 3, 9, 10, 11, 14, 15, 18, 27).

Claimant was, without question, also a good employee before July 9, 2010. He was hired in either late 2002 or early 2003. (ROA p. ____; APA p. 136). By June of 2005, his lead supervisor, Dennis Messer, ranked Claimant "among the top" of 27 employees. (ROA p. ____; APA p. 136). Mr. Messer found Claimant to be "very professional," "polite," "very hardworking" and "dedicated." (ROA p. ____; APA p. 136).

Claimant's Performance Appraisal Review on March 7, 2009 included findings of "outstanding" or "very good" in almost every category. (ROA p. ____; APA p. 138-143). His employer noted that Claimant "puts out more work than he's ever asked to" and he "works well with everyone and is a great team player." (ROA p. ____; APA p. 139, 141). His "Attendance/Punctuality" rating was "outstanding." (ROA p. ____; APA p. 142).

Unfortunately, Claimant's good health, excellent work ethic and pleasant demeanor were altered permanently on July 9, 2010.

To truly understand how the injury impacted Claimant's life, it is critical to understand

Claimant's job and the mechanics of the accident. Claimant "ran a line truck" for Williams Electric Company. (ROA p. ____; Tr. p. 22-23). A line truck is the "pole setting truck to set pole lines to build power lines." (ROA p. ____; Tr. p. 23). The specific duties of Claimant's job were to "operate truck, pick up the poles,....deliver them, set the poles, frame the hardware, put the insulators and stuff on it and then the bucket truck comes to install the power lines." (ROA p. ____; Tr. 25). His job "required a lot of climbing poles/ladders and frequently lifting of 75lbs. or more." (ROA p. ____; APA p.90).

On July 9, 2010, Claimant and his team were installing a pole. As part of this process, they were using a 300 pound auger to create the hole for placement of the pole. This 300 pound auger cut loose and swung down approximately 20 feet and hit Claimant on the left side of his head. (ROA p. ____; APA p. 37, 43, 58, 67, 113). He was flown by helicopter from the accident site to Spartanburg Regional Medical Center because of the severity of the accident. (ROA p. ____; APA p. 50, 57, 113).

Pursuant to the records from Spartanburg Regional Medical Center, "at admission, Rusty was confused but alert, did not recall the accident. He had an unknown duration of loss of consciousness." (ROA p. ____; APA p. 43). He had no recollection of the incident or "even minor events leading up to the day of the incident." (ROA p. ____; APA p. 50). He sustained a left frontal laceration approximately 4 inches in length. (ROA p. ____; APA p. 59, 114). He sustained a concussion, left frontal skull fracture, and left frontal orbital fracture. (ROA p. ____; APA p. 43, 48, 51, 52, 53, 54, 55, 69, 114). The left frontal bone was depressed into the skull and bone fragments were "projecting superiorly from the superior wall of the orbit up into the left frontal lobe." (ROA p. ____; APA p. 52). The radiologist described these fractures as "extensive." (ROA p. ____; APA p. 54).

In addition to the facial and head trauma, Claimant complained of neck pain on the day of the accident. (APA p. 50). The CT of the cervical spine indicated degenerative changes at C5-6. (ROA p.

___; APA p. 53).

Claimant followed up with Dr. Cavert McCorkel. Dr. McCorkel, without any objective tests, released Claimant as having reached maximum medical improvement with a permanent partial impairment of 2% at the whole person as a result of his head injury. (ROA p. ___; APA p. 147). Interestingly, Dr. McCorkel released Claimant on September 27, 2010 despite the fact that Claimant was still suffering from dizziness. (ROA p. ___; APA p. 147).

As instructed by Dr. McCorkel, Claimant returned to work on September 28, 2010. (ROA p. ___; Tr. p. 24).

Although he tried to do his job, Claimant was now a different person. According to his supervisor, Dennis Messer, Claimant started sleeping on the job and became argumentative. (ROA p. ___; Tr. p. 30). Mr. Messer had never had these problems with Claimant prior to the accident. (ROA p. ___; Tr. p. 38). Claimant also complained of headaches which Mr. Messer assumed were related to the neck. (ROA p. ___; Tr. p. 31, 32, 37).

Toward the end of his employment with Williams Electric Company, Claimant was supposed to come to work packed for a 10 day trip out of state because of a storm. When he showed up for work the day they were leaving, he did not come packed for the trip. Mr. Messer confirmed that Claimant advised him that he could not travel with them “because of his headaches and stuff.” (ROA p. ___; Tr. 32, 39).

Williams Electric Company took Claimant out of service on April 17, 2011 because of his “memory problems.” (ROA p. ___; APA p. 117, 156; Barbara Champion/Dennis Messer Email dated February 13, 2012).

Because of his ongoing problems, Claimant was evaluated by Upstate Spine and Neurosurgery Center, PC. (ROA p. ___; APA No. 4). These records indicate that Claimant’s “pain

increased shortly after returning to work, triggered by overhead work and noise from the truck and has been occurring in an intermittent pattern for months.” (ROA p. ____; APA. P. 71). Claimant’s pain was “described as being located in the neck (posterior, bilateral)” and “other (bilateral frontal headache).” (ROA p. ____; APA p. 71). On May 25, 2011, Claimant informed his doctor that he had “severe pain since accident and so have a hard time concentrating on tasks, forget things I am doing. Noise like work “kills me.” Music louder than conversation may hurt.” (ROA p. ____; APA p.71).

Neurosurgeon Dr. Chittum evaluated Claimant on May 25, 2011 and recommended that Claimant participate in physical therapy for his neck pain to see if that would also alleviate his headaches. (ROA p. ____; APA p. 72).

Claimant started physical therapy on May 31, 2011 and attended four sessions. (ROA p. ____; APA P.100). Physical therapy was not beneficial and actually exasperated Claimant’s symptoms. (ROA P. ____; APA p. 75).

Claimant was discharged from physical therapy on June 24, 2011 for being non-compliant. The therapist indicated that Claimant was not attentive during physical therapy sessions and was tardy to all sessions. (ROA p. ____; APA p. 100).

An MRI of the cervical spine revealed significant degenerative disc disease/spondylosis and left paracentral disc protrusion at C5/6 with decreased disc height and kyphotic angulation and degenerative disc disease with central disc protrusion at C6/7. (ROA p. ____; APA p. 75). On September 15, 2011 Upstate Spine and Neurosurgery Center recommended an anterior discectomy fusion at C5-6 and C6-7. (ROA p. ____; APA p. 75, 115).

Claimant’s pain continued to gradually worsen over the next few months. (ROA p. ____; APA p. 76). On January 17, 2012, he made the decision that he did want to undergo the surgery. (ROA p. ____; APA p. 78).

On January 30, 2012, Claimant underwent anterior discectomy and fusion at C5-6 and C6-7 with plating from C5-C7 and insertion of biomechanical device. (ROA p. ____; APA p. 79, 115). During his postoperative visit, Claimant's mood and affect was described as "labile." This was the first change in his neuropsychiatric orientation. (ROA p. ____; APA p. 80).

On February 23, 2012, Claimant was fitted with a bone growth stimulator because of multilevel cervical fusion. (ROA p. ____; APA. P. 81).

Dr. Chittum referred Claimant to Dr. Robbie Buechler at Neurology Centers of the Carolinas, PA on April 20, 2012 because of complaints of memory loss. (ROA p. ____; APA No. 6).

Claimant reported that his symptoms related to his neck improved subsequent to the surgery but "he still continues to have some headaches, dizziness, photophobia, intermittent blurred vision, neck pain but with less radiation down into his arm." (ROA p. ____; APA p. 101). Dr. Buechler found Claimant's mood to be "affected" and noted that Claimant was "somewhat depressed", "somewhat quiet" and "quite sleepy." (ROA p. ____; APA p. 101). Dr. Buechler also noted that Claimant had "difficulty with any amounts of multitasking, short term memory is poor especially for non-written issues." (ROA p. ____; APA p. 101).

Dr. Buechler wanted to perform memory tests, neurocognitive assessment and nerve conduction studies. (ROA p. ____; APA p. 103). On June 1, 2012, Dr. Buechler reported that Claimant was sleepy but he "could not tell whether this was due to sedation or inattention, or this was his cognitive problem. Either way, I think it was either directly or indirectly related to the trauma he sustained." (ROA p. ____; APA p. 107). He found moderate MCI and depression. (ROA p. ____; APA p. 107). Dr. Buechler also mentioned that Claimant should undergo traumatic brain injury treatment at Roger C. Peace Rehabilitation Hospital. (ROA p. ____; APA p. 107).

By September 25, 2012, Claimant was not even able to complete traumatic brain injury tests

despite trying to do so. Dr. Buechler requested neurocognitive testing. (ROA p. ____; APA p. 110). Dr. Buechler once again indicated that Claimant needed to be seen at Roger C. Peace for assessment to determine the best way to treat the traumatic brain injury. (ROA p. ____; APA p. 110). As related to the cervical spine injury, Dr. Buechler noted that the Claimant was still having radicular pain down the left arm. (ROA p. ____; APA p.110).

On September 5, 2012, Dr. Buechler was “grateful” for the fact that Claimant’s workers’ compensation case manager seemed amenable to having Claimant evaluated at Roger C. Peace. (ROA p. ____; APA p. 111). Dr. Buechler specifically ordered that Claimant be evaluated by Roger C. Peace. (ROA p. ____; APA p.112). Unfortunately, the workers’ compensation case manager reneged on approval for the referral to Roger C. Peace. According to Dr. Randolph Waid, evaluation by Roger C. Peace would have been the most effective way to determine the extent, nature and cause of Claimant’s injuries. (ROA p. ____; APA p.124).

Despite the fact that the Claimant continued to have symptoms, neck pain, stiff neck and headaches consistently over numerous months, the very day Dr. Chittum learned that Claimant had been arrested for narcotics, Dr. Chittum suddenly found that the Claimant was approaching MMI. (ROA p. ____; APA p.87). Dr. Chittum ordered a Functional Capacity Evaluation which was performed on September 25, 2012. Based upon the evaluator’s opinion that Claimant qualified for a light-medium position, Dr. Chittum found Claimant had reached maximum medical improvement with a 71% impairment to the neck and 25% impairment to the whole person. (ROA p. ____; APA p. 87). Dr. Chittum also opined that Claimant would need continued pain management. (ROA p. ____; APA p.89).

Claimant was also examined by two separate eye doctors. Dr. McPhail found on July 24, 2012 that Claimant had “visual field loss-generalized due to traumatic brain injury.” (ROA p. ____;

APA P.5). Dr. Wickliffe Keisler confirmed on April 24, 2013 that Claimant sustained severe and permanent physical brain damage as indicated by the nonspecific field loss in both eyes. (ROA p. ____; APA p. 125-131). Claimant was sleepy and had difficulty focusing and maintaining attention during the examination on April 8, 2013. (ROA p. ____; APA p.131). Dr. Wickliffe Keisler also noted that Claimant suffers from “ptosis of the left upper eyelid, which is also affecting his vision visual field.”

Authorized treating neurosurgeon, Dr. Buechler, specifically agreed and endorsed Dr. Wickliffe Keisler’s opinion that Claimant sustained severe and permanent brain damage. (ROA p. ____; Reply to Motion in Limine-Exhibit “A”).

Claimant underwent two neuropsychological evaluations-one referred by Claimant’s attorney and one referred by the Defendants’ attorney. Dr. Randolph Waid found that Claimant “continued to experience disruptive somatic, emotional, cognitive difficulties since his involvement with the work related accident.” He found “physical damage to the brain involving frontal lobe injury with his current level of functioning being more significantly comprised by the persistence of disruptive somatic and emotional difficulties.” (ROA p. ____; APA p. 124). In Dr. Waid’s opinion, Claimant had not reached maximum medical improvement. Dr. Waid highly recommended additional neuropsychological/ neuropsychiatric treatment as well as “more aggressive neuropsychological/neuropsychiatric interventions. (ROA p. ____; APA p. 124).

On the other hand, Mark Williams simply found that the “Claimant is probably malingering cognitive and other complaints.” (ROA p. ____; APA p.172). Both Waid and Williams offered extensive explanations for why their opinion should carry more weight than the other’s.

Perhaps the clearest window into the impact of this injury on Claimant’s life is the assessment by his regular general practioner. Claimant returned to Dr. Henry Shugart at Carolina

Medical Affiliates on April 5, 2013. Claimant's complaints of back pain, joint pain, stiffness, headaches, depression, anxiety, memory loss, and mental disturbance were all consistent with the voluminous records from the previous months. (ROA p. ____; APA p. 38).

Most illuminating is Dr. Shugart's Assessment and Plan based upon not a one-time evaluation of Claimant but also his knowledge of him over the years. Dr. Shugart noted that on June of 2010 Claimant had "no demonstrable deficit, no complaints with mentation." (ROA p. ____; APA p. 39). Dr. Shugart found that his examination of Claimant "grossly consistent with decreased affect, delayed capacity." (ROA p. ____; APA p.39). He found that Claimant has "deficits from his sustained injury" and "upon review of my prior interactions with this patient, I note no observed or reported difficulties with mentation, headaches, arm pain, visual changes prior to his head injury. In my opinion, this is secondary to his accidental injury." (ROA p. ____; APA p. 39).

Dr. Shugart found that Claimant's brain damage to be severe and permanent and indicated that Claimant was unable to perform his prior duties because of this severe permanent brain injury. (ROA p. ____; APA p. 39).

Dr. Shugart reviewed the competing neuropsychologist evaluations performed by Randolph Waid and Mark Williams, the results from the eye exam performed by Dr. Wickliffe Keisler, the records from Spartanburg Regional Healthcare System and the records Dr. Robbie Buechler. Based upon his knowledge of Claimant, his examination of Claimant and his review of the relevant medical records, Dr. Shugart reiterated that Claimant sustained permanent and severe damage as a result of the July 2010 accident. (ROA p. ____; APA p. 41). Dr. Shugart then takes Dr. Williams to task by stating:

Dr. Williams, in summary also noted some deficiencies with his extensive testing. He did not debate that there are attentional and reported memory deficits; he documents well that he, Dr. Waid, and other physicians, (as did I) note and report these deficits. However, throughout his report, he discounts the other testing results,

and his own observations and measured deficits stating, “I do not believe that the claimant is currently experiencing any significant psychological or cognitive deficits that would support a DSM-IV diagnosis other than malingering. I do not believe that the claimant is experiencing any significant psychological distress or dysfunction that can be considered as being causally related to his July 9, 2010 accident.” He repeatedly points to a discrepancy in the records where the responders/witnesses report that Mr. Lowery was alert throughout, versus reports from the emergency room claiming he lost consciousness as proof that Mr. Lowery could not have amnesia from the event as he reports.

I would address a few of these points.

First it is not argued that Mr. Lowery suffered a significant injury on July 9, 2010. In fact, the injury was so severe that the patient was flown to the trauma center - this only occurs when there is significant concern/injury.

Now, whether Mr. Lowery lost consciousness or not, I feel is a minor point. Amnesia, in a medical definition, is unrelated to loss of consciousness, it only deals with lack of memory – which has been reported and is documented. Indeed no loss of consciousness is required to sustain physical brain damage.

Multiple physicians have documented that Mr. Lowery has difficulty with attention, memory and slowed speech, in addition to his physical injuries. I personally had seen Mr. Lowery prior to his injury with no documentation, observation of mental deficits. However, in follow up, almost three years post injury, these deficits were obvious to me. So again, the fact of the injury is not debated, and the fact of the deficits is not debated. It seems to me that the sticking point is to the cause of these deficits. I would think that any reasonable person would consider such a traumatic brain injury to be able to cause such deficits.

So, either the accident caused the deficits as I and other examiners have determined, or Mr. Lowery is malingering for his own benefit as Dr. Williams suggests. Dr. Williams further injected data in his examination that points to drug issues with Mr. Lowery but never suggests that this could be responsible for his observed deficits. The only reason I could think of to do so, would be to disparage Mr. Lowery – but I do not think that has a place in his examination unless he connects the deficits with drugs in some way. But to do so would admit that the deficits are “real” and the other and in my opinion more likely cause would be Mr. Lowery’s injury. (ROA p. ____; APA p. 41-42).

Certified Vocational Evaluator Rock Weldon also determined that Claimant is permanently and totally disabled but that he would benefit from additional evaluation and/or treatment of his continuing problems as noted by the numerous treating physicians. (ROA p. ____; APA p. 132-135).

STANDARD OF REVIEW

The Administrative Procedures Act (APA) establishes the standard for judicial review of workers' compensation decisions. Pierre v. Seaside Farms, Inc., 386 S.C. 534, 689 S.E.2d 615, 618 (2010). Under the APA, this court can reverse or modify the decision of the Appellate Panel when the substantial rights of the appellant have been prejudiced because the decision is affected by an error of law or is clearly erroneous in view of the reliable, probative, and substantial evidence considering the record as a whole. Transp. Ins. Co. & Flagstar Corp. v. S.C. Second Injury Fund, 389 S.C. 422, 427, 699 S.E.2d 687, 688-90 (2010).

ARGUMENT

I. IS THE APPELLATE PANEL ORDER AFFECTED BY ERROR OF LAW WHEN IT RELIES HEAVILY UPON INADMISSABLE AND OVERLY PREJUDICIAL EVIDENCE OF UNPROVEN ALLEGATIONS OF CRIMINAL ACTIVITY?

The Defendants' primary defense in this case revolved around Claimant's alleged involvement in the drug business. As there is not a single shred of evidence that the use of drugs had anything to do with the accident or Claimant's injuries, evidence of criminal charges for which Claimant has not been convicted is inadmissible as a matter of law. The single commissioner and Appellate Panel both relied upon this irrelevant and inadmissible evidence to the prejudice of Claimant.¹ As such, the Appellate Panel Order is "affected by error of law."

In its Appellate Panel Order, the Appellate Panel made the following findings of fact related to the topic of illegal drugs:

¹ The single commissioner relied upon and cited excerpts from transcript of Claimant's deposition in the Order. (ROA p. ___; Single Commissioner Order p. 13-15). The transcript was not admitted into evidence. (ROA p. ___; Email from Workers' Compensation Commission dated October 9, 2013). The single commissioner then relied upon the deposition transcript to find that Claimant used methamphetamines after the accident and sold illegal drugs before the accident. (ROA p. ___; Id.). The single commissioner also relied upon the deposition transcript to deny the request for lump sum payment of benefits. (ROA p. ___; Id.). It was pure error for the single commissioner to consider, and specifically rely upon, the deposition testimony which was not admitted into evidence. Although the Appellate Panel did not reference the testimony of Claimant, the repeated references by the single commissioner tainted the Appellate Panel's review of the record in this case.

...

3. Casey Collier is an agent for SLED. This finding is based on the testimony at the hearing.

4. Ms. Collier is qualified to testify as an expert in drug enforcement. This finding is based on the testimony at the hearing.

5. In March 2012, Claimant was arrested for selling illegal drugs to a confidential informant that worked for Ms. Collier. This finding is based on the testimony at the hearing.

6. Claimant has outstanding warrants for his arrest related to illegal drug charges. This finding is based on the testimony at the hearing.

7. Claimant has used methamphetamine after the date of accident in this matter. This finding is based on the record as a whole.²

8. Claimant was also involved with illegal drugs, specifically methamphetamine, before the accident. This finding is based on the record as a whole.³

...

12. Subsequent to the accident, Claimant entered into an agreement to work as a confidential informant with SLED, to set up a buy of methamphetamine with some drug dealers out of Atlanta, and, to this point, evade arrest for his pending warrants, all of which indicate a level of independent function and decision-making. This finding is based on the evidence and testimony.

...

25. Because there is strong evidence of illegal drug use, including the claimant's own sworn testimony, I find a lump sum payment of permanent disability benefits to be contrary to the Claimant's interests.

Claimant was unfairly prejudiced by the introduction of evidence regarding drug issues because almost all of the material findings of fact and conclusions of law in the Appellate Panel Order were based directly or indirectly on the drug issues. Instead of excluding this testimony and

2 In her Decision and Order, the single commissioner supported this finding of fact by referencing "the deposition testimony of the Claimant, pages 44-47 and page 197 of the deposition." (ROA p. ____; Single Commission Order p. 14 para.7).

3 In her Decision and Order, the single commissioner supported this finding of fact by referencing "the Claimant's

evidence, the single commissioner and Appellate Panel focused on this evidence to justify minimizing Claimant's claim for benefits. The single commissioner improperly allowed an agent for SLED to testify for approximately one-half the hearing on issues that had no bearing on the determination of Claimant's disability caused by the admitted injury by accident. The Appellate Panel affirmed the single commissioner's ruling.

Evidence of Claimant's pending drug charges and alleged illegal drug use is not relevant in a worker's compensation proceeding. "Relevant evidence" means evidence having any tendency to make the existence of any fact *that is of consequence* to the determination of the action more probable or less probable than it would be without the evidence. Rule 401, SCRE. (emphasis added). Allegations that Claimant has pending drug charges, uses or used illegal drugs, sells or sold illegal drugs or works in concert with SLED as a confidential informant do not have any bearing on the amount of disability Claimant suffered as a result of his admitted on the job accident.⁴ As such, this irrelevant evidence is not admissible. Rule 402, SCRE. See e.g. Fore v. Griffco of Wampee, Inc., 409 S.C. 360, 762 S.E.2d 37 (Ct. App. 2014).

In Griffco, the Court of Appeals in another worker's compensation case recently found that the single commissioner erred in admitting and relying upon a letter which included "an as-yet unproven allegation" that the employee had committed a crime. Id at 371, 762 S.E.2d at 43. The Court of Appeals also found that the prejudice to the employee from admitting the evidence exceeded its probative value. Id. The Court of Appeals ultimately held that the single commissioner's order was affected by an *error of law* because of the inclusion of evidence of the ongoing criminal investigation. Id at 372, S.E.2d at 43.

deposition testimony." (ROA p. ___; Single Commissioner Order p. 14 para. 8).

⁴ Furthermore, character evidence is not admissible nor is evidence of other crimes, wrongs or acts in effort to prove the character of a person. Rule 404, SCRE. (finding that evidence of prior bad acts is not admissible unless to such motive, identity, the existence of a common scheme or plan, the absence of mistake or accident or intent).

In Griffco, the Court of Appeals found that the employee failed to show that her substantial rights were prejudiced as a result of the admission of improper evidence because the Appellate Panel stated in its order that it did not rely upon the improper evidence.

Contrarily, in the present case at bar, the Appellate Panel expressly stated in its order that it did rely on the improper evidence. In fact, almost all of the material findings of fact and conclusions of law were based upon the improper evidence of “as yet unproven allegations.”

The single commissioner erred in allowing the SLED agent to testify regarding Claimant working as a confidential informant for SLED and the Appellate Panel erred in affirming this evidentiary ruling. (ROA p. ___; Tr. p. 14). The purpose for allowing the SLED agent to testify over Claimant’s objections was to try to establish that Claimant was making money while he was not working for Williams Electric Company. (ROA p. ___; Tr. p. 3). The single commissioner allowed the testimony regarding Claimant working as a confidential informant because a “reduction in his charges” has “some value to him.” (ROA p. ___; Tr. p. 14). Admission of this evidence was error by the single commissioner which was perpetuated by the Appellate Panel when it denied the claim for permanent and total disability based upon the fact that the Claimant worked as a confidential informant. (ROA p. ___; Appellate Panel Order p. 11, Findings of Fact No.12).

Even if somehow considered relevant, evidence of drug issues should have been excluded in the present case because its probative value was substantially outweighed by the danger of unfair prejudice. Rule 403, SCRE. See Griffco, 409 S.C. at 371, 762 S.E.2d at 431 (finding evidence of unproven allegations of criminal activity unfairly prejudiced in a workers’ compensation case). Unfair prejudice means an undue tendency to suggest a decision on an improper basis. Kennedy v. Griffin, 358 S.C. 122, 127, 595 S.E.2d 248, 250 (Ct. App. 2004).

In Kennedy v. Griffin, the Court of Appeals held that evidence of the presence of marijuana in the defendant's blood stream to be inadmissible because there was no correlation between the marijuana and the accident in question. The admission of the blood test results showing the presence of marijuana in the defendant's system was reversal error.

Similarly, the findings regarding Claimant's drug activities are unduly prejudicial as these activities have no bearing on whether Claimant sustained a compensable by accident or the amount of benefits due him. As correctly noted by Dr. Henry Shugart when commenting on Dr. Williams'⁵ improper focus on the drug issues:

The only reason I can think of to do so, would be to disparage Mr. Lowery-but I do not think that has a place in his examination unless he connects the deficiencies with drugs in some way. But to do so would admit that the deficiencies are a "real" and the other in my opinion more likely caused would be Mr. Lowery's injury. (ROA p. ___; APA p. 42).

Finding of Fact No. 12 is also particularly illuminating. The Appellate Panel found that Claimant "entered into an agreement to work as a confidential informant with SLED, to set up a buy of methamphetamine with some drug dealers out of Atlanta, and, to this point, evade arrest for his pending warrant, all of which indicate a level of independent function and decision making." (ROA p. ___; Appellate Panel Order p. 11, Finding of Fact No.12). First of all, there is no indication or assertion that Claimant is devoid of independent function and decision making. Such is not necessary for finding of permanent total disability. Total disability does not require complete helplessness. Watson v. Xtra Mile Driver Training, Inc., 399 S.C. 455, 732 S.E.2d 190 (Ct. App. 2012). Furthermore, the finding that the Claimant was trying to avoid arrest is nothing more than pure speculation.

The burden of proof is on the injured employee only to prove facts which would bring the

⁵ The Appellate Panel relied heavily on the opinions of Dr. Williams to deny Claimant's request for lifetime benefits. (ROA p. ___; Appellate Panel Order p. 11; Finding of Fact No.11).

injury under the coverage of the Worker's Compensation Act. Clade v. Champion Lab., 330 S.C. 8, 11, 496 S.E.2d 856, 857 (1998). Similarly, the injured employee has a burden of proving causation. Shealy v. Algernon Blair, Inc., 250 S.C. 140, 146 S.E.2d 646, 649 (1967). The injured employee satisfies its burden of proof by establishing facts by the preponderance of the evidence. Allen v. Phinney Oil Co., 241 S.C. 173, 127 S.E.2d 448 (1962). A workers' compensation claimant does not have the burden of proving he is innocent of pending crimes. By admitting into evidence and then relying upon allegations of pending drug charges and alleged illegal drug use, the single commissioner and Appellate Panel effectively placed the burden on Claimant to prove he was not guilty. The single commissioner and Appellate Panel presumed Claimant guilty.

The case at bar was a worker's compensation proceeding - not a criminal prosecution. The single commissioner erred in admitting even a single document or single word of testimony regarding alleged illegal acts for which Claimant has not been convicted. The single commissioner and Appellate Panel perpetuated this unconstitutional burden shifting by relying exclusively on Dr. Mark Williams to support a finding that Claimant exaggerated his symptoms in his neuropsychological testing. (ROA p. ___; Appellate Panel Order p. 11, Findings of Fact No. 11). Dr. Henry Shugart hit the nail on the proverbial head by stating that the only reason Dr. Williams "injected data in his examination that points to drug issues" was to "disparage" Claimant. (ROA p. ___; APA p. 42). By the same token, the only reason the single commissioner allowed evidence of drug issues was to find some way to substantiate the denial of this lifetime benefits case. The evidence of "as yet unproven allegations" of criminal activity unfairly prejudiced the rights of Claimant and amounted to pure error of law.

The single commissioner erred in admitting into evidence irrelevant testimony and exhibits involving illegal drugs. The Appellate Panel affirmed and adopted the single commissioner's

erroneous evidentiary rulings, findings of fact and conclusions of law to the direct prejudice of Claimant. The substantial rights of the Claimant were prejudiced by the errors of law permeating the Appellate Panel Order.

II. THE APPELLATE PANEL ERRED IN AFFIRMING THE SINGLE COMMISSIONER'S DECISION TO EXCLUDE FROM EVIDENCE AN EMAIL CREATED BY THE EMPLOYER WHICH CLEARLY ESTABLISHED THAT THE CLAIMANT WAS TAKEN OUT OF WORK BECAUSE OF "MEMORY ISSUES."

At trial, the employer representative testified that Claimant never complained of memory problems while he was on the job. (ROA p. ____; Tr. p. 31). He further testified that Claimant was written out of work because he refused to go on the ten day storm trip without obtaining a doctors' excuse. (ROA p. ____; Tr. p. 32). However, this testimony is contradicted by an email created by Barbara Champion - the "workman's comp secretary" for the employer. (ROA p. ____; Tr. p. 40).

On cross-examination, counsel for Claimant attempted to introduce the email dated February 15, 2012 signed by Dennis Messer which clearly states that Claimant was "taken out of service on 4/17/11 for memory issues." (ROA p. ____; Tr. p. 40, 41, Email from Messer dated February 15, 2012). The single commissioner excluded this email because Dennis Messer was unable to "authenticate it." (ROA p. ____; Tr. p. 43).

First of all, the Defendants did not object to the email based upon lack of authentication. Nevertheless, under Rule 901(a), SCRE, authentication is not necessary if there is evidence sufficient to support a finding that the matter in question is what its proponent claims. On its face, the email establishes what the document is. It is an email exchange between Claimant's sister, Sherry Gillespie, and Williams Electric Company's "workman's comp secretary" Barbara Champion. The email is from Barbara Champion's Williams Electric and Company email address. The employer and its representative do not contest the dates set forth in the mail. The email is from Barbara

Champion's address *with the electronic signature of Dennis Messer*. (ROA p. ____; Email dated February 15, 2012). At trial, Mr. Messer did not testify that the email was not sent on his behalf. He admitted that it "could have been." (ROA p. ____; Tr. p. 42). Authentication of this email was not necessary. It cannot seriously be argued that Claimant, or anybody else, fabricated this email.

The single commissioner erred in excluding this email as the email bears directly on one of the major issues in question and the email was proper for impeachment of Mr. Messer's testimony. Rule 607, SCRE. The Appellate Panel erred in affirming the single commissioner's decision to exclude this most relevant evidence.

III. THE FINDING AND CONCLUSION THAT THE CLAIMANT SUSTAINED ONLY MILD PERMANENT PHYSICAL BRAIN DAMAGE IS NOT SUPPORTED BY THE RELIABLE, PROBATIVE AND SUBSTANTIAL EVIDENCE IN THE RECORD.

After acknowledging that Claimant sustained a brain injury, the Appellate Panel then found that Claimant "exaggerated his symptoms in his neurophysiological testing." (ROA p. ____; Appellate Panel Order p. 11, Finding of Fact No. 11). The Appellate Panel then found that Claimant's independent functioning and decision - making skills of working as a confidential informant with SLED (while also point evading arrest for pending warrants) was support for a finding that his brain injury is "mild and not severe." (ROA p. ____; Appellate Panel Order p. 14-15, Findings of Fact No. 10, 11, 12, 13). The finding that Claimant's brain damage is "mild and not severe" is not supported by the reliable, probative and substantial evidence in the record. It is also affected by error of law because it is premised upon inadmissible and overly prejudicial evidence.

Claimant was hit in the head with a 300 pound auger swinging from a distance of approximately 20 feet away. He suffered frontal bone fracture and orbital fractures. He still has pieces of his skull lodged in his brain. (ROA p. ____; APA p. 48, 52, 114). Over time, Claimant's symptoms worsened to include memory loss, headaches, dizziness, blurred vision, photophobia,

depression, altered mood and affect, excessive sleepiness, cognitive difficulties, emotional difficulties and interpersonal sensitivity. All of the health care providers who offered an opinion as to Claimant's brain damage, save one, opined that it is severe and permanent. Dr. Robbie Buechler, who was selected by the Defendants to evaluate Claimant, found to a reasonable degree of medical certainty that Claimant "did suffer permanent and severe physical brain damage when he was struck in the head by a steel auger at work on July 9, 2010. This conclusion is based on my objective findings from his medical treatment and testing." (ROA p. ____; APA p. 146).

Dr. Wickliffe Keisler found that Claimant sustained "physical brain damage that is of a severe and permanent nature" due to "nonspecific visual field loss in both eyes." (ROA p. ____; Tr. p. 131).

Dr. Buechler agreed with Dr. Wickliffe Keisler's "assessment and her authority to do so as an ophthalmologist in determining that the damage was from the prior noted accident and that the MRI changes and other evidence including vision loss, that this does correlate with permanent and significant and/or severe changes and it is likely to cause of him having trouble with his vision." (ROA p. ____; Reply to Motion in Limine – Exhibit A).

The only physician with personal experience with Claimant prior to the accident found in no uncertain terms that Claimant's "brain damage is severe and permanent." (ROA p. ____; APA p. 39). Dr. Shugart was so passionate about his opinion that he separately wrote a letter dated April 24, 2013 summarizing the opinions of the health care providers and finding that "any reasonable person would consider such a traumatic brain injury to be the cause of" Rusty's deficiencies despite the efforts of Dr. Mark Williams to "disparage" Claimant. (ROA p. ____; APA p. 41, 42).

Certified Vocational Evaluator Rock Weldon reviewed Claimant's employment and medical history and found him to be "permanently and totally disabled." (ROA p. ____; APA p. 132, 135).

Weldon and Associates specifically noted further discrepancies in the Defendants' vocational evidence:

Further, I do not agree with the writer's decision to use Mr. Lowery's physical abilities, aptitudes and skills as they did in the Transferable Skills Analysis (OASYS). Their testing (BETA) which they performed indicated that Mr. Lowery is now functioning below where he was before his accident. Tested Beta IQ was "extremely low to borderline level of intelligence". The BETA is a measure of performance related intelligence and his score of 68 would indicate he is incapable of performing many of the handling, manipulative duties he demonstrated in the past. I strongly disagree with using his past work history as an indicator of his present abilities and aptitudes as these have obviously changed since his accident.

Contrarily, the Employability Analysis and Labor Market Survey performed at the request of the Defendants only cherry-picked information it wanted to consider. As noted by Rock Weldon, the Defendants' vocational report "did not consider the information provided by Mr. Lowery's family physician, Dr. Shugart or the limitations and recommendations of Dr. Randolph Waid in making their recommendations." (ROA p. ___; APA p. 134, 312-321).

The Appellate Panel found that Claimant returned to work after his accident without any complaints or problems. As confirmed by Mr. Messer, Claimant did complain of headaches and he did undergo a personality change. The records support the conclusion that these headaches were due, at least in part, to the cervical spine injury. (ROA p. ___; APA p. 78). After undergoing the multi-level disc fusion on January 30, 2012, Claimant's symptoms improved. He still complained of headaches but they were less frequent and less intense. (ROA p. ___; Tr. p. 86). Even though Claimant was still complaining of headaches and neck pain and still being seen by a neurologist, Dr. Chittum found the Claimant to be at maximum medical improvement with a 71% impairment to his spine *and* 25 % medical impairment to whole person. (ROA p. ___; APA p. 86-89).

The Defendants' IME doctor paints Claimant as a malingerer. The Appellate Panel expressly relied upon Dr. Williams to find that Claimant exaggerated his symptoms at his neuropsychological

testing. (ROA p. ___; Order p.14, Findings of Fact No. 11).

Interestingly, the claim of malingering does not carry over into Claimant's symptoms related to his neck injury. Claimant freely acknowledged that his neck pain decreased after the multi-level cervical fusion. (ROA p. ___; APA p. 82, 86, 101, 115). It seems quite odd that a "malingerer" would exaggerate complicated symptoms related to a head injury but not exaggerate straight - forward symptoms associated with a neck injury.

Furthermore, as noted by Dr. Randolph Waid, Claimant's inconsistent results in the neuropsychological testing are, in and themselves, evidence of physical brain damage. Dr. Shugart is the only treating or evaluating physician who had any knowledge of Claimant prior to and subsequent to the July 9, 2010 accident. He provided a very clear assessment of Claimant's post-accident condition. Dr. Shugart indicated that his examination of Claimant was "grossly consistent with decreased affect, delayed capacity." (ROA p. ___; APA p. 39). Based upon his observations of Claimant both before and after the accident, Dr. Shugart found Claimant's brain damage to be severe and permanent. (ROA p. APA p. 39).

The Defendants own authorized neurologist, Dr. Robbie Buechler, was compelled by reality as to "agree and endorse the conclusion reached by Dr. Wickliffe Keisler." Dr. Buechler noted:

Ophthalmologists and neurologists have often to decide whether something may be from eye and/or brain and make a differential diagnosis to determine where the problem might be. The proper assessment to determine this is often a visual field test as well as vision tests. I agree with Dr. Wickliffe Keisler's assessment and her authority to do so as an ophthalmologist in determining that the damage was from the prior noted accident and that with the MRI changes and other evidence including vision loss, that this does correlate with permanent and significant and/or severe changes and is likely the cause of him having trouble with his vision. (ROA p. ___; Reply to Defendants Motion in Limine – Exhibit A").

The overwhelming evidence supports only one finding – the Claimant sustained permanent and severe brain damage. Although physical brain damage does not need to be proven through an

“objective diagnostic medium,” it was in this case. See Sparks v. Palmetto Hardwood, Inc., 750 S.E.2d 61 (S.C. 2013). Dr. Wickliffe Keisler confirmed the severe and permanent brain damage by objective tests. (ROA p. ___; APA p. 125-131). The treating physicians agreed. Dr. Williams’ records do not constitute substantial evidence upon which reasonable minds could find anything other than severe and permanent brain damage.

IV. EVEN IF THE CLAIMANT DID NOT SUSTAIN PHYSICAL BRAIN DAMAGE, THE APPELLATE PANEL ERRED IN FAILING TO FIND THE CLAIMANT PERMANENTLY AND TOTALLY DISABLED.

After finding that Claimant’s brain injury “mild and not severe,” the Appellate Panel failed to address Claimant’s entitlement to a finding of permanent and total disability under S.C. Code Ann. §42-9-30(21).

According to the authorized treating physician, Claimant sustained 71% medical impairment to the neck *and* 25% medical impairment to the whole person. With these impairment ratings, the single commissioner should have found that the Claimant sustained greater than 50% loss of use of the back entitling him to the presumption of permanent and total disability under S.C. Code Ann. §42-9-30.

Such a finding would have been consistent with the opinions of Drs. Shugart, Chittum, Buechler, Wade and vocational expert Rock Weldon. Claimant simply cannot maintain employment given his restrictions related to his back injury, his work history, his legal issues and his psychological and mental deficits which keep Claimant from remembering to make it to appointments on time or keep him from staying awake for an entire work day.

Even if the finding of physical brain damage is not warranted, which is not at all conceded by the Claimant, Claimant should have been declared permanently and totally disabled pursuant to S.C. Code Ann. §42-9-30.

V. THE FINDING OF THE CLAIMANT'S AFTER-INJURY AVERAGE WEEKLY WAGE IS NOT SUPPORTED BY THE RELIABLE, PROBATIVE AND SUBSTANTIAL EVIDENCE IN THE RECORD.

Even if considered a partial wage loss claim, which is not conceded, the Appellate Panel's finding that the Claimant's after-injury average weekly wage is \$450.00 is not supported by the reliable, probative and substantial evidence in the record.

The Appellate Panel found as a matter of fact that, if Claimant stayed with Williams Electric Company, he could continue to earn \$15.00 per hour. (ROA p. ____; Appellate Panel Order p. 12, Finding of Fact No. 20). This is simply not supported by the evidence. The actual testimony elicited at the hearing from one of Claimant's supervisor's is that "a light to medium duty work for us would run anywhere from \$15-\$18 an hour, *depending on how much he could do.*" (ROA p. ____; Tr. p. 34)(emphasis added). The same supervisor acknowledged later in his testimony that he had not reviewed Claimant's medical records and did not know what any of the tests revealed regarding Claimant's employability. (ROA p. ____; Tr. p. 39, 40). It is pure speculation on part of the single commissioner to find that the Claimant could earn \$15.00 per hour working for his former employer.

Apparently recognizing the rank speculation involved in this finding, the Appellate Panel back-tracked and found that Claimant would not be able to earn that amount if he lost this hypothetical job. Accordingly, the Appellate Panel randomly selected \$11.25 per hour as Claimant's after-injury earning potential. Even the Defendant's vocational evaluator found that Claimant's anticipated earnings would be between \$7.25 and \$7.50 an hour. (ROA p. ____; APA p. 321).

Even assuming Claimant is not permanently and totally disabled, any finding of an "after-injury average weekly wage" in excess of \$300.00 is pure speculation and not supported by the reliable, probative and substantial evidence in the record.

VI. THE FINDING THAT, SUBSEQUENT TO HIS INJURY BY ACCIDENT, THE CLAIMANT PERFORMED HIS WORK DUTIES AS USUAL WITHOUT ANY PROBLEMS IS NOT SUPPORTED THE RELIABLE, PROBATIVE AND SUBSTANTIAL EVIDENCE IN THE RECORD.

The Appellate Panel relied upon the testimony of Dennis Messer to find as a matter of fact that Claimant returned to work after the accident, “performed his duties as usual” and that he “appeared to be fine and was not having any problems.” (ROA p. ___; Appellate Panel Order p. 12, Finding of Fact No. 15). These findings are not supported by the reliable, probative and substantial evidence in the record.

Mr. Messer’s actual testimony was that he started getting complaints from Richard Hoover about Claimant sleeping on the job, spending an excessive amount of time on a cellphone and becoming argumentative. (ROA p. ___; Tr. p. 30). Mr. Messer also testified that Claimant complained about headaches while working. (ROA p. ___; Tr. p. 31, 32, 37, 40, 44, 45).

The Appellate Panel perpetuated this unsupported finding of fact by excluding the email created by the employer which established that Claimant was taken out of service on April 17, 2011 because of “memory issues.” The email completely undermines Mr. Messer’s testimony as well as the Appellate Panels findings of fact. The finding that Claimant performed his duties as usual and appeared to be fine is also undermined by the myriad medical records establishing just the opposite.

VII. THE FINDING THAT THE EMPLOYER “WOULD HAVE ACCOMODATED THE CLAIMANT’S PERMANENT RESTRICTIONS” IS NOT SUPPORTED BY THE RELIABLE, PROBATVIE AND SUBSTANTIAL EVIDENCE IN THE RECORD.

As support for the finding that the Claimant sustained only a permanent *partial* wage loss, the Appellate Panel found that the “employer would have accommodated the Claimant’s permanent restrictions” and paid him anywhere from \$15-18 per hour for light/medium duty. (ROA p. ___; Appellate Panel Order p. 12, Findings of Fact No. 16 and 17). Once again, the Appellate Panel relied

upon the testimony of Dennis Messer for this finding but did not consider *all* of Mr. Messer's testimony.

Mr. Messer's actual testimony was that he had not seen anything from Dr. Chittum regarding Claimant's work restrictions. (ROA p. ____; Tr. p. 33). He also testified that he had not received anything indicating that Claimant had "been released for any kind of duty." (ROA p. ____; Tr. p. 33). He testified that he has not reviewed any of the medical records. (ROA p. ____; Tr. p. 39). He confirmed that he does not know anything about what the doctors have said about Claimant's medical condition and he does not know what any of the testing has shown. (ROA p. ____; Tr. p. 39). All Mr. Messer testified was that Williams Electric Company "would *consider*" hiring Claimant for light to medium work which would pay "anywhere from \$15-\$18 per hour, *depending on how much he could do.*" (ROA p. ____; Tr. p. 34)(emphasis added).

The finding that the employer would have accommodated the Claimant's permanent restrictions is not supported by the reliable, probative and substantial evidence in the record because the employer did not even know what the Claimant's permanent restrictions were.

VIII. THE APPELLATE PANEL'S REJECTION OF THE CLAIMANT'S REQUEST FOR LUMP SUM PAYMENT OF BENEFITS IS FOUNDED UPON INADMISSABLE AND IRRELEVANT EVIDENCE.

In his Form 50, Claimant requested that his permanent, total and lifetime benefits be paid in a lump sum. The Appellate Panel denied the request for a lump sum payment of benefits "because there is strong evidence of illegal drug use." (ROA p. ____; Appellate Panel Order p. 13 para. 25). As set forth more fully above, the Appellate Panel allowance of the testimony and documents regarding illegal drug use was pure error of law.

As clearly stated by the single commissioner at trial, the only purpose for which any of this evidence was to be introduced or considered was on the issue of Claimant's ability to earn money.

(ROA p. ____; Tr. p. 3). As acknowledged by the single commissioner at the conclusion of the evidentiary hearing, the SLED agent did not actually offer any evidence about Claimant making money selling drugs. (ROA p. ____; Tr. p. 48). Accordingly, none of the testimony of the SLED agent should have been considered by the single commissioner or the Appellate Panel or relied upon to make any findings of fact or conclusions of law.

IX. THE FINDING THAT THE CLAIMANT REACHED MAXIMUM MEDICAL IMPROVEMENT ON OCTOBER 30, 2012 IS NOT SUPPORTED BY THE RELIABLE, PROBATIVE AND SUBSTANTIAL EVIDENCE IN THE RECORD.

In finding that Claimant reached maximum medical improvement on October 30, 2012, the Appellate Panel relied upon the WCC Form 14B prepared by Dr. Christopher Chittum . (ROA p. ____; APA p. 89). The finding is not supported by the reliable, probative and substantial evidence in the record.

Dr. Chittum was Claimant’s primary treating physician related to the neck. He did not offer an opinion as to the whether Claimant had reached maximum medical improvement related to the brain damage nor did he offer an opinion as to any impairment related to the brain damage. Dr. Chittum recognized this was not within his area of expertise as he referred Claimant to Dr. Buechler for that evaluation.

Dr. Buechler never found that the Claimant had reached maximum medical improvement. As of September 5, 2012, Dr. Buechler was under the impression that Claimant was going to be referred to Roger C. Peace for evaluation and treatment. (ROA p. ____; APA p. 111, 112). Even though he did not believe the Claimant had reached maximum medical improvement, Dr. Buechler opined that Claimant “did suffer permanent and severe physical brain damage with a high degree of medical certainty...post a July 2010 injury.” (ROA p. ____; APA p. 145).

No other treating physicians actually found that Claimant had reached maximum medical

improvement. Dr. Randolph Waid clearly believed that Claimant had not reached maximum medical improvement and would benefit from aggressive neuropsychiatric/neuropsychological intervention such as the Roger C. Peach Rehabilitation program. (ROA p. ____; APA p. 124). Certified Vocational Evaluator Rock Weldon also found that Claimant would benefit from “additional evaluation and/or treatment of his continuing problems.” (ROA p. ____; APA p. 135).

The reliable, probative and substantial evidence of the record supports the finding that, although Claimant has not yet reached maximum medical improvement, he sustained permanent and severe brain damage which can never be remedied to the point where Claimant would be anything other than permanent and totally disabled.

CONCLUSION

Before the accident on July 9, 2010, Rusty Lowery had a “cheerful disposition.” (ROA p. ____; APA p. 137). He had held the same job for several years. (ROA p. ____; APA p. 136). This job required him to lift 75 pounds or more on a frequent basis. (ROA p. ____; APA p. 90). Claimant was one of the best employees for Williams Electric Company and was “hardworking,” “dedicated” and “very professional.” (ROA p. ____; APA p. 136). He followed instructions and performed well under pressure. (ROA p. ____; APA p. 141). He was a “great team player” who “work[ed] well with everyone.” (ROA p. ____; APA p. 142). He came to work on time and worked “more than he’s ever asked to.” (ROA p. ____; APA p. 139-142). He took “pride in his work.” (ROA p. ____; APA p. 142). He considered himself the “best pole guy around.” (ROA p. ____; APA p. 101). Claimant had no significant health problems prior to July 9, 2010.

Fast forward a few months and Claimant is a completely different person. He is sleeping on the job. (ROA p. ____; Tr. p. 30, 37). He is not following instructions from his supervisor. (ROA p. ____; Tr. p. 30-31, 38). He is argumentative and hard to get along with. (ROA p. ____; Tr. p. 30). He is

complaining of frequent headaches. Regardless of how Mr. Messer tries to avoid that issue, Claimant was written out of work on April 17, 2011 because of “memory issues.” (ROA p. ____; APA p. 117, 156).

Claimant ultimately had to undergo a multi-level cervical fusion to help alleviate his neck pain and the debilitating headaches. He is now left with a 71% medical impairment to his neck, 25% impairment to his whole person and can only lift a few pounds at a time. (ROA p. ____; APA p. 99).

Not only is Claimant no longer punctual, he does not always remember to show up for appointments. (ROA p. ____; APA p. 100, 149, 156, 162). He either refuses or is unable to follow instructions. (ROA p. ____; APA p. 100, 150, 162). He is “distant, disengaged, guarded and distrusting.” (ROA p. ____; APA p. 150). He “avoids going out as much because of noise and problems with headaches that are exacerbated by vibration and light.” (ROA p. ____; APA p. 118, 155). He is now “more irritable, impatient with an easier anger.” (ROA p. ____; APA p. 118).

Even his speech pattern changed. He has “difficulty accessing words” and has “soft hesitant speech.” (ROA p. ____; APA p. 39). This finding is consistent throughout the records of Drs. Shugart, (ROA p. ____; APA p. 39, 42), Buechler, (ROA p. ____; APA p. 106), Waid, (ROA p. ____; APA p. 119) and Williams. (ROA p. ____; APA p. 151).

Claimant’s excessive sleepiness continues along with “difficulty with memory, focusing and maintaining attention.” (ROA p. ____; APA p. 6, 39, 41-42, 71, 101, 106, 107, 110, 119, 124, 127, 131, 150, 162). As confirmed by objective tests, Claimant has loss of vision in both eyes proving severe and permanent brain damage. (ROA p. ____; APA p. 5, 131). He also has ptosis of the left upper eyelid related by being hit in the head by a 300 pound auger. (ROA p. ____; Tr. p. 131).

The Defendants rely almost exclusively on the report of Dr. Mark Williams for the proposition that Claimant is not entitled to a finding of lifetime benefits. Dr. Williams is not a

treating physician. Dr. Shugart, Claimant's primary doctor, considered Dr. Williams' report and attacked it head-on. (ROA p. ____; APA p. 41, 42). The opinions of a treating physician should be awarded greater weight than those of an IME psychologist. See Matter of Howle, 294 S.C. 244, 363 S.E.2d 693 (1988) (finding reports of treating physician who examined and treated patient over 16 month period entitled to greater weight than an evaluator from a single session). Accord Johnson v. Barnhart, 434 F.3d 650, 654 (4th Cir. 2005) (finding that courts accord greater weight to the opinion of treating physicians because the treating physician has necessarily examined the patient and has a treatment relationship with the patient). The opinion of Dr. Shugart should be given greater weight over Dr. Williams' opinion especially when the Certified Vocational Evaluator and other psychologist also found flaws in Dr. Williams report. (ROA p. ____; Weldon, APA p. 134; Waid APA p. 116-117, 123-124).

Furthermore, the treating neurologist authorized by the Defendants for the neck problems, Dr. Buechler, expressly agreed and endorsed Dr. Wickliffe Keisler's finding of permanent and severe brain damage. (ROA p. ____; Reply to Defendants Motion in Limine-Exhibit "A").

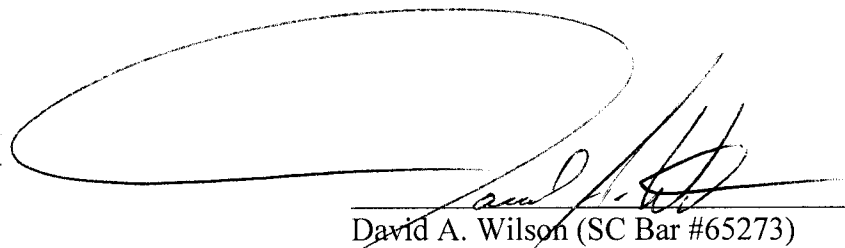
Claimant now has severe and permanent impairment of normal brain function. This qualifies as "physical brain damage" under Sparks v. Palmetto Hardwood, Inc., 750 S.E. 2d 61 (S.C. 2013) and Crisp v. SouthCo, Inc., 401 S.C. 627, 738 S.E.2d 835 (2013). He is permanently and totally disabled as a result of the combined effects of his injuries. As such, he is entitled to an award of lifetime benefits under S.C. Code Ann. §42-9-10(C).

Instead of considering the overwhelming relevant evidence establishing entitlement to lifetime benefits, the single commissioner and Appellate Panel essentially punished Claimant for not showing up at the hearing and for his alleged involvement in illegal drugs. The evidence regarding illegal drugs is not relevant and should not have been admitted into evidence. See Fore v. Griffco of

Wampee, Inc., 409 S.C. 360, 762 S.E.2d 37 (Ct. App. 2014). The Appellate Panel Order is “affected by an error of law” as it is based heavily on inadmissible and overly prejudicial evidence of unproven allegations of criminal wrong doing.

It is not the role of the Workers’ Compensation Commission to make judgments on morality. It is not the role of the Workers’ Compensation Commission to punish “bad” people and reward “nice” people. The role of the Workers’ Compensation Commission is to consider the relevant evidence and make findings as to compensability, causation and disability based thereon. Rusty Lowery’s involvement with illegal drugs, whatever that involvement may be, is not relevant in a Workers’ Compensation proceeding. The single commissioner and Appellate Panel erred as a matter of law in allowing such evidence and expressly relying upon it to deny him the benefits to which he is entitled.

Based upon the foregoing, the Claimant/Appellant Rusty Lowery respectfully requests that the Appellate Panel Decision and Order of the South Carolina Workers’ Compensation Commission filed June 16, 2014 be reversed and/or remanded and he be awarded lifetime benefits based upon permanent and total disability with physical brain damage. In the alternative, the Claimant/Appellant requests an award of permanent and total disability pursuant to S.C. Code Ann. §42-9-30(20). In the alternative, the Claimant requests a finding that he has not reached maximum medical improvement and request a referral to Roger C. Peace Rehabilitation Hospital for evaluation as requested by several doctors.



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Greenville, South Carolina
December 22, 2014

Attorneys for Appellant

THE STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

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APPEAL FROM SOUTH CAROLINA
WORKERS' COMPENSATION COMMISSION

SC Court of Appeals

W.C.C.FILE NO.: 1008485
APPELLATE CASE NO.: 2014-001503

Rusty Lowery, Claimant.....Appellant,

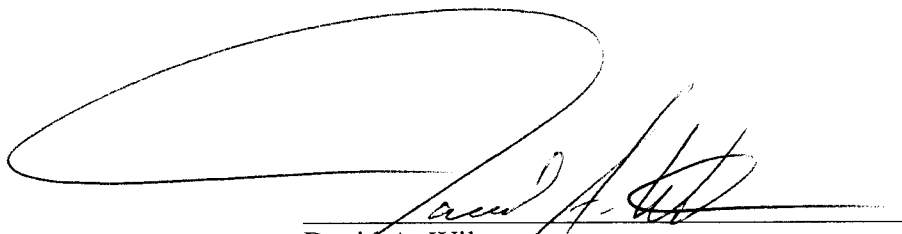
v.

Pioneer Associates, Employer, and
Chartis Casualty Co., Carrier.....Respondent.

PROOF OF SERVICE

I certify that I have served the Initial Brief of Appellant and Designation of Matter on Respondent by depositing a copy to them in the United States Mail, Postage prepaid, on December 22, 2014 addressed as follows:

Katharine D. Phipps, Esquire
Wilson Jones Carter & Baxley, P.A.
872 S. Pleasantburg Drive
Greenville, SC 29607

A large, stylized handwritten signature in black ink, appearing to read 'David A. Wilson', is written over a horizontal line. The signature is highly cursive and loops back to the left.

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December 22, 2014

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SC Court of Appeals

**RE: Rusty Lowery v. Pioneer Associates, Employer, and Chartis Casualty Co.,
Carrier
Appellate Case No.: 2014-001503**

Dear Ms. Kitchings:

Enclosed please find the original and one copy of the following:

1. Initial Brief of Appellant;
2. Designation of Matter to be included in the Record on Appeal;
3. Proof of Service on opposing counsel.

Please return the filed copies to me in the enclosed self-addressed stamped envelope.

Respectfully,



David A. Wilson

DAW/ccb

Enclosures

cc: Chad D. Pye, Esquire
Katherine D. Phipps, Esquire

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