

THE STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

APPEAL FROM THE SOUTH CAROLINA
WORKERS' COMPENSATION COMMISSION

Susan S. Barden, Commissioner
Gene McCaskill, Commissioner
Andrea C. Roche, Commissioner

W.C.C. FILE NO.: 1111934

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S.C. Supreme Court

Thomas Chad Hilton PETITIONER.

v.

Flakeboard America Limited, Employer, and Liberty Mutual Insurance Company,
Carrier RESPONDENTS.

APPENDIX

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APPENDIX

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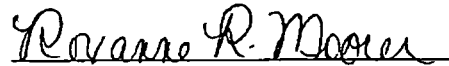
Thomas Chad Hilton PETITIONER.

v.

Flakeboard America Limited, Employer, and Liberty Mutual Insurance Company,
Carrier RESPONDENTS.

CERTIFICATE OF SERVICE

I, Roxanne R. Moorner, paralegal for Andrew N. Safran, Esquire, Attorney for Petitioner, do hereby certify that on the 9th day of March, 2015, I caused to be filed, via hand delivery, the original and two (2) copies of the Petitioner's Appendix, with the Clerk of the South Carolina Supreme Court.


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March 9, 2015

000001

DECISION AND ORDER
OF THE
SOUTH CAROLINA WORKERS' COMPENSATION COMMISSION

W.C.C. FILE NUMBER: 1111934

THOMAS CHAD HILTON, EMPLOYEE, CLAIMANT,

VERSUS

FLAKEBOARD AMERICA LIMITED, EMPLOYER,

AND

LIBERTY MUTUAL INSURANCE COMPANY, CARRIER, DEFENDANTS.

HEARING: Held on January 3, 2013 in Columbia,
South Carolina.

APPEARANCES: Claimant represented by Andrew N.
Safran, Esquire, Post Office Box 12089,
Columbia, South Carolina 29211.

Defendants represented by L. Brenn
Watson, Esquire of Willson, Jones,
Carter & Baxley, P.A., 872 S.
Pleasantburg Drive, Greenville, South
Carolina 29607. .

PURPOSE OF HEARING: To determine issues raised by the filing
of Form 21, particularly whether: (a)
Defendants have established an
entitlement to terminate the payment of
temporary total disability compensation;
(b) Mr. Hilton has achieved maximum
medical improvement; (c) he requires
further treatment for the consequences
of his compensable accident; and (d) Mr.
Hilton remains temporarily totally
disabled.

DECISION AND ORDER BY: The Honorable Avery B. Wilkerson, Jr.,
Commissioner.

FILED: June 4, 2013

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STATEMENT OF THE CASE

On August 17, 2011, Claimant, Thomas Chad Hilton, sustained a compensable accident while traveling through North Carolina en route to a delivery site in Virginia while performing his job duties for Defendant, Flakeboard America Limited. As this Employer and its Carrier, Liberty Mutual Insurance Company, acknowledged the compensability of Mr. Hilton's resulting injury, they: (a) commenced the payment of temporary total disability compensation effective August 20, 2011; while (b) authorizing his receipt of medical treatment through several providers, primarily Drs. R. Joseph Healy and Chi-Dai Chen of Carolina Surgical Associates.

By Form 21 dated July 6, 2012, Defendants sought authorization to terminate the payment of temporary total disability compensation based upon their contentions: (a) "Claimant has made direct and materially misrepresentations that directly pertain to his alleged disability"; (b) he was "not currently disabled, and ha[d] . . . not been disabled since September 12, 2011"; and (c) "[C]laimant . . . ha[d] reached maximum medical improvement with no impairment"

In response, Mr. Hilton maintained: (a) any inconsistent and/or inaccurate statements contained in the record (deposition testimony or otherwise) were the product of significant cognitive deficits stemming from physical brain damage, rather than a

purposeful/intentional/volitional attempt to mislead; (b) he had not achieved maximum medical improvement as to the consequences of his compensable accident; (c) Defendants were obliged to authorize the various treatment modalities which had been prescribed/recommended by Dr. Healy, their designated treating physician; and (d) he remained temporarily totally disabled at this time.

A hearing relative to this matter was initially scheduled for August 29, 2012. However, this hearing was postponed until November 19, 2012: (a) due to counsel's scheduling conflicts; and (b) so as to allow completion of necessary discovery. On that date, the undersigned: (a) required the parties to engage in a mediation proceeding conducted by Wallace G. Holland, Esquire; (b) determined this claim would be heard no later January 4, 2013 in the event mediation did not lead to a resolution to the current dispute; and (c) granted Defendants' Motion to Compel Production of Documents by the South Carolina Department of Social Services, which had maintained these materials were not discoverable under the present circumstances.

Pending the rescheduling of this hearing, the: (a) parties unsuccessfully mediated this claim on December 5, 2012; and (b) South Carolina Department of Social Services appealed the undersigned's December 12, 2012 production Order per Form 30 dated December 27, 2012.

The undersigned ultimately conducted an extensive hearing on January 3, 2013 in Columbia, South Carolina. At that time, testimony was received from Mr. Hilton, Mrs. Michelle S. Hilton (his wife) and Mr. Gerald Covington. In this regard, the parties entered a stipulation as to the substance of Mr. Frank Smith's proposed testimony, rather than requiring this witness (who was present) to testify.

STIPULATIONS

At the commencement of the hearing, counsel for the respective parties stipulated:

1. The purpose of the hearing was to determine the issues raised by the filing of Form 21, including whether: (a) Defendants have established an entitlement to terminate the payment of temporary total disability compensation; (b) Mr. Hilton has achieved maximum medical improvement; (c) Defendants' were entitled to credit for overpayment of temporary disability compensation should Mr. Hilton be found at maximum medical improvement; (d) he requires further treatment for the consequences of his compensable accident; and (e) Mr. Hilton remains temporarily totally disabled.

2. Notice of the hearing was timely and properly served upon the parties of interest.

3. Venue, set in Richland County, was proper per S.C. Code Ann. Section 42-17-20 (1976) in view of the parties' agreement to

transfer venue from Marlboro County for the purpose of conducting the hearing.

4. Defendants were withdrawing their previous Motion to Compel production of the documents in possession of the South Carolina Department of Social Services, to the extent: (a) the Department of Social Services would not be required to produce any of the previously sought materials; (b) the undersigned's December 12, 2012 Order would be vacated; and (c) this agency's pending appeal, which had been rendered moot, would be dismissed without prejudice.

5. Claimant's average weekly wage and compensation rate are in dispute, and the parties agreed to review this issue post-hearing to determine if a resolution could be reached as to the proper compensation rate.

MEDICAL EVIDENCE/APA SUBMISSIONS

The following documents were submitted into evidence pursuant to the Administrative Procedures Act, without objection, by the respective parties:

CLAIMANT

<u>Exhibit No.</u>	<u>Description</u>	<u>Page Nos.</u>
APA 1:	February 13, 2012 - November 9, 2012 reports/notes/responses of Dr. R. Joseph Healy	1 - 15
APA 2:	August 19, 2012 reports/responses of Dr. Donna Schwartz-Watts, as well as Dr. Donna Schwartz-Watts' August 20, 2012 Curriculum Vitae	16 - 30

APA 3:	August 16, 2012 - November 8, 2012 reports/responses, as well as undated Curriculum Vitae, of Dr. Tora L. Brawley of the University of South Carolina School of Medicine's Department of Neuropsychiatry and Behavioral Science	31 - 40
APA 4:	August 14, 2012 - November 8, 2012 reports of Dr. Nicholas A. Lind of Post Trauma Resources	41 - 48
APA 5:	August 9, 2012 report of Dr. Ezra B. Riber of Palmetto Pain Management, LLC	49 - 50
APA 6:	August 22, 2011 - October 6, 2011 reports from Agape Senior Primary Care-Bennettsville	51 - 54
APA 7:	August 19, 2011 reports/notes from Marlboro Park Hospital	55 - 65
APA 8:	September 19, 2011 - October 31, 2011 reports of Dr. W. James Evans of Comprehensive Neurological Services, P.C.	66 - 71
APA 9:	October 21, 2011 - November 16, 2011 reports/notes/forms from Marlboro Primary Care Associates	72 - 80
APA 10:	June 9, 2000 - February 11, 2011 reports from Pinehurst Neurology, P.A. (Dr. Bruce S. Solomon)	81 - 89

DEFENDANTS

APA 1:	November 28, 2001 - August 19, 2011 reports/notes from Marlboro Park Hospital	1 - 35
APA 2:	August 22, 2011 - October 21, 2011 reports/notes from Agape Senior Primary Care	36 - 42
APA 3:	August 23, 2011 - September 12,	

	2011 reports/notes from Carolina Surgical Associates (Dr. Chi-Dai Chen)	43 - 51
APA 4:	October 21, 2011 - November 16, 2011 reports/notes from Marlboro Primary Care Associates	52 - 63
APA 5:	February 13, 2012 - April 16, 2012 reports/notes of/obtained from Dr. R. Joseph Healy	64 - 72
APA 6:	February 23, 2011 report from Pinehurst Neurology, P.A. (Dr. Bruce S. Solomon)	73
APA 7:	June 17, 2011 - May 7, 2012 reports/notes/forms obtained from Pee Dee Orthopaedic Associates, P.A. (Dr. Jason B. O'Dell)	74 - 85
APA 8:	September 19, 2011 - October 31, 2011 reports of Dr. W. James Evans of Comprehensive Neurological Services, P.C.	86 - 91
APA 9:	January 13, 2003 - March 29, 2003 reports/notes from Palmetto Wellness and Injury Center (Raymond H. Stroup, B.F., D.C.)	92 - 108
APA 10:	April 16, 2009 - June 21, 2012 records from Carnival Cruise Lines (A1 - A9)	109 - 117
APA 11:	November 30, 2011 note from Marlboro Primary Care Associates (63 (a))	118

Additionally, Defendants submitted: (a) a video surveillance disc generated by InQuest Solutions for the period March 27, 2012 through March 30, 2012; (b) a second video surveillance disc generated by InQuest Solutions for the period October 19, 2012

through October 20, 2012; (c) Dr. R. Joseph Healy's August 20, 2012 deposition transcript (113 pgs.); (d) Dr. Chi-Dai Chen's August 23, 2012 deposition transcript (103 pgs., including exhibits); and (e) Mr. Hilton's May 31, 2012 deposition transcript (110 pgs., including exhibits).

FINDINGS OF FACT

Based upon the testimony of the various witnesses, my assessment of their credibility/demeanor, the documentary evidence submitted by the respective parties pursuant to the Administrative Procedures Act and the Commission file relative to this claim, I FIND AS FACTS:

1. On August 17, 2011, Mr. Hilton sustained a compensable injury to his left buttocks/upper leg area while transporting material, via tractor trailer, to a location in Virginia. Specifically, while en route to this delivery site, Mr. Hilton was bitten in his buttocks/upper leg area by an insect as he was operating the tractor trailer.

2. At the time he sustained this compensable injury, Mr. Hilton was performing duties arising out of and within the course and scope of his employment as a tractor trailer/delivery driver for Flakeboard America Limited, where he had worked since May 3, 2010.

3. After sustaining this injury, Mr. Hilton: (a) reported its occurrence to a representative of Flakeboard America Limited;

(b) continued to experience buttocks/upper leg pain; (c) nonetheless completed his delivery assignment; and (d) ultimately returned to his Bennettsville, South Carolina home, where his wife observed evidence of an insect bite at the focal site of his pain.

4. Although he attempted to continue working, Mr. Hilton's symptoms (pain, swelling and redness emanating from the wound) persisted, to the extent he sought treatment through the Marlboro Park Hospital Emergency Room on August 19, 2011. As confirmed by a review of the records generated by this facility, he: (a) reported the sudden onset of buttocks/upper leg pain two days prior; (b) indicated he had since experienced "pain, redness, skin breakdown . . . [and] swelling [from a] single lesion . . . [that he attributed to] being bitten by a spider"; (c) exhibited "a raised, round, red area with obvious bite mark in the center of the . . . [buttocks/upper leg] lesion"; (d) also manifested skin discoloration ("bright red"), tenderness and swelling ("edematous") in the "area surrounding the bite"; (e) was diagnosed to have experienced a spider bite, for which he received an injection of Decadron, as well as a prescription for Percocet; and (f) was instructed to seek further treatment in the event his symptoms did not improve.

5. When his condition progressively worsened, Mr. Hilton was assessed at Agape Senior Primary Care (August 22, 2011),

where he: (a) related the same history and mechanism of injury; (b) reported high fever the previous day; (c) exhibited a "[l]arge, warm, red abscessed . . . [area in the] left upper posterior thigh . . . [that measured] approx[imately] . . . 5 inches in diameter [and was] . . . exquisitely painful"; (d) received an injection of Marcaine into the center of this abscessed wound; and (d) was directed to Dr. Chi-Dai Chen for surgical assessment.

6. Upon initially examining Mr. Hilton (August 23, 2011), Dr. Chen: (a) noted persistent complaints "of severe pain and drainage from the wound . . . [with] associated symptoms of fever, nausea, and vomiting"; (b) observed "an area of erythema and induration on the left posterior thigh"; (c) similarly identified "an opening with some underlying necrotic subcutaneous tissue . . . consistent with an abscess with surrounding cellulitis"; and (d) admitted Mr. Hilton to the hospital "for IV antibiotics and . . . local debridement . . . [d]ue to the severity of his symptoms"

7. During the course of this August 24, 2011 procedure, Dr. Chen: (a) excised the skin overlying Mr. Hilton's abscess, which led to an "immediate finding of underlying necrotic fat"; (b) engaged in ". . . [b]lunting dissection to breakdown any loculation and purulent draining" after excising this necrotic fat; and (c) obtained an intraoperative culture prior to washing

the wound and packing this area "using moist gauze dressing, 4 x 4, and tape." Following this procedure, Dr. Chen inspected the wound on two occasions (September 1, 2011 and September 12, 2011) prior to placing Mr. Hilton on PRN status.

8. While Mr. Hilton had admittedly encountered and sought treatment for predominant left heel/ankle pain prior to his August 17, 2011 injury, consideration of various reports generated by Dr. Jason B. O'Dell of Pee Dee Orthopaedic Associates, P.A. (from whom he received medical care for this problem) verifies: (a) the diagnosis as of July 28, 2011 was "Achilles Tendonitis"; (b) on that date, Mr. Hilton reported the pain (that Dr. O'Dell had diagnosed to be reflective of "Achilles Tendonitis") radiated up the back of his leg ; and (c) on December 1, 2011, the last day he received treatment from this orthopaedic surgeon, Dr. O'Dell's "FOCUSED EXAM. . . remain[ed] unchanged. . . [with] ongoing insertional pain and tenderness", which this physician continued to characterize as the product of "(Chronic). . . Achilles tendinitis."

9. A review of reports generated by Dr. W. James Evans of Comprehensive Neurologic Services, P.C. (to whom he was referred by Dr. O'Dell) reveals: (a) Mr. Hilton presented to Dr. Evans initially on September 19, 2011 with complaints of bilateral foot pain (worse on the left), mostly involving the heel, which had been present for five (5) months; (b) the upward radiation

referenced by Dr. O'Dell had apparently improved, while "[p]ertinent negatives included decreased mobility, instability, limping, night pain, night-time awakening, numbness, swelling, weakness or foot drop"; (c) an acknowledgement that the left foot pain which Dr. O'Dell attributed to Achilles tendonitis was present prior to his August 17, 2011 spider bite (September 19, 2011); (d) by October 31, 2011, Mr. Hilton's left foot pain had worsened; (e) he had subsequently began experiencing "pins and needles pain . . . after the spider bite" (October 31, 2011); and (e) based upon the particular elements of Mr. Hilton's history, this neurologist characterized the newly developed left lower extremity symptoms as the "late complications of the brown recluse spider bite."

10. During this time period (October 21, 2011), Mr. Hilton began receiving authorized treatment for the ongoing left leg symptoms Dr. Evans had attributed to the spider bite through Marlboro Primary Care Associates. While treating at this facility: (a) he was diagnosed to be suffering from "neuropathic" left leg pain; (b) Mr. Hilton did not receive appreciable benefit from prescribed medications; (c) staff members were apprised of his previously diagnosed left Achilles condition; and (d) he was ultimately referred for neurological consultation by Dr. Gopalbhai Vaghela of this practice.

11. On February 13, 2012, Mr. Hilton was evaluated by Dr. R. Joseph Healy (identified by Dr. Vaghela's assistant as the only neurologist in Florence that accepted workers' compensation cases), who: (a) noted not only the presence of persistent left leg symptoms, but also the non-traumatic onset of low back pain; (b) prescribed Gralise; and (c) recommended proceeding with electrodiagnostic studies. Significantly, the EMG element of this testing, which was performed on March 14, 2012, revealed abnormal nerve function of the left leg, which Dr. Healy characterized as "a non-discogenic sciatica", prompting him to again prescribe Gralise. This authorized physician also ordered a lumbar MRI scan to further assess Mr. Hilton's back pain.

12. Inspection of Dr. Healy's notes/reports for the period April 16, 2012 through July 17, 2012 indicates: (a) his belief Mr. Hilton's left non-discogenic sciatica was the product of compression stemming from the initial consequences of his compensable brown recluse spider bite; (b) this condition was further compromising Mr. Hilton's gait, affecting the foot and the left ankle, and having a potentially aggravating impact on the pre-injury left Achilles tendon problem ("he had problems with the left achilles tendon prior to the bite but he appears to have an achilles tendonitis at this point which may be from posturing of the left foot"); (c) the neuropathic pain condition was reaching a chronic phase (May 17, 2012); and (d) while the

Gralise "help[ed] . . .", Mr. Hilton was having difficulty obtaining authorization of this medication by Liberty Mutual.

13. On May 31, 2012, Mr. Hilton was deposed by defense counsel. My review of this nearly two hour deposition reveals that on direct examination, Mr. Hilton: (a) disclosed the occurrence of a 2000 motor vehicle accident that produced a head injury initially resulting in a period of unconsciousness; (b) advised that it also required surgery for ". . . [s]ome bleeding"; (c) recalled only one physician visit following this surgery (for staple removal), while denying any problems associated with this head trauma since the single post-injury doctor visit; (d) admitted a June, 2011 vacation cruise, but required review of a card in his wallet to ascertain when this trip occurred; and (e) testified Dr. Healy had been the only neurologist from whom he had ever received treatment.

14. Additionally, Mr. Hilton testified: (a) the radiating left leg pain that was producing the pins/needles sensation in his foot had only begun some time after the August 17, 2011 spider bite and was distinguishable from the Achilles tendonitis sensations documented by Dr. O'Dell (which had actually extended upward approximately two inches beyond the ankle); (b) the current leg pain was likewise not associated with an incident (small piece of metal became embedded in the skin around his left ankle) that had occurred some years prior (creating no residual

problems); (c) the back pain referenced by Dr. Healy developed gradually and had not been present at the time of his August 17, 2011 injury; (d) his driving had substantially decreased since the accident date (estimating once a week when asked to specifically quantify); (e) typical periods of standing fell in the 15 - 20 minute range; (f) the majority of time at his home was spent laying down; (g) he had not joined his wife on a subsequent (October, 2011) cruise; and (h) his appearance/the manner in which he walked, stood, etc. could vary, particularly if he was having a "bad day".

15. In this regard, inspection of records generated by Dr. Bruce S. Solomon of Pinehurst Neurology, P.A. reveals: (a) this motor vehicle accident resulted in "multiple trauma . . . [, including] a closed-head injury"; (b) his particular pathology involved "a subdural and epidural hematoma on the right" that required performance of a craniotomy; (c) receipt of Dilantin therapy for "subsequent seizures", in conjunction with repeated neurological assessment following the 2000 head trauma; (d) he was medically restricted from resuming truck driving until June 13, 2001 ; and (e) Mr. Hilton was continuing to experience "short-term memory problems" (ex. "putting his keys in the refrigerator and a ham in the cabinet") following this injury.

16. Significantly, on February 11, 2011 (approximately six months before sustaining the spider bite), Mr. Hilton was

reevaluated by Dr. Solomon, who noted: (a) reports of persistent "memory loss", as well as "mood swings"; (b) the absence of any complaints of "back pain"; and (c) slightly deficient short-term memory per clinical examination.

17. On August 9, 2012, Mr. Hilton was independently evaluated by Dr. Ezra B. Riber of Palmetto Pain Management, LLC, who: (a) was aware of all material aspects of Mr. Hilton's post-injury history; (b) specifically noted the various symptoms which were exhibited prior to Dr. Chen's surgery, as well as Dr. Evans' belief the worsening of "pre-injury leg pain was the result of the spider bite"; (c) observed limited lumbar range of motion "particularly with extension and concomitant left lateral flexion"; (d) discovered "significant EHL weakness on the left consistent with an L5 radicular syndrome"; (e) noticed Mr. Hilton's gait favored the left lower extremity; and (f) felt Mr. Hilton had developed "[c]ompensatory low back pain . . . following altered gait" with an associated lumbar facet syndrome.

18. Based upon these findings and Mr. Hilton's medical history, Dr. Riber: (a) recommended initial treatment of the radicular pain through a selective nerve root injection; (b) explained the "clinical EHL weakness is certainly consistent with the results of the electrodiagnostic studies"; (c) attributed the current radiculopathy to "initial compression caused by the expanding wound, as well as the venom, which itself can certainly

produce nerve root irritation and neuropathic pain"; (d) referenced the previously documented "change in his premorbid symptom pattern" as a basis for attributing Mr. Hilton's current neuropathic pain and the "likely compensatory" back pain to the consequences of the spider bite; and (e) determined Mr. Hilton had not reached maximum medical improvement, while indicating his work status would be "restricted to sedentary" activities with the ability "to change positions per tolerance."

19. On August 12, 2012, Mr. Hilton underwent a forensic psychiatric evaluation by Dr. Donna Schwartz-Watts, a clinical professor of forensic psychiatry affiliated with the University of South Carolina School of Medicine's Department of Neuropsychiatry and Behavioral Science. At that time, Dr. Schwartz-Watts also interviewed Mrs. Hilton, who reported: (a) her husband manifested "violent mood swings which are in part provoked by his lack of memory"; (b) aggressive denial when reminded of statements he could not remember; (c) activity reflective of confabulation, which she described as "a clinical symptom of cognitive impairment, [that] . . . is not volitional"; and (d) a "general expression of decreased . . . emotion . . . unless he is aggressive."

20. Dr. Schwartz-Watts also conducted a mental a status examination, which verified: (a) Mr. Hilton "had cognitive impairment including difficulty with visual spatial design"; (b)

"[h]e perseverated, . . . a clinical symptom of cognitive impairment"; (c) Mr. Hilton "had difficulty abstracting similarities between difficult objects"; (d) he also encountered "difficulty registering and recalling objects and required prompting and forced choice"; (e) poor performance "on a test of verbal fluency", which was also associated with perseveration; and (f) Mr. Hilton "gave a good effort" in connection with this assessment.

21. She further observed: (a) the presence of "end gaze nystagmus" (previously documented by Dr. Solomon); (b) "difficulty performing rapid alternating movements" (which could ultimately be accomplished with practice); (c) Dr. Solomon's records referenced various relevant factors (a right sided subdural and epidural hematoma with a resultant focal motor seizure disorder; "aguesia and olfactory impairment"; "short-term memory problems"; "short-term memory impairment on neurological evaluation"); and (d) neuropsychological assessment was warranted.

22. In accordance with Dr. Schwartz-Watts' directive, Mr. Hilton underwent neuropsychological evaluation by Dr. Tora Brawley of the University of South Carolina School of Medicine's Department of Neuropsychiatry and Behavioral Science (August 16, 2012), who confirmed: (a) her awareness of the fact "discrepancies . . . in his report of personal history facts . . . [had led to]

accusations that he was purposefully being dishonest"; (b) "Mr. Hilton had difficulty correctly recalling some personal information . . . [d]uring the clinical interview"; (c) review of relevant medical records "revealed that he suffered both a subdural and epidural hematoma which required surgical evacuation via a right temporal craniotomy" in 2000; (d) memory issues following the 2000 head trauma; (e) reports of "continued problems with memory loss, mood swings, light headedness and sleep difficulties" to Dr. Solomon in February, 2011; and (f) "his difficulties have worsened following complications from a spider bite in August, 2011."

23. In conjunction with this evaluation, Dr. Brawley, who currently serves as an assistant professor for the University of South Carolina School of Medicine, administered ten neuropsychological instruments, including "the Test of Memory Malinger", which "revealed him to have significant deficits in many areas" These deficits included "immediate verbal learning", "immediate verbal memory for prose passages", "recall of a complex figure", "controlled verbal fluency", "judgment of line orientation", "nonverbal abstract reasoning and problem solving" and "trail making ability".

24. Dr. Brawley also specifically explained that "[f]ormal effort testing was conducted and performance was completely

within normal limits, indicating no evidence of an attempt to exaggerate or malingering cognitive symptoms."

25. Based upon Mr. Hilton's relevant medical history, her clinical interview and the results of this rather extensive neuropsychological testing, Dr. Brawley determined: (a) "testing results revealed the presence of severe cognitive deficits in many areas assessed, including memory"; (b) "[t]hese deficits are consistent with residual organic deficits from his previous head injury and have likely been exacerbated by more recent . . . physical injuries and psychosocial stressors"; (c) "[t]here was no indication of an attempt to malingering on testing"; (d) "any discrepancies noted in his report of personal history or other areas are related to his cognitive deficits, rather than an attempt to purposely report incorrect information"; and (e) "[t]his [conclusion] . . . is further supported by documented reports and medical evidence of continued memory problems in February, 2011."

26. After considering these neuropsychological test results, in light of her own clinical finding, Mr. Hilton's medical history and the content of his deposition, Dr. Schwartz-Watts: (a) concluded "to a reasonably degree of medical certainty that Mr. Hilton has severe cognitive impairments, including memory disturbance, confabulation and perseveration which can account for the obvious discrepancies in his deposition

testimony"; and (b) expressed "grave concerns about his competency to testify in these proceedings due to his memory deficits and inability to learn new information."

27. During this time period (August 14, 2012), Mr. Hilton was also evaluated by Dr. Nicholas A. Lind of Post Trauma Resources, who observed: (a) apparent memory impairment per mental status examination; (b) "Mr. Hilton's score of 84 . . . [on the MMPI-2-RF] is consistent with the memory problems expected from his 2000 head trauma"; (c) his "memory complaints are consistent with his described head injury and appear legitimate as determined by the validity measures of the psychological testing measures used in this evaluation"; (d) "Mr. Hilton's reported memory deficits are more likely than not, with as much certainty reasonable in the field of psychology, legitimate"; and (e) formal neuropsychological testing would better gauge "the validity and extent of Mr. Hilton's memory deficits"

28. In this regard, after reviewing "the findings and conclusions of Dr. Brawley's 16 August, 2012 neuropsychological evaluation", Dr. Lind (also a practicing neuropsychologist) agreed: (a) "[t]he results are consistent with the psychological evaluation . . . [he had] conducted on 14 August, 2012 and suggests significant deficits in memory as well as executive and dexterity impairments"; and (b) "[t]his additional evidence

confirms that Mr. Hilton's reported memory deficits are more likely than not, with as much certainty reasonable in the field of psychology, legitimate and explain the difficulties he continues to experience with recall of his history."

29. During the course of his August 20, 2012 deposition, Dr. Healy was extensively examined as to various contested issues, including the likely source of Mr. Hilton's current symptoms, additional medical needs and work status. He was also repeatedly questioned, through use of medical records and surveillance video footage, relative to various aspects of Mr. Hilton's credibility, particularly as it related to the consequences of his August 17, 2011 spider bite, his physical/functional capabilities and the deposition discrepancies.

30. In discussing the source of Mr. Hilton's current left leg symptoms, Dr. Healy verified: (a) an acknowledgement of pre-injury symptoms that were reflective of some degree of neuropathic pain (Healy Deposition, pp. 31 - 37; 43 - 44); (b) the pins and needles sensation Mr. Hilton was now experiencing, which was clearly indicative of neuropathic pain, had been neither reported nor identified by any medical record prior to August 17, 2011 (Healy Deposition, pp. 95 & 100); (c) the findings documented through pre-surgical treatment notes (pain, redness, skin breakdown, swelling, bite marks, fever, nausea and

vomiting) were not only indicative of a brown recluse spider bite, but also a "systemic effect" produced by the injected venom (Healy Deposition, pp. 76 - 79; 85, 87); (d) toxic venom of this nature can, in and of itself, create neuropathic pain of the type described by Mr. Hilton (Healy Deposition, pp. 41, 81 & 122); (e) the nature/degree of Mr. Hilton's pre-surgical symptoms (swelling; size of abscess and surrounding inflammation) were also sufficient to create sciatic nerve compression, even in the absence of muscle tissue damage (Healy Deposition, pp. 80 & 88); (f) Mr. Hilton's current left leg symptoms most probably, to a reasonable degree of medical certainty, result from the consequences of the August 17, 2011 spider bite (venom itself and/or nerve compression caused by pre-surgical wound development) and/or the aggravation/acceleration of preexisting pathology by the consequences of this bite (Healy Deposition, pp. 81 - 84, 89 - 90, 103); (g) the symptoms which temporally resulted from the spider bite, as well as the degree of necrosis documented during surgery, could not be faked (Healy Deposition, pp. 84 - 88); (h) the presence of neuropathic injury had been objectively verified by EMG testing (Healy Deposition, pp. 17 & 125); and (i) he was comfortable with his ability to render this opinion as to causal connection, indicating Mr. Hilton's surgeon was in no better position to address this issue (Healy Deposition, pp. 70 & 90).

31. When questioned as to Mr. Hilton's current back symptoms, Dr. Healy explained: (a) an understanding that "his walking was [not] . . . totally normal" pre-injury (Healy Deposition, p. 44); (b) the consequences of the spider bite had further contributed to gait alteration (Healy Deposition, p. 104); (c) while he noticed this gait disturbance, "it wasn't dramatic" (Healy Deposition, p. 7); (d) the video surveillance footage was consistent with his prior observations (Healy Deposition, p. 63); (e) this gait disturbance had resulted in the development of mechanical low back pain (Healy Deposition, p. 72); (e) Mr. Hilton's current back symptoms were compensatory (due to increased gait alteration attributable to neuropathic pain) and had "come on quicker than . . . might have otherwise [been] . . . expected" due to the aggravating/accelerating impact of the causally related increase in neuropathic pain by the consequences of the brown recluse spider bite (Healy Deposition, pp. 103 - 104, 122 - 123); (g) the EHL weakness identified by Dr. Riber was a relatively objective finding that was consistent with the sciatica confirmed by electrodiagnostic studies and "absolutely" reflective of actual nerve dysfunction (Healy Deposition, pp. 119 - 121, 125 - 126); (i) Mr. Hilton required treatment of the nature outlined by Dr. Riber (Healy Deposition, p. 121); (j) given his longstanding professional relationship with Dr. Riber (who he characterized as "the guru" for pain

management care), it was his wish that Mr. Hilton receive this treatment through Dr. Riber (Healy Deposition, pp. 119 & 122); and (k) Mr. Hilton had not yet achieved maximum medical improvement (Healy Deposition, p. 132).

32. Additionally, Dr. Healy addressed Mr. Hilton's cognitive capacity, specifically confirming/concluding: (a) while the focus of his treatment had been the neuropathic pain component, he had noticed clinical cognitive limitations (Healy Deposition, p. 45); (b) it was not unusual for someone who has experienced head trauma of the nature Mr. Hilton sustained in 2000 to develop cognitive loss (Healy Deposition, p. 108); (c) persistent memory loss was actually "referenced as an ongoing symptom to a neurologist" before the August 17, 2011 accident date (Healy Deposition, pp. 109 - 110); (d) neuropsychological testing of the nature performed by Dr. Brawley included "not only specific tests, but actual portions of other tests, that are specifically geared towards ferreting out exaggeration and malingering" (Healy Deposition, p. 111); (e) the absence of malingering and exaggeration of cognitive symptoms, as well as the valid assessment of cognitive function verified by the neuropsychological test battery administered by Dr. Brawley were consistent with his own intuitive impressions (Healy Deposition, p. 112); (f) the results of this testing did not support allegations that Mr. Hilton's actions (including deposition

testimony) were reflective of dishonesty and deceit (Healy Deposition, p. 112); (g) these test results were indicative of a "significant problem from the head injury" (Healy Deposition, p. 114); (h) his agreement with Dr. Brawley's determination "that any discrepancies noted in his report of personal history or other areas are related to cognitive deficits rather than an attempt to purposefully report incorrect information" (Healy Deposition, pp. 114 - 115); (i) his impressions were also consistent with those of Drs. Schwartz-Watts and Lind (Healy Deposition, pp. 115 - 116); (j) he had no doubt Mr. Hilton was experiencing "noticeable cognitive damage secondary to brain injury . . . [which is] a very reasonable and more than likely explanation for . . . [the various factual] discrepancies" identified by Defendants (Healy Deposition, pp. 116 - 117); and (k) to a reasonable degree of medical certainty, he was "comfortable that [Mr. Hilton] in his efforts to receive treatment . . . and his testimony has done nothing contrived or purposeful, but rather that any of these discrepancies or conflicts are the results of his brain injury and results of cognitive deficits" (Healy Deposition, p. 128)

33. After considering the purportedly dishonest behavior alleged by Defendants, Dr. Healy similarly/consistently validated Mr. Hilton's credibility, testifying: (a) although he recognized the presence of certain discrepancies in Mr. Hilton's medical

history, he had no concerns as to this gentleman's credibility (Healy Deposition, pp. 31 - 38, 45 - 49); (b) his participation in the October, 2011 cruise was an insufficient basis upon which to characterize Mr. Hilton as "a liar" (Healy Deposition, pp. 55 - 60); (c) the presence of cognitive deficits stemming from the prior brain injury was a reasonable explanation for these alleged inconsistencies (Healy Deposition, p. 117); (d) the need for cues (i.e., testifying accurately after looking at a card bearing the date of a prior cruise) "fits" as an explanation for Mr. Hilton's ability to recall certain information (Healy Deposition, pp. 117 - 118); (e) Mr. Hilton's satisfaction of validity criteria, including the absence of malingering or exaggeration per applicable elements of the neuropsychological test battery administered by Dr. Brawley, supported his belief there was no indication this gentleman was not credible (Healy Deposition, pp. 112 - 113); (f) he would "not . . . blindly support somebody who is faking, malingering or being less than candid" (Healy Deposition, p. 127); and (g) Mr. Hilton was a credible patient (Healy Deposition, pp. 70 - 71, 106, 131 - 132).

34. This authorized treating physician's testimony further establishes: (a) due to his causally related symptoms and the potentially impairing effects of medication, in light of the nature of his occupation, Mr. Hilton had been maintained on out-of-work status (Healy Deposition, pp. 18, 63 - 64, 67); (b) his

primary instructions in terms of activities of daily living were to avoid "anything extreme", while attempting to function within tolerance levels (Healy Deposition, pp. 19, 66 - 67); (c) the surveillance video did not depict Mr. Hilton engaging in any unacceptable activity (Healy Deposition, pp. 66 & 74); and (d) although Mr. Hilton remained on out-of-work status, he had no objection to an attempt to engage in sedentary activity in accordance with Dr. Riber's recommendation (which he felt could be therapeutic) (Healy Deposition, p.127)

35. Shortly after deposing Dr. Healy, Defendants solicited Dr. Chen's testimony. While this general surgeon initially opined that he did not believe Mr. Hilton's abscess or area of inflammation was large enough to create compression on the sciatic nerve, he subsequently conceded: (a) he neither was nor considered himself an expert in the field of neurology (Chen Deposition, p. 38); (b) he likewise was not an expert in terms of the ultimate implications of venomous bites (Id.); (c) he had no reason to dispute Mr. Hilton was bitten by an insect on August 17, 2011 (Chen Deposition, p. 41); (d) Mr. Hilton's post-injury complaints/symptoms were "consistent with . . . ones that are commonly attributable to a Brown Recluse spider bite" (Chen Deposition, p. 43); (e) the presence of the same reported symptoms upon which Dr. Healy had concluded Mr. Hilton was manifesting "a systemic effect" produced by spider venom (Chen

Deposition, pp. 46 - 48); (f) the tissue damage discovered during surgery was consistent with the destructive process caused by venom or infection (Chen Deposition, p. 52); (g) "venom itself can create damage to an underlying nerve" (Id.); and (h) venom can likewise "create nerve irritation and neuropathic pain." (Chen Deposition, p. 53).

36. Dr. Chen also candidly acknowledged/agreed: (a) nerve root injury "would actually fall more within . . . a neurologist['s] . . . area of expertise than a surgeon's in terms of delineating etiology of nerve irritation or nerve damage" (Chen Deposition, pp. 53 - 54); (b) he would "normally defer to a neurologist in terms of making a conclusion as to what is the cause of nerve root damage in a scenario" (Chen Deposition, p. 54); (c) Dr. Healy's finding of non-discogenic sciatic per electrodiagnostic studies had "some degree of objectivity" (Id.); (d) he would defer to the specialist's (Dr. Healy's) opinion relative to the causal relationship of Mr. Hilton's non-discogenic sciatica and the consequences of the spider bite (Chen Deposition, pp. 54 - 55); (e) he did not "have the specialty or knowledge to disagree with" Dr. Healy's opinion (Chen Deposition, p. 55); (f) Dr. Evans' opinion that Mr. Hilton's current left lower extremity symptoms represented the late complication of a brown recluse spider bite was consistent with Dr. Healy's conclusion "in terms of etiology" (Chen Deposition, p. 57); (g)

he would likewise defer to Dr. Evans' opinion on this point (Id.); and (h) he did not "hold [him]self . . . out as being an expert in [n]eurology (Id.)".

37. This physician further testified: (a) identification of the source of nerve damage identified by an EMG was outside his area of expertise (Chen Deposition, p. 60); (b) he did not possess the expertise to decide the question of causation (Chen Deposition, p. 60 - 61); (c) he was consequently deferring to the neurologist "in terms of cause and effect as far as what . . . [Mr. Hilton's] current problems are and how they relate to the spider bite" (Chen Deposition, p. 61); (d) any opinions offered in response to defense counsel's questions on this point were "really . . . outside [his] . . . area of specialization and expertise" (Chen Deposition, p. 65); and (e) given this lack of expertise, he "would defer to the [n]eurologist . . . as to his determination of the source of [Mr. Hilton's] . . . symptoms" (Chen Deposition, p. 76).

38. Pursuant to questionnaire responses dated November 7, 2012, Dr. Schwartz-Watts confirmed: (a) ". . . [g]iven the nature/degree of his previous head trauma (involving both subdural and epidural hematoma requiring surgical evacuation via right temporal craniotomy), [her] . . . clinical findings and the results of his valid neuropsychological testing, . . . Mr. Hilton's current cognitive deficits (including severe memory

compromise) most probably result from physical brain damage"; (b) ". . . [i]n view of the nature/degree of Mr. Hilton's previous head trauma, [her] . . . clinical findings and the results of neuropsychological testing, . . . the cognitive deficits attributable to this physical brain damage have most probably been aggravated by the consequences of his August 17, 2011 work related injury"; (c) ". . . [g]iven the nature/degree of Mr. Hilton's physical brain damage, [her] . . . clinical findings and the results of neuropsychological testing, . . . inconsistencies/inaccuracies arising in connection with his testimony, as well as any inconsistent/inaccurate information he has provided when questioned as to prior events and/or statements (i.e., requiring reliance on his memory), are most probably the result of this physical brain damage, rather than a purposeful/intentional/volitional attempt to mislead"; (d) "the cognitive deficits produced by Mr. Hilton's physical brain damage (including the aggravation created by the consequences of his August 17, 2011 work related injury) most probably negatively effect and/or impair his behavioral judgment, including the manner in which he responds to stressors and conducts his daily activities"; and (e) "lapses in behavioral judgment would also most probably be attributable to the aggravation of Mr. Hilton's cognitive deficits by the consequences of his August 17, 2011 work related injury"

39. A questionnaire executed by Dr. Brawley on November 8, 2012 similarly: (a) attributes "Mr. Hilton's current cognitive deficits (including severe memory compromise) . . . [to] physical brain damage"; (b) recognizes "the cognitive deficits attributable to this physical brain damage have most probably been aggravated by the consequences of . . . [Mr. Hilton's] August 17, 2011 work related injury"; (c) relates any "inconsistencies/inaccuracies arising in connection with his testimony, as well as any inconsistent/inaccurate information he has provided when questioned as to prior events and/or statements (i.e., requiring reliance on his memory) . . . [to] the result[s]. . . of this physical brain damage, rather than an purposeful/intentional/volitional attempt to mislead"; (d) recognized "the cognitive deficits produced by Mr. Hilton's physical brain damage (including the aggravation created by the consequences of his August 17, 2011 work related injury) most probably affect and/or impair his behavioral judgment, including the manner in which he responds to stressors and conducts his daily activities"; and (e) ties these "lapses in behavioral judgment . . . to his previous brain damage and the aggravation of Mr. Hilton's cognitive deficits by the consequences of his August 17, 2011 work related injury" Dr. Lind also offered identical opinions, from a neuropsychological standpoint, via questionnaire responses dated November 8, 2012.

40. Significantly, when asked to address these questions, Dr. Healy verified (agreed): (a) Mr. Hilton's "current cognitive deficits (including severe memory compromise) most probably result from physical brain damage"; (b) "the cognitive deficits attributable to this physical brain damage have most probably been aggravated by the consequences of Mr. Hilton['s] . . . August 17, 2011 work related injury"; (c) the testimonial inaccuracies (which Defendants alleged to be reflective of a knowing effort to deceive) "are most probably the result of this physical brain damage, rather than a purposeful/intentional/volitional attempt to mislead"; and (d) the negative impact Mr. Hilton's aggravated cognitive deficits are producing on his behavioral judgment.

41. The undersigned also reviewed various medical records (dating back to 2001), which Defendants maintain are relevant to the source of Mr. Hilton's current symptoms. These records include: (a) November 28, 2001 notes from Marlboro Park Hospital that reference complaints of a left knee contusion; (b) January 10, 2003 reports from the same hospital that relate to low back pain following a motor vehicle accident; (c) chiropractic treatment records identifying receipt of spinal (cervical, thoracic and lumbar) care for soft tissue injury stemming from this motor vehicle accident (January 13, 2003 until March 29, 2003), as well as the chiropractor's assignment of a 5%

impairment rating; (d) reports from Marlboro Park Hospital relative to the assessment/removal of the previously referenced piece of metal that had become embedded in Mr. Hilton's left ankle area; and (e) October 13, 2008 x-rays of Mr. Hilton's left foot and knee, which revealed on "an old fifth metatarsal fracture".

42. The undersigned also considered records generated by Carnival Cruise Lines, which reflect: (a) Mr. Hilton traveled on six cruises (ranging from three to five days in duration) from April 15, 2009 through early June, 2012; (b) two of these cruises occurred following his accident date; (c) he participated in an October 24, 2011 - October 29, 2011 cruise; (d) during the course of this cruise, various charges were incurred under the name of Michelle Hilton at several facilities on the ship ("Stars Bar", "Diamonds Disco", "Bogarts Café", "Wine Sensation", "Puttin on Ritz", and "Pool"), while other charges were attributed to Mr. Hilton's "FOLIO" number; (e) two others accompanied he and his wife on the June, 2012 cruise (which also lasted five days); and (f) on-ship charges (identifying substantially the same venues) were incurred through Mrs. Hilton's account.

43. However, the Carnival Cruise Line data offers limited insight as to Mr. Hilton's activity level during these cruises. Essentially, the records confirm unspecified purchases during the duration of the cruise (several of which occurring after

midnight), but generally do not differentiate between purchases of food/beverages, services, etc.

44. Additionally, the undersigned reviewed the video surveillance footage submitted by Defendants. While the surveillance involved observing Mr. Hilton at multiple locations, the bulk of this footage focused on several hours spent at Mr. Covington's place of business ("Collision Repair Center") during the afternoon of March 27, 2012. The surveillance depicts Mr. Hilton standing for finite periods of time, walking short distances, engaging in limited bending/leaning and sitting in a vehicle. This time-stamped footage (conducted between 11:47 AM and 6:25 PM) also contains segments, totaling well over an hour, where Mr. Hilton is either sitting or completely out of sight.

45. During exhaustive cross-examination, Mr. Hilton was noticeably confused and did not always remember what he had said during his previous deposition. He actually apologized more than once for inaccurate/incorrect statements made during the deposition, including his failure to remember going on the October, 2011 cruise. Mr. Hilton also recalled certain elements of his post-head trauma medical history (involving not only treatment received for the August 17, 2011 spider bite, but also previous health issues), while confirming his wife generally attended medical appointment with him in order to assist in the provision of information.

46. In this regard, I find Mr. Hilton's testimony remained consistent relative to: (a) his recollection that the previous incidents referenced by Defendants (involving his left leg and back) had not resulted in any permanent or long term symptoms/limitations; (b) his receipt of treatment from Dr. O'Dell for left leg symptoms prior to the August 17, 2011 accident date; (c) the distinction between symptoms attributable to Achilles tendonitis and the left leg pain which developed in the aftermath of the brown recluse spider bite; and (d) the nature of his current back symptoms.

47. Given Mr. Hilton's well-documented cognitive deficits, the testimony of his wife proved to be particularly enlightening. Specifically, Mrs. Hilton: (a) corroborated the circumstances surrounding her husband's 2000 head trauma (from a standpoint of someone who was in the vehicle at the time of impact, on the scene following his ejection from their vehicle and present for most of his treatment); (b) noted Mr. Hilton had changed following this accident; (c) provided examples of the cognitive problems he had exhibited following the 2000 head trauma; (d) acknowledged his recollection of events occurring prior to the 2000 accident remained good; (e) outlined the "routine" they had implemented to facilitate her husband's continued employment rather than pursuing disability benefits; (f) confirmed Mr. Hilton's cognitive compromise had not resolved with the passage

of time and remained problematic, to the extent they had returned to Dr. Solomon in the hope of obtaining medical assistance approximately six months prior to the August 17, 2011 spider bite; and (g) indicated his memory lapses, mood swings, level of agitation, ability to measure time, attention/focus and frequency of inaccuracy had clearly worsened following the spider bite.

48. She further verified: (a) Mr. Hilton's inability to recall the October, 2011 cruise (absent reviewing something to prompt his memory) was not usual; (b) her husband's physical activities were noticeably limited during each of the cruises; (c) while she and her husband drank alcohol and generally remained at one of the on-ship venues (as opposed to in the cabin) during the cruises, he did not engage in dancing or spend appreciable times on his feet; (d) she was present during a portion of the March 27, 2012 surveillance period; and (e) actually observing Mr. Hilton sitting (either in her vehicle or on a sofa inside Mr. Covington's building) during her husband's March 27, 2012 visit to this location.

49. Mrs. Hilton's testimony was substantially corroborated by Mr. Covington, a longtime friend of her husband. When questioned as to his observations/impressions, Mr. Covington explained: (a) he had been afforded ample opportunity to interact with Mr. Hilton both before and after the 2000 head trauma; (b) Mr. Hilton exhibited no difficulties with memory, focus, mood

disturbance, etc. prior to the 2000 accident; (c) noticeable changes had occurred subsequent to this accident, particularly involving memory and Mr. Hilton's reaction to these memory deficits; and (d) the nature of Mr. Hilton's pre-August 17, 2011 memory dysfunction had caused him to question how his friend was still being allowed to operate a tractor trailer.

50. After thoroughly reviewing all evidence of record and observing each of the witnesses during the course of the hearing, I specifically find: (a) Mr. Hilton's presentation (both live and through deposition) is completely consistent with the material level of cognitive dysfunction confirmed by Drs. Healy, Schwartz-Watts, Brawley and Lind; (b) the inaccuracies/inconsistencies in his testimony, as well as incorrect/erroneous information he has provided in the context of this litigation, result from cognitive deficits produced by physical brain damage documented by at least four duly qualified specialists, rather than a purposeful, intentional, volitional or preconceived attempt to mislead and/or knowingly provide false information; (c) Mr. Hilton has been experiencing cognitive dysfunction since the 2000 head trauma, which clearly produced some degree of physical brain damage (as evidenced by his post-motor vehicle accident pathology, need for brain surgery and the symptoms documented through February 11, 2011); (d) the persistent symptoms referenced by Dr. Solomon in 2011, coupled with the unanimous opinions expressed by Drs.

Healy, Schwartz-Watts, Brawley and Lind, firmly establish the presence of appreciable cognitive dysfunction prior to April 17, 2011; (e) these experts, as well as the lay testimony, also verify his current level of cognitive dysfunction; (f) this explanation for any alleged credibility issues is founded upon uncontradicted medical evidence (objective and/or wholly validated through use of devices specifically aimed toward identifying malingering/embellishment); and (g) the current circumstances unquestionably verify the legitimacy of Mr. Hilton's cognitive loss, while dispelling any notion that the implications of his pre-existing brain damage were contrived.

51. I further find: (a) great weight should be afforded to the opinions expressed by Dr. Healy, particularly with respect to the issue of maximum medical improvement, as this authorized treater not only had the opportunity to assess Mr. Hilton on multiple occasions, but also considered Defendants' allegations (including the assertion his current left leg and back symptoms are purely the result of preexisting conditions) and the products of their surveillance; (b) after reviewing the surveillance footage and being apprised as to aspects of prior medical history which Defendants believe to be particularly relevant, Dr. Healy concluded Mr. Hilton had not achieved maximum medical improvement and required further treatment through Dr. Riber; (d) he similarly verified the consequences of Mr. Hilton's compensable

injury continued to prohibit resumption of his pre-injury employment activities; (e) upon reviewing the results of neuropsychological testing, in light of his own clinical observations, Dr. Healy agreed Mr. Hilton's 2000 head trauma had produced appreciable cognitive deficits secondary to physical brain damage; and (f) Defendants' designated authorized treater likewise validated Mr. Hilton's credibility, repeatedly declining to endorse Defendants' contention that this gentleman had presented himself and/or testified in a dishonest, deceptive or misleading fashion.

52. I likewise find Mrs. Hilton's testimony to be a key element in connection with my assessment of her husband's presentation, as she: (a) provided a compelling account of the circumstances surrounding the 2000 head trauma, as well as its impact on Mr. Hilton's cognitive abilities (as compared to his prior state); (b) convincingly outlined the nature/persistence of Mr. Hilton's cognitive dysfunction in a manner which was wholly consistent with his valid neuropsychological test results and the unanimous opinions expressed by the medical experts; (c) made no effort to disavow the occurrence of various activities which were the focus of Defendants' credibility allegations, instead offering explanations for this conduct in the context of his longstanding cognitive problems; and (d) reliably noted the current state of his cognitive disorder.

53. I also find: (a) Mr. Hilton has not achieved maximum medical improvement relative to the consequences of his compensable accident, which continue to produce left leg and back symptoms; (b) his left leg and back symptoms proximately result from the aggravation of preexisting, nondisabling conditions by the consequences of his August 17, 2011 compensable accident; (c) Mr. Hilton requires further treatment for these injury components in accordance with Dr. Healy's recommendations; (d) his receipt of this treatment is reasonable, medically necessary and geared toward lessening the ultimate period of disability produced by the consequences of his compensable accident; (e) the current circumstances warrant Dr. Healy's continued service as Mr. Hilton's authorized treating physician, as well as his receipt of particular treatment modalities identified and/or endorsed by this neurological specialist; and (f) Mr. Hilton remains temporarily totally disabled by the consequences of his compensable accident.

54. I finally find: (a) any discrepancies, inconsistencies, errors, etc. in connection with either Mr. Hilton's testimony or conduct result from the cognitive dysfunction confirmed by no less than four medical specialists; (b) the testimony and conduct which Defendants maintain warrants termination of Mr. Hilton's claim were/are neither volitional nor reflective of dishonesty; (c) entry of a finding as to a lack of credibility is not

warranted in this instance; (d) I would not find him not to be credible; (e) the issues currently in dispute, including the presence of cognitive dysfunction explaining/rebutting Defendants' allegations as to a lack of credibility, are clearly medically driven; and (f) the evidence of record amply supports Mr. Hilton's contentions as to this issue.

CONCLUSIONS OF LAW

IN VIEW OF THESE FINDINGS OF FACT, I CONCLUDE AS MATTERS OF LAW:

1. The parties to this proceeding are subject to and bound by the provisions of the South Carolina Workers' Compensation Act.

2. On August 17, 2011, Mr. Hilton, an employee within the meaning of S.C. Code Ann. Section 42-1-130 (2002), sustained a compensable injury to his left leg within the meaning of S.C. Code Ann. Section 42-1-160 (2007), while performing duties arising out of and within the course and scope of his employment with Flakeboard America Limited, an employer within the meaning of S.C. Code Ann. Section 42-1-140 (1976). This injury ultimately produced a back injury component, the consequences of which are likewise compensable per Section 42-1-160. See, Whitfield v. Daniel Construction Company, 226 S.C. 337, 83 S.E. 2d 460, 462 (1954); Mullinax v. Winn-Dixie Stores, Inc., 318 S.C.

431, 458 S.E. 2d 76, 79 (Ct. App. 1995). (Every natural consequence of compensable injury is likewise compensable).

3. "Maximum medical improvement is a term used to indicate that a person has reached such a plateau that in the physician's opinion there is no further medical care or treatment which will lessen the degree of impairment." O'Banner v. Westinghouse Electric Corporation, 319 S.C. 24, 459 S.E. 2d 324, 327 (Ct. App. 1995); Hall v. United Rentals, Inc., 371 S.C. 69, 636 S.E. 2d 876, 887 (Ct. App. 2006).

4. As previously noted, neither Dr. Healy (Defendants' designated treating physician) nor Dr. Riber believe Mr. Hilton has achieved maximum medical improvement as to the consequences of his compensable accident. Similarly, the parties have agreed the issue relating to the current source(s) of Mr. Hilton's cognitive dysfunction needs to be addressed by the Commission at a later date. Further, Dr. Chen's opinions: (a) limit any determination of maximum medical improvement to the August 24, 2011 debridement procedure itself; and (b) consistently defer to Dr. Healy's judgment/conclusions as to the effects of Mr. Hilton's neurologic/nerve injury. I consequently conclude the evidence of record firmly establishes Mr. Hilton has not achieved maximum medical improvement.

5. While Defendants argue Mr. Hilton's purported lack of credibility authorizes a determination that he has reached

maximum medical improvement, I conclude: (a) achievement of maximum medical improvement is a purely medical determination (See, Williams v. South Carolina Department of Mental Retardation, 308 S.C. 438, 418 S.E. 2d 555 (Ct. App. 1992) (Commission finding of maximum medical improvement on date that did not coincide with medical evidence held erroneous); See also, Collins v. Speedway Motor Sport Corp., 165 N.C. App. 113, 598 S.E. 2d 185, 191 (2004) ("MMI is a 'purely medical determination'")); and (b) the evidence of record clearly establishes he has not attained maximum medical improvement.

6. I also conclude: (a) the existence of physical brain damage in the context of the disputes currently before me is a medically driven issue (i.e., the allegations as to Mr. Hilton's lack of credibility); (b) the medical evidence of record, including opinions expressed by Mr. Hilton's designated authorized treating neurologist, unequivocally verifies any inaccuracies/inconsistencies in Mr. Hilton's testimony, as well as incorrect/erroneous information he has provided in the context of this litigation, result from cognitive deficits produced by physical brain damage confirmed by four duly qualified medical specialists, rather than a purposeful, intentional, volitional or preconceived attempt to mislead and/or knowingly provide false information; (c) the lay witnesses have likewise provided convincing testimony as to the nature/impact of Mr. Hilton's

previous and current levels of cognitive dysfunction(both following the 2000 motor vehicle accident and at present); and (d) an adverse credibility finding is neither warranted nor justified in this instance.

7. Defendants are financially responsible for all causally related medical modalities which Mr. Hilton has heretofore received/undergone through Dr. Healy or any other authorized providers, as these modalities were reasonable, medically necessary and tended to lessen his period of disability within the meaning of S.C. Code Ann. Section 42-15-60 (A) (2007). In this regard, I also conclude: (a) Defendants are financially responsible for the additional medical treatment modalities provided/prescribed/recommended by Dr. Healy relative to Mr. Hilton's compensable left leg and back injury components, including the particular modalities identified by Dr. Riber; (b) Dr. Healy shall remain Mr. Hilton's designated/authorized treating physician for the purposes of this claim, notwithstanding the fact certain treatment modalities may be provided/performed by other specialists; and (c) the parties otherwise retain their respective rights per this statute.

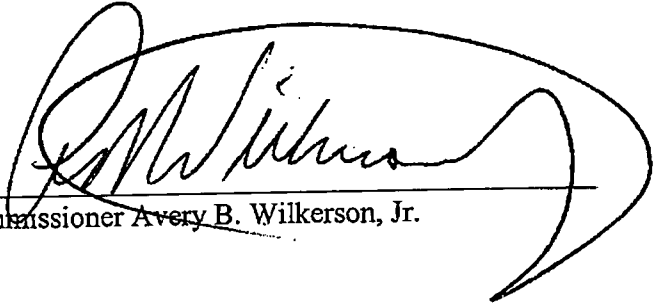
8. I also conclude Mr. Hilton remains temporarily totally disabled within the meaning of S.C. Code Ann. Section 42-9-10 (2007).

9. I finally conclude that the issue involving whether the consequences of Mr. Hilton's compensable accident have produced injury components other than his left leg and back shall be held in abeyance pending further agreement of the parties or Order of this Commission. Resolution of the disputed average weekly wage/compensation rate issue shall similarly be held in abeyance.

AWARD

ACCORDINGLY, IT IS HEREBY ORDERED that Defendants shall: (a) continue to pay Mr. Hilton weekly temporary total disability compensation; (b) accept financial responsibility for all causally related medical modalities heretofore provided/prescribed by any authorized physicians/specialists in connection with the treatment of his compensable injury components; (c) authorize Mr. Hilton's receipt of the causally related treatment modalities provided/prescribed by Dr. Healy; and (d) similarly accept financial responsibility for causally related medical modalities through other specialists in accordance with the prescriptions/recommendations of Dr. Healy, who shall remain Mr. Hilton's designated treating physician for the purposes of this claim.

IT IS SO ORDERED.



Commissioner Avery B. Wilkerson, Jr.

CERTIFICATE OF SERVICE

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

June 4, 2013

By: Elaine Boyd, Administrative Assistant to Commissioner Wilkerson

South Carolina Workers' Compensation Commission
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Columbia, South Carolina 29202-1715
(803) 737-5700

WCC File # 1111934

Carrier File # WC555-A26831

Carrier Code # _____

Employer FEIN _____

Thomas Chad Hilton 249-65-8056

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L. Brenn Watson

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Employer's Name

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Insurance Carrier

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Request for Commission Review by ☐ claimant ☒ employer (check one)

Date of injury: 8/17/2011

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

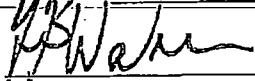
SEE ATTACHED

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

I certify that X I have served this document pursuant to R.67-211 by delivering a copy to Andrew N. Safran, Esquire
Name

P.O. Box 12089, Columbia, SC 29211; and Virginia Crocker, Judicial Director, SC WCC, P.O. Box 1715, Columbia, SC 29202-1715
Address

on the 17th day of June, 2013 by ☒ first class mail; ☐ personal service; ☐ certified mail.



Preparer's Signature

L. Brenn Watson

Willson Jones Carter & Baxley, P.A.

872 S. Pleasantburg Drive

Greenville, SC 29607

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

Attorney for Defendants

Title

June 17, 2013

Date

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

General Exceptions

1. In so far as the hearing commissioner's Findings of Fact, Conclusions of Law, and/or Order specifically state, or imply, that claimant has not reached maximum medical improvement related to the August 17, 2011 work accident, the same are not supported by the preponderance of the evidence and are errors of law.
2. In so far as the hearing commissioner's Findings of Fact, Conclusions of Law, and/or Order specifically state, or imply, that claimant is entitled to ongoing temporary disability related to the August 17, 2011 work accident, the same are not supported by the preponderance of the evidence and are errors of law.
3. In so far as the hearing commissioner's Findings of Fact, Conclusions of Law, and/or Order specifically state, or imply, that claimant is entitled to further medical treatment related to the August 17, 2011 work accident, the same are not supported by the preponderance of the evidence and are errors of law.
4. The hearing commissioner erred by not finding that the preponderance of the evidence establishes that the claimant completely lacks credibility and by not finding his claim for ongoing benefits is fraudulent.

Specific Exceptions

5. The hearing commissioner erred in Finding of Fact No. 8 by finding that the claimant sought treatment for "predominant left heel/ankle pain" prior to August 17, 2011; the error being that the same is not supported by the preponderance of the evidence and is an error of law.
6. The hearing commissioner erred in Finding of Fact No. 8 by finding that medical records generated by Dr. O'Dell verifies that on July 28, 2011 the claimant reported pain "that Dr. O'Dell had diagnosed to be reflective of 'Achilles Tendonitis'"; the error being that the same is not supported by the preponderance of the evidence and is an error of law.
7. The hearing commissioner erred in Finding of Fact No. 9 by finding that a review of reports generated by Dr. James Evans reveals "the upward radiation referenced by Dr. O'Dell had apparently improved"; the error being that the same is not supported by the preponderance of the evidence and is an error of law.
8. The hearing commissioner erred in Finding of Fact No. 9 by finding that medical records generated by Dr. James Evans reveals "an acknowledgement that the left foot pain which Dr. O'Dell attributed to Achilles Tendonitis..."; the error being that the same is not supported by the preponderance of the evidence and is an error of law.
9. The hearing commissioner erred in Finding of Fact No. 9 by finding that medical records generated by Dr. James Evans reveals that the claimant began experiencing pins and needles pain after the spider bite; the error being that the same is not supported by the preponderance of the evidence and is an error of law.
10. The hearing commissioner erred in Finding of Fact No. 9 by finding that medical records generated by Dr. James Evans reveals "based upon the particular elements of Mr. Hilton's history, this neurologist characterized the newly developed left lower extremity symptoms as the 'late complications of the brown recluse spider bite'; the error being that the same is not supported by the preponderance of the evidence and is an error of law.
11. The hearing commissioner erred in Finding of Fact No. 10 by finding that Dr. Evans attributed the claimant's ongoing left leg symptoms to the spider bite; the error being that the same is not supported by the preponderance of the evidence and is an error of law.
12. The hearing commissioner erred in Finding of Fact No. 10 by finding that while the claimant treated at Marlboro Primary Care Associates "he was diagnosed to be suffering from 'neuropathic' left leg pain"; the error being that the same is not supported by the preponderance of the evidence and is an error of law.

13. The hearing commissioner erred in Finding of Fact No. 10 by finding that while the claimant treated at Marlboro Primary Care Associates he "...did not receive appreciable benefit from prescribed medications"; the error being that the same is not supported by the preponderance of the evidence and is an error of law.
14. The hearing commissioner erred in Finding of Fact No. 12 by finding that Dr. Healy's notes/reports indicate that the claimant's non-discogenic sciatica and/or the consequences of the brown recluse spider bite compromised his gait, affected the foot and left ankle, and had a potentially aggravating affect on the pre-injury left Achilles tendon problem; the error being that the same is not supported by the preponderance of the evidence and is an error of law.
15. The hearing commissioner erred in Finding of Fact No. 13 by finding that the claimant required review of a card in his wallet to ascertain when a June, 2011 cruise vacation occurred; the error being that the same is not supported by the preponderance of the evidence and is an error of law.
16. The hearing commissioner erred in Finding of Fact No. 16 by finding that a February 11, 2011 report from Dr. Solomon noted persistent memory loss; the error being that the same is not supported by the preponderance of the evidence and is an error of law.
17. The hearing commissioner erred in Finding of Fact No. 17 by finding that Dr. Ezra Riber was aware of all material aspects of the claimant's post-injury history; the error being that the same is not supported by the preponderance of the evidence and is an error of law.
18. The hearing commissioner erred in Finding of Fact No. 22 by finding that Dr. Tora Brawly confirmed: claimant's alleged memory issues following the 2000 head trauma; claimant's reports of continued memory loss, mood swings, light headedness and sleep difficulties to Dr. Solomon; and, claimant's difficulties have worsened following complications from a spider bite in August, 2011; the errors being that the same are not supported by the preponderance of the evidence and are errors of law.
19. The hearing commissioner erred in Finding of Fact No. 25 by finding that Dr. Tora Brawly determined and concluded that any discrepancies noted in the claimant's report of personal history or other areas are related to his cognitive deficits, rather than an attempt to purposely report incorrect information; the error being that the same is not supported by the preponderance of the evidence and is an error of law.
20. The hearing commissioner erred in Finding of Fact No. 28 by finding that Dr. Lind was a practicing neuropsychologist; the error being that the same is not supported by the preponderance of the evidence and is an error of law.
21. The hearing commissioner erred in Finding of Fact No. 30 by finding that Dr. Healy verified that the nature/degree of the claimant's pre-surgical symptoms was sufficient to create sciatic nerve compression; the error being that the same is not supported by the preponderance of the evidence and is an error of law.
22. The hearing commissioner erred in Finding of Fact No. 30 by finding that Dr. Healy verified that the claimant's symptoms which temporarily resulted from the spider bite as well as the degree of necrosis documented during surgery could not be faked; the error being that the same is not supported by the preponderance of the evidence and is an error of law.
23. The hearing commissioner erred in Finding of Fact No. 30 by finding that Dr. Healy verified that the presence of neuropathic injury had been objectively verified by EMG testing; the error being that the same is not supported by the preponderance of the evidence and is an error of law.
24. The hearing commissioner erred in Finding of Fact No. 30 by finding that Dr. Healy verified that he was comfortable with his ability to render "this opinion" as to causal connection, indicating the claimant's surgeon was in no better position to address this issue; the error being that the same is not supported by the preponderance of the evidence and is an error of law.

25. The hearing commissioner erred in Finding of Fact No. 31 by finding that Dr. Healy explained that the claimant's current back symptoms were compensatory (due to increased gait alteration attributable to neuropathic pain) and had "come on quicker than...might have otherwise been...expected" due to the aggravating/accelerating impact of the causally related increase in neuropathic pain by the consequences of the brown recluse spider bite; the error being that the same is not supported by the preponderance of the evidence and is an error of law.
26. The hearing commissioner erred in Finding of Fact No. 32 by finding that Dr. Healy addressed the claimant's cognitive capacity and specifically confirmed/concluded that he had noticed clinical cognitive limitations; the error being that the same is not supported by the preponderance of the evidence and is an error of law.
27. The hearing commissioner erred in Finding of Fact No. 32 by finding that Dr. Healy addressed the claimant's cognitive capacity and specifically confirmed/concluded that persistent memory loss was actually "referenced as an ongoing symptom to a neurologist" before the August 17, 2011 accident date; the error being that the same is not supported by the preponderance of the evidence and is an error of law.
28. The hearing commissioner erred in Finding of Fact No. 32 by finding that Dr. Healy addressed the claimant's cognitive capacity and confirmed/concluded that neuropsychological test results did not support allegations that the claimant's actions (including deposition testimony) were reflected with dishonesty and deceit; the error being that the same is not supported by the preponderance of the evidence and is an error of law.
29. The hearing commissioner erred in Finding of Fact No. 32 by finding that Dr. Healy addressed the claimant's cognitive capacity and specifically confirmed/concluded that his impressions were consistent with those of Drs. Schwartz-Watts and Lind; the error being that the same is not supported by the preponderance of the evidence and is an error of law.
30. The hearing commissioner erred in Finding of Fact No. 32 by finding that Dr. Healy addressed the claimant's cognitive capacity and specifically confirmed/concluded that to a reasonable degree of medical certainty he was "comfortable that Mr. Hilton in his efforts to receive treatment...and his testimony has done nothing contrived or purposeful, but rather that any of these discrepancies or conflicts are the results of his brain injury and results of cognitive deficits..."; the error being that the same is not supported by the preponderance of the evidence and is an error of law.
31. The hearing commissioner erred in Finding of Fact No. 33 by finding that Dr. Healy considered the dishonest behavior alleged by Defendants and consistently validated the claimant's credibility; the error being that the same is not supported by the preponderance of the evidence and is an error of law.
32. The hearing commissioner erred in Finding of Fact No. 33 by finding that Dr. Healy consistently validated that he had no concerns as to the claimant's credibility; the error being that the same is not supported by the preponderance of the evidence and is an error of law.
33. The hearing commissioner erred in Finding of Fact No. 33 by finding that Dr. Healy consistently validated that the claimant's participation in the October, 2011 cruise was an insufficient basis upon which to characterize the claimant as "a liar;" the error being that the same is not supported by the preponderance of the evidence and is an error of law.
34. The hearing commissioner erred in Finding of Fact No. 33 by finding that Dr. Healy consistently validated that the claimant was a credible patient; the error being that the same is not supported by the preponderance of the evidence and is an error of law.
35. The hearing commissioner erred in Finding of Fact No. 34 by finding that Dr. Healy's testimony establishes that the claimant had been maintained on out-of-work status; the error being that the same is not supported by the preponderance of the evidence and is an error of law.

36. The hearing commissioner erred in Finding of Fact No. 35 by finding that Dr. Chen conceded that the claimant had symptoms following the August 17, 2011 accident which manifested "a systemic effect" produced by spider venom; the error being that the same is not supported by the preponderance of the evidence and is an error of law.
37. The hearing commissioner erred in Finding of Fact No. 35 by finding that Dr. Chen conceded that the tissue damage discovered during surgery was consistent with the destructive process caused by venom or infection; the error being that the same is not supported by the preponderance of the evidence and is an error of law.
38. The hearing commissioner erred in Finding of Fact No. 36 by finding that Dr. Chen acknowledged/agreed that nerve root injury would actually fall more within a neurologist's area of expertise than a surgeon's in terms of delineating etiology of nerve irritation or nerve damage; the error being that the same is not supported by the preponderance of the evidence and is an error of law.
39. The hearing commissioner erred in Finding of Fact No. 36 by finding that Dr. Chen acknowledged/agreed that he would normally defer to a neurologist in terms of making a conclusion as to what is the cause of nerve root damage in a scenario; the error being that the same is not supported by the preponderance of the evidence and is an error of law.
40. The hearing commissioner erred in Finding of Fact No. 36 by finding that Dr. Chen acknowledged/agreed that he would defer to Dr. Healy's opinion relative to the causal relationship of the claimant's non-discogenic sciatica and the consequences of the spider bite; the error being that the same is not supported by the preponderance of the evidence and is an error of law.
41. The hearing commissioner erred in Finding of Fact No. 36 by finding that Dr. Chen acknowledged/agreed that he did not have the specialty or knowledge to disagree with Dr. Healy's opinion; the error being that the same is not supported by the preponderance of the evidence and is an error of law.
42. The hearing commissioner erred in Finding of Fact No. 36 by finding that Dr. Chen acknowledged/agreed that he would defer to Dr. Evans' opinion as to causation and etiology of symptoms; the error being that the same is not supported by the preponderance of the evidence and is an error of law.
43. The hearing commissioner erred in Finding of Fact No. 37 by finding that Dr. Chen testified that: identification of the source of nerve damage identified by an EMG was outside his area of expertise; he did not possess the expertise to decide the question of causation; he was consistently deferring to the neurologist in terms of cause and effect as far as the claimant's current problems and their relationship to the spider bite; any opinions offered in response to defense counsel's questions on this point were outside of area of specialization and expertise; and, given this lack of expertise, he would defer to the neurologist as to the determination of the source of the claimant's symptoms; the errors being that the same are not supported by the preponderance of the evidence and are errors of law.
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44. The hearing commissioner erred in Finding of Fact No. 38 by finding that Dr. Schwartz-Watts confirmed that the claimant's previous head trauma and the cognitive deficits attributable to this physical brain damage have most probably been aggravated by the consequences of his August 17, 2011 work-related injury; the errors being that the same is not supported by the preponderance of the evidence, is an error of law, and is an improper determination/finding regarding an issue that was not properly before the commission for determination.
45. The hearing commissioner erred in Finding of Fact No. 38 by finding that Dr. Schwartz-Watts confirmed that "...[g]iven the nature/degree of Mr. Hilton's physical brain damage, [her]...clinical findings and the results of neuropsychological testing,...Mr. Hilton's current cognitive deficits (including severe memory compromise) most probably result from physical brain damage;" the error being that the same is not supported by the preponderance of the evidence and is an error of law.

46. The hearing commissioner erred in Finding of Fact No. 38 by finding that Dr. Schwartz-Watts confirmed that "...inconsistencies/inaccuracies with the claimant's testimony, as well as any inconsistent/inaccurate information he has provided when questioned as to prior events and/or statements (i.e., requiring reliance on his memory), are most probably the result of this physical brain damage, rather than a purposeful/intentional/ volitional attempt to mislead"; the error being that the same is not supported by the preponderance of the evidence and is an error of law.
47. The hearing commissioner erred in Finding of Fact No. 38 by finding that Dr. Schwartz-Watts confirmed that "the cognitive deficits produced by Mr. Hilton's physical brain damage (including the aggravation created by the consequences of his August 17, 2011 work related injury) most probably negatively effect and/or impair his behavioral judgment, including the manner in which he responds to stressors and conducts his daily activities"; the error being that the same is not supported by the preponderance of the evidence and is an error of law.
48. The hearing commissioner erred in Finding of Fact No. 38 by finding that Dr. Schwartz-Watts confirmed that the claimant's "lapses in behavioral judgment would also most probably be attributable to the aggravation of Mr. Hilton's cognitive deficits by the consequences of his August 17, 2011 work related injury..."; the errors being that the parties stipulated and the Commissioner agreed that any issue as to an alleged aggravation of the claimant's prior physical brain damage was not properly before the commissioner for determination at the hearing and the same is not supported by the preponderance of the evidence and is an error of law.
49. The hearing commissioner erred in Finding of Fact No. 39 by finding that Dr. Brawley opined that the cognitive deficits attributable to the claimant's prior physical brain damage had most probably been aggravated by the consequences of the claimant's August 17, 2011 work-related injury; the errors being that the same is not supported by the preponderance of the evidence, is an error of law, and this issue was not properly before the commission for determination.
50. The hearing commissioner erred in Finding of Fact No. 39 by finding that Dr. Brawley: relates any inconsistencies/inaccuracies arising in connection with his testimony, as well as any inconsistent/inaccurate information he has provided when questioned as to prior events and/or statements (i.e., requiring reliance on his memory)...[to] the result[s]...of this physical brain damage, rather than a purposeful/intentional/volitional attempt to mislead; recognized the cognitive deficits produced by Mr. Hilton's physical brain damage (including the aggravation created by the consequences of his August 17, 2011 work related injury) most probably affect and/or impair his behavioral judgment, including the manner in which he responds to stressors and conducts his daily activities; and, ties these lapses in behavioral judgment...to his previous brain damage and the aggravation of Mr. Hilton's cognitive deficits by the consequences of his August 17, 2011 work related injury...; the errors being that the same are not supported by the preponderance of the evidence and are errors of law.
51. The hearing commissioner erred in Finding of Fact No. 39 by finding that Dr. Lind also offered identical opinions, from a neuropsychological standpoint, as Dr. Brawley, via questionnaire responses dated November 8, 2012; the errors being that the parties stipulated and the Commissioner agreed that any issue as to an alleged aggravation of the claimant's prior physical brain damage was not properly before the commission for determination at the hearing, the same is not supported by the preponderance of the evidence and is an error of law.
52. The hearing commissioner erred in Finding of Fact No. 43 by finding that the Carnival Cruise Line data offers limited insight as to the claimant's activity level during these cruises; the error being that the same is not supported by the preponderance of the evidence and is an error of law.
53. The hearing commissioner erred in Finding of Fact No. 45 by finding that during cross-examination the claimant was noticeably confused and did not always remember what he had said during his previous deposition; the error being that the same is not supported by the preponderance of the evidence and is an error of law.
54. The hearing commissioner erred in Finding of Fact No. 45 by finding that the claimant confirmed that his wife generally attended medical appointments with him in order to assist in the provision of information; the error being that the same is not supported by the preponderance of the evidence and is an error of law.

55. The hearing commissioner erred in Finding of Fact No. 46 by finding the claimant's testimony remained consistent regarding: his recollection of the previous incidents referenced by Defendants (involving his left leg and back) had not resulted in any permanent or long term symptoms/limitations; his receipt of treatment from Dr. O'Dell for left leg symptoms prior to the August 17, 2011 accident date; the distinction between symptoms attributable to Achilles tendonitis and the left leg pain which developed in the aftermath of the brown recluse spider bite; and, the nature of his current back symptoms; the errors being that the same are not supported by the preponderance of the evidence and are errors of law.
56. The hearing commissioner erred in Finding of Fact No. 47 by finding that the claimant's wife's testimony proved enlightening by: noting the claimant had changed following his 2000 head trauma; providing examples of the cognitive problems he had exhibited following the 2000 head trauma; acknowledging his recollection of events occurring prior to the 2000 accident remained good; outlining the routine they had implemented to facilitate the claimant's continued employment rather than pursuing disability benefits; confirming the claimant's cognitive compromise had not resolved with the passage of time and remained problematic; and, indicating his memory lapses, mood swings, level of agitation, ability to measure time, attention/focus and frequency of inaccuracy had clearly worsened following the spider bite; the errors being that the same are not supported by the preponderance of the evidence and are errors of law.
57. The hearing commissioner erred in Finding of Fact No. 48 by finding that Mrs. Hilton verified: the claimant's inability to recall the October, 2011 cruise (absent reviewing something to prompt his memory) was not unusual; her husband's physical activities were noticeably limited during each of these cruises; while she and her husband drank alcohol and generally remained at one of the on-ship venues (as opposed to in the cabin) during the cruises, he did not engage in dancing or spend appreciable times on his feet; she was present during a portion of the March 27, 2012 surveillance period; and, actually observing Mr. Hilton sitting (either in her vehicle or on a sofa inside Mr. Covington's building) during her husband's March 27, 2012 visit to this location; the errors being that the same are not supported by the preponderance of the evidence and are errors of law.
58. The hearing commissioner erred in Finding of Fact No. 49 by finding that Mrs. Hilton's testimony was substantially corroborated by Mr. Covington, who explained: he had been afforded ample opportunity to interact with Mr. Hilton both before and after the 2000 head trauma; Mr. Hilton exhibited no difficulties with memory, focus, mood disturbance, etc. prior to the 2000 accident; noticeable changes had occurred subsequent to this accident, particularly involving memory and Mr. Hilton's reaction to these memory deficits; and, the nature of Mr. Hilton's pre-August 17, 2011 memory dysfunction had caused him to question how his friend was still being allowed to operate a tractor trailer; the errors being that the same are not supported by the preponderance of the evidence and are errors of law.
59. The hearing commissioner erred in Finding of Fact No. 50 by finding that "Mr. Hilton's presentation (both live and through deposition) is completely consistent with the material level of cognitive dysfunction confirmed by Drs. Healy, Schwartz-Watts, Brawley and Lind"; the error being that the same is not supported by the preponderance of the evidence and is an error of law.
60. The hearing commissioner erred in Finding of Fact No. 50 by finding that "the inaccuracies/inconsistencies in his testimony, as well as incorrect/erroneous information he has provided in the context of this litigation, result from cognitive deficits produced by physical brain damage documented by at least four duly qualified specialists, rather than a purposeful, intentional, volitional or preconceived attempt to mislead and/or knowingly provide false information"; the error being that the same is not supported by the preponderance of the evidence and is an error of law.
61. The hearing commissioner erred in Finding of Fact No. 50 by finding that "Mr. Hilton has been experiencing cognitive dysfunction since the 2000 head trauma, which clearly produced some degree of physical brain damage (as evidenced by his post-motor vehicle accident pathology, need for brain surgery and the symptoms documented through February 11, 2011)"; the error being that the same is not supported by the preponderance of the evidence and is an error of law.

62. The hearing commissioner erred in Finding of Fact No. 50 by finding that "the persistent symptoms referenced by Dr. Solomon in 2011, coupled with the unanimous opinions expressed by Drs. Healy, Schwartz-Watts, Brawley and Lind, firmly establish the presence of appreciable cognitive dysfunction prior to April 17, 2011"; the error being that the same is not supported by the preponderance of the evidence and is an error of law.
63. The hearing commissioner erred in Finding of Fact No. 50 by finding that "these experts, as well as the lay testimony, also verify his current level of cognitive dysfunction"; the error being that the same is not supported by the preponderance of the evidence and is an error of law.
64. The hearing commissioner erred in Finding of Fact No. 50 by finding that the "explanation for any alleged credibility issues is founded upon uncontradicted medical evidence (objective and/or wholly validated through use of devices specifically aimed toward identifying malingering/embellishment)"; the error being that the same is not supported by the preponderance of the evidence and is an error of law.
65. The hearing commissioner erred in Finding of Fact No. 50 by finding that "the current circumstances unquestionably verify the legitimacy of Mr. Hilton's cognitive loss, while dispelling any notion that the implications of his pre-existing brain damage were contrived"; the error being that the same is not supported by the preponderance of the evidence and is an error of law.
66. The hearing commissioner erred in Finding of Fact No. 51 by finding "great weight should be afforded to the opinions expressed by Dr. Healy, particularly with respect to the issue of maximum medical improvement, as this authorized treater not only had the opportunity to assess Mr. Hilton on multiple occasions, but also considered Defendants' allegations (including the assertion his current left leg and back symptoms are purely the result of preexisting conditions) and the products of their surveillance"; the error being that the same is not supported by the preponderance of the evidence and is an error of law.
67. The hearing commissioner erred in Finding of Fact No. 51 by finding that "after reviewing the surveillance footage and being apprised as to aspects of prior medical history which Defendants believe to be particularly relevant, Dr. Healy concluded Mr. Hilton had not achieved maximum medical improvement and required further treatment through Dr. Riber"; the error being that the same is not supported by the preponderance of the evidence and is an error of law.
68. The hearing commissioner erred in Finding of Fact No. 51 by finding that Dr. Healy "similarly verified the consequences of Mr. Hilton's compensable injury continued to prohibit resumption of his pre-injury employment activities"; the error being that the same is not supported by the preponderance of the evidence and is an error of law.
69. The hearing commissioner erred in Finding of Fact No. 51 by finding that "upon reviewing the results of neuropsychological testing, in light of his own clinical observations, Dr. Healy agreed Mr. Hilton's 2000 head trauma had produced appreciable cognitive deficits secondary to physical brain damage"; the error being that the same is not supported by the preponderance of the evidence and is an error of law.
70. The hearing commissioner erred in Finding of Fact No. 51 by finding that "Defendants' designated authorized treater likewise validated Mr. Hilton's credibility, repeatedly declining to endorse Defendants' contention that this gentleman had presented himself and/or testified in a dishonest, deceptive or misleading fashion"; the error being that the same is not supported by the preponderance of the evidence and is an error of law.
71. The hearing commissioner erred in Finding of Fact No. 52 by finding that Mrs. Hilton's testimony was a key element in connection with the commissioner's assessment of the claimant's presentation because she: "provided a compelling account of the circumstances surrounding the 2000 head trauma, as well as its impact on Mr. Hilton's cognitive abilities (as compared to his prior state)"; the error being that the same is not supported by the preponderance of the evidence and is an error of law.

72. The hearing commissioner erred in Finding of Fact No. 52 by finding that Mrs. Hilton "convincingly outlined the nature/persistence of Mr. Hilton's cognitive dysfunction in a manner which was wholly consistent with his valid neuropsychological test results and the unanimous opinions expressed by the medical experts"; the error being that the same is not supported by the preponderance of the evidence and is an error of law.
73. The hearing commissioner erred in Finding of Fact No. 52 by finding that Mrs. Hilton "made no effort to disavow the occurrence of various activities which were the focus of Defendants' credibility allegations, instead offering explanations for this conduct in the context of his longstanding cognitive problems"; the error being that the same is not supported by the preponderance of the evidence and is an error of law.
74. The hearing commissioner erred in Finding of Fact No. 52 by finding that Mrs. Hilton "reliably noted the current state of his cognitive disorder"; the error being that the same is not supported by the preponderance of the evidence and is an error of law.
75. The hearing commissioner erred in Finding of Fact No. 53 by finding that "Mr. Hilton has not achieved maximum medical improvement relative to the consequences of his compensable accident, which continue to produce left leg and back symptoms"; the error being that the same is not supported by the preponderance of the evidence and is an error of law.
76. The hearing commissioner erred in Finding of Fact No. 53 by finding that the claimant's "left leg and back symptoms proximately result from the aggravation of preexisting, nondisabling conditions by the consequences of his August 17, 2011 compensable accident"; the error being that the same is not supported by the preponderance of the evidence and is an error of law.
77. The hearing commissioner erred in Finding of Fact No. 53 by finding that "Mr. Hilton requires further treatment for these injury components in accordance with Dr. Healy's recommendations"; the error being that the same is not supported by the preponderance of the evidence and is an error of law.
78. The hearing commissioner erred in Finding of Fact No. 53 by finding that the claimant's "receipt of this treatment is reasonable, medically necessary and geared toward lessening the ultimate period of disability produced by the consequences of his compensable accident"; the error being that the same is not supported by the preponderance of the evidence and is an error of law.
79. The hearing commissioner erred in Finding of Fact No. 53 by finding that "the current circumstances warrant Dr. Healy's continued service as Mr. Hilton's authorized treating physician, as well as his receipt of particular treatment modalities identified and/or endorsed by this neurological specialist"; the error being that the same is not supported by the preponderance of the evidence and is an error of law.
80. The hearing commissioner erred in Finding of Fact No. 53 by finding that "Mr. Hilton remains temporarily totally disabled by the consequences of his compensable accident"; the error being that the same is not supported by the preponderance of the evidence and is an error of law.
81. The hearing commissioner erred in Finding of Fact No. 54 by finding that "any discrepancies, inconsistencies, errors, etc. in connection with either Mr. Hilton's testimony or conduct result from the cognitive dysfunction confirmed by no less than four medical specialists"; the error being that the same is not supported by the preponderance of the evidence and is an error of law.
82. The hearing commissioner erred in Finding of Fact No. 54 by finding that "the testimony and conduct which Defendants maintain warrants termination of Mr. Hilton's claim were/are neither volitional nor reflective of dishonesty"; the error being that the same is not supported by the preponderance of the evidence and is an error of law.

83. The hearing commissioner erred in Finding of Fact No. 54 by finding that "entry of a finding as to a lack of credibility is not warranted in this instance"; the error being that the same is not supported by the preponderance of the evidence and is an error of law.
84. The hearing commissioner erred in Finding of Fact No. 54 by finding that "I would not find him not to be credible"; the error being that the same is not supported by the preponderance of the evidence and is an error of law.
85. The hearing commissioner erred in Finding of Fact No. 54 by finding that "the issues currently in dispute, including the presence of cognitive dysfunction explaining/rebutting Defendants' allegations as to a lack of credibility, are clearly medically driven"; the error being that the same is not supported by the preponderance of the evidence and is an error of law.
86. The hearing commissioner erred in Finding of Fact No. 54 by finding that "the evidence of record amply supports Mr. Hilton's contentions as to [the credibility] issue"; the error being that the same is not supported by the preponderance of the evidence and is an error of law.
87. The hearing commissioner erred in Conclusion of Law No. 2 by concluding that the claimant's August 17, 2011 injury produced a back injury component, the consequences of which are likewise compensable per §42-1-160; the error being that the same is not supported by the preponderance of the evidence and is an error of law.
88. The hearing commissioner erred in Conclusion of Law No. 4 by concluding that "the parties have agreed the issue relating to the current source(s) of Mr. Hilton's cognitive dysfunction needs to be addressed by the Commission at a later date"; the error being that the parties agreed that this issue was not to be addressed by the commissioner at the January 3, 2013 hearing.
89. The hearing commissioner erred in Conclusion of Law No. 4 by concluding that the evidence of record firmly establishes the claimant has not reached maximum medical improvement; the error being that the same is not supported by the preponderance of the evidence and is an error of law.
90. The hearing commissioner erred in Conclusion of Law No. 4 by concluding that Dr. Chen's opinions "limit any determination of maximum medical improvement to the August 24, 2011 debridement procedure itself"; the error being that the same is not supported by the preponderance of the evidence and is an error of law.
91. The hearing commissioner erred in Conclusion of Law No. 4 by concluding that Dr. Chen's opinions "consistently defer to Dr. Healy's judgment/conclusions as to the effects of Mr. Hilton's neurologic/nerve injury"; the error being that the same is not supported by the preponderance of the evidence and is an error of law.
92. The hearing commissioner erred in Conclusion of Law No. 5 by concluding that achievement of maximum medical improvement is a purely medical determination; the error being that the same is an error of law.
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93. The hearing commissioner erred in Conclusion of Law No. 5 by concluding that the evidence of record clearly establishes the claimant has not attained maximum medical improvement; the error being that the same is not supported by the preponderance of the evidence and is an error of law.
94. The hearing commissioner erred in Conclusion of Law No. 6 by concluding "the existence of physical brain damage in the context of the disputes currently before me is a medically driven issue (i.e., the allegations as to Mr. Hilton's lack of credibility)"; the error being that the same is not supported by the preponderance of the evidence and is an error of law.
95. The hearing commissioner erred in Conclusion of Law No. 6 by concluding "the medical evidence of record, including opinions expressed by Mr. Hilton's designated authorized treating neurologist, unequivocally verifies any inaccuracies/inconsistencies in Mr. Hilton's testimony, as well as incorrect/erroneous information he has provided in the context of this litigation, result from cognitive deficits produced by physical brain damage confirmed by

four duly qualified medical specialists, rather than a purposeful, intentional, volitional or preconceived attempt to mislead and/or knowingly provide false information"; the error being that the same is not supported by the preponderance of the evidence and is an error of law.

96. The hearing commissioner erred in Conclusion of Law No. 6 by concluding "the lay witnesses have likewise provided convincing testimony as to the nature/impact of Mr. Hilton's previous and current levels of cognitive dysfunction (both following the 2000 motor vehicle accident and at present)"; the error being that the same is not supported by the preponderance of the evidence and is an error of law.
97. The hearing commissioner erred in Conclusion of Law No. 6 by concluding "an adverse credibility finding is neither warranted nor justified in this instance"; the error being that the same is not supported by the preponderance of the evidence and is an error of law.
98. The hearing commissioner erred in Conclusion of Law No. 7 by concluding that Defendants are financially responsible for all causally related medical modalities which claimant has received/undergone through Dr. Healy or any other authorized providers, as these modalities are reasonably medically necessary; the error being that the same is not supported by the preponderance of the evidence and is an error of law.
99. The hearing commissioner erred in Conclusion of Law No. 7 by concluding that "Defendants are financially responsible for the additional medical treatment modalities provided/prescribed/recommended by Dr. Healy relative to Mr. Hilton's compensable left leg and back injury components, including the particular modalities identified by Dr. Riber"; the error being that the same is not supported by the preponderance of the evidence and is an error of law.
100. The hearing commissioner erred in Conclusion of Law No. 7 by concluding that "Dr. Healy shall remain Mr. Hilton's designated/authorized treating physician for the purposes of this claim, notwithstanding the fact certain treatment modalities may be provided/performed by other specialists"; the error being that the same is not supported by the preponderance of the evidence and is an error of law.
101. The hearing commissioner erred in Conclusion of Law No. 8 by concluding the claimant remains temporary totally disabled within the meaning of S.C. Code Ann. §42-9-10; the error being that the same is not supported by the preponderance of the evidence and is an error of law.
102. The hearing commissioner erred in Conclusion of Law No. 9 by concluding the claimant suffered a compensable injury to his back; the error being that the same is not supported by the preponderance of the evidence and is an error of law.
103. The hearing commissioner erred in Awarding/Ordering that the Defendants "continue to pay Mr. Hilton weekly temporary total disability compensation"; the error being that the same is not supported by the preponderance of the evidence and is an error of law.
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104. The hearing commissioner erred in Awarding/Ordering that the Defendants "accept financial responsibility for all causally related medical modalities heretofore provided/prescribed by any authorized physicians/specialists in connection with the treatment of his compensable injury components"; the error being that the same is not supported by the preponderance of the evidence and is an error of law.
105. The hearing commissioner erred in Awarding/Ordering that the Defendants "authorize Mr. Hilton's receipt of the causally related treatment modalities provided/prescribed by Dr. Healy"; the error being that the same is not supported by the preponderance of the evidence and is an error of law.
106. The hearing commissioner erred in Awarding/Ordering that the Defendants "similarly accept financial responsibility for causally related medical modalities through other specialists in accordance with the prescriptions/recommendations of Dr. Healy, who shall remain Mr. Hilton's designated treating physician for the

purposes of this claim"; the error being that the same is not supported by the preponderance of the evidence and is an error of law.

BEFORE THE SOUTH CAROLINA
WORKERS' COMPENSATION COMMISSION

WCC FILE NO. 1111934

Thomas Chad Hilton,	)	
Employee,	)	
Claimant/Respondent,	)	
	)	
vs.	)	
	)	
Flakeboard America Limited,	)	BRIEF OF DEFENDANTS/APPELLANTS
	)	
Employer,	)	
and	)	
	)	
Liberty Mutual Insurance,	)	
	)	
Carrier,	)	
Defendants/Appellants.	)	

STATEMENT OF THE CASE

Defendants contend this is a case of fraud. Claimant was hired by the Employer as a CDL licensed truck driver in May, 2010. He worked in this capacity driving a tractor trailer truck to various states to deliver Flakeboard product. Claimant sustained an admitted injury to his left upper thigh/buttock on August 17, 2011, when he was supposedly bitten by a spider. On July 6, 2012, Defendants filed a Form 21 alleging that (1) Claimant made direct and material misrepresentations which directly pertained to his alleged disability; (2) Claimant had reached maximum medical improvement (MMI); (3) Claimant had not been disabled since September 12, 2011; and (4) Claimant had no permanent impairment. Defendants requested an Order terminating Claimant's temporary total disability (TTD) benefits and allowing Defendants a credit for overpayment of TTD since September 12, 2011.

A Form 21 hearing was initially scheduled to take place on August 29, 2012, but that hearing was ultimately postponed based on Claimant's attorney's request for postponement to move his daughter into college. Prior to this hearing date, Defendants served a subpoena on the South Carolina Department of Social Services (SCDSS) for information believed to be relevant

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to the claim. The attorney for SCDSS, Delton W. Powers, responded to Defendants' subpoena via letter: "As you are likely aware, the documents that you have requested are protected by law (SC Code of Laws §43-5-40) and my client cannot disclose the same unless Court-Ordered to do so." On September 12, 2012, Defendants filed a Motion for Court Order to Compel and/or Authorizing the Department of Social Services to Produce Records. The Form 21 hearing was rescheduled for October 2, 2012, and Defendants' Motion was set to be heard at that time, but the hearing was ultimately postponed based on a conflict in Defense Counsel's schedule, and based on a conflict in the schedule of Counsel for the SCDSS. The hearing was rescheduled for November 19, 2012, and after a lengthy pretrial conference on that date, the Single Commissioner instructed defense counsel to draft two Orders: (1) Order compelling the parties to mediate the claim, which was signed December 7, 2012, and (2) Order granting Defendants' Motion to Compel production of the SCDSS records, which was signed December 12, 2012. The parties attempted mediation of the claim on December 5, 2012, but an agreement was not reached.

On December 27, 2012, a Form 30 Request for Commission Review was served on the Commission on behalf of the SCDSS. On December 28, 2012, the Commission emailed the respective parties, stating the following: "I'm a little confused by the submission I'm trying to process right now. It's a Form 30 with Power's Law Firm letterhead for a Form 30. However, there is a check for the amount of \$25.00 from Atty. Andrew Safran attached." Mr. Safran responded with an email stating the following: "As Mr. Powers practices in Bennettsville and wanted to ensure the appeal was timely filed, I agreed to file e-mailed documents and issue the check from my office."

The Form 21 hearing was ultimately heard by the Single Commissioner on January 3, 2013. Defendants agreed they would not enforce the Order compelling production of the SCDSS documents in order to avoid further delay of the claim, which rendered the appeal filed by the

SCDSS moot. Therefore, the hearing went forward on the issues set forth in Defendants' Form 21 on January 3, 2013.

Defendants argued that Claimant has made direct and material misrepresentations throughout the life of his claim and has perpetrated a fraud on the Commission, that Claimant reached MMI for his minor abscess injury on September 12, 2011, and that Claimant has no permanent impairment. Defendants requested an Order terminating Claimant's TTD benefits and allowing Defendants a credit for overpayment of TTD since September 12, 2011. Claimant argued that the one by one centimeter (1 x 1 cm) abscess on his left thigh/buttock compressed his sciatic nerve, thereby causing permanent damage, which has now affected his left leg and back. He argued that he has not reached MMI, and that he is entitled to ongoing medical treatment and benefits. Claimant contended that any inconsistencies or inaccuracies in his testimony were the result of a 2000 motor vehicle accident and associated head injury with cognitive deficits, and that he has made no intentional misrepresentations during his claim. Claimant also presented various opinions that his preexisting brain injury and alleged cognitive deficits stemming from the 2000 MVA had been aggravated by the August 17, 2011 spider bite on his left buttock, but the parties stipulated that this issue would not be addressed by the Commission at the hearing.

Following the hearing, the Single Commissioner issued a Decision and Order, dated June 4, 2013, whereby he found: (1) Claimant sustained a compensable injury to his left upper thigh/buttock on August 17, 2011 when he was bitten by a spider; (2) The spider bite also caused injury components to Claimant's left leg and back; (3) Claimant has not reached MMI; (4) Claimant is entitled to ongoing treatment as prescribed by Dr. Healy; (5) Dr. Healy will remain Claimant's authorized treating physician; (6) Claimant is entitled to ongoing TTD benefits; and, (7) An adverse credibility finding is not warranted. Defendants filed a Form 30, Request for Commission Review, on June 17, 2013, and this appeal follows.

STATEMENT OF THE FACTS/EVIDENCE

Defendants *authorized* medical treatment from *Dr. Chi Dai Chen* related to Claimant's left buttock abscess caused by an apparent spider bite. Upon release from Dr. Chen's care on September 12, 2011, Claimant renewed/continued his subjective complaints, and Defendants *authorized* him to treat at *Marlboro Primary Care*. Claimant was eventually referred to a neurologist by the clinician at Marlboro Primary Care. According to a notation in the record from Marlboro Primary Care, Dr. R. Joseph Healy is the only neurologist in Florence who will accept workers' compensation patients. As Defendants had no other reasonable alternative with regard to a treating neurologist, *Dr. Healy* was *authorized* to evaluate and treat Claimant's complaints. Defendants authorized treatment in good faith based on Claimant's complaints.

Claimant also received medical treatment from unauthorized providers immediately prior to the August 17, 2011 work incident, and following the August 17, 2011 work accident. Claimant sought this treatment on his own due to preexisting left foot and lower extremity symptoms similar to what he alleges in this claim. This *unauthorized treatment* was provided by *Dr. Jason O'Dell* at Pee Dee Orthopaedics and *Dr. Walter Evans* at Comprehensive Neurological Services. At times, the treatment provided by authorized providers overlaps with treatment provided by unauthorized providers related to Claimant's preexisting symptoms.

I. Pre-Accident Medical Treatment

On January 10, 2003, Claimant reported having suffered from "foot trouble" on an intake form at his chiropractor's office. (Defs' APA, 93) Claimant was being seen at the chiropractor's office in 2003 for "Lower Back Pain" following a motor vehicle accident. (*Id.*) Claimant's chiropractor opined that Claimant was totally disabled for twenty-two (22) days following the 2003 car accident, and that Claimant was partially disabled for another seventy-six (76) days. (*Id.*) Claimant's chiropractor ultimately assigned Claimant a five percent (5%) permanent impairment to his back on account of the 2003 car accident. (Defs' APA, 92-108)

X-rays of Claimant's left foot taken at Marlboro Park Hospital on October 13, 2008 revealed "hammertoe deformity of the second through fifth toe. Hallux valgus deformity of the great toe....Old fifth metatarsal fracture." (Defs' APA, 27)

On June 17, 2011 (*two months before the work accident*), Claimant was seen by Dr. Jason O'Dell at Pee Dee Orthopaedics with complaints of left foot and heel pain. Dr. O'Dell noted an onset date of March 11, 2011. Claimant complained of heel pain with tenderness when ambulating, and Claimant reported a "long-standing history of high arched foot and toe deformities. He knows his grandfather had similar deformities and has had foot problems." Claimant also reported "occasional periods of running in the left foot related to decrease sensation in the toes and hands...." Dr. O'Dell prescribed a Flector patch and recommended "at least consideration of a neurology workup to evaluate for testing for Charcot-Marie-Tooth disease." (Defs' APA, 78-79) ("Charcot-Marie-Tooth disease is a group of hereditary disorders that damage the nerves in your arms and legs.")¹

Claimant returned to Dr. O'Dell on July 28, 2011 (*only 21 days before the work accident*), with complaints of left cavus (high arch) foot and ankle pain. Claimant was also "complaining of pain radiating up the back of his leg." Dr. O'Dell noted that Claimant "stated that he is still waiting for his appointment with Neuro for an evaluation," and he also diagnosed Claimant with Achilles tendonitis. Dr. O'Dell prescribed anti-inflammatory medication (Mobic) and a splint, and he noted the following: "If no improvement, I plan to immobilize in a cast." (Defs' APA, 80-81)

¹ *Charcot-Marie-Tooth disease*, Mayo Clinic. "Foot deformities such as hammertoes and high arches are common in Charcot-Marie-Tooth disease. Symptoms usually begin in your feet and legs, but they may eventually affect your hands and arms." <http://www.mayoclinic.com/health/charcot-marie-tooth-disease/DS00557>

II. Post-Accident Medical Treatment

On August 17, 2011, Claimant sustained an admitted injury to his left upper thigh/buttock, when he was supposedly bitten by a spider while driving his tractor trailer truck for the Employer. Claimant admittedly never saw the spider or insect that bit him. Claimant sought no medical treatment until Friday, August 19, when he presented at Marlboro Park Hospital, where he "relates being bitten by a spider." The evaluator noted a "raised, round, red area with obvious bite mark in the center of the lesion," and Claimant was given an injection of the anti-inflammatory Decadron at that time. Claimant's vital signs showed him to have a temperature of 97.8 degrees with no fever, no chills, no fatigue, and no malaise. (Defs' APA, 29-35) *Claimant testified at his deposition that he suffered from a fever, convulsions, and could not urinate Saturday and Sunday, August 20 and 21, following the evaluation at Marlboro Park Hospital.*

Claimant presented to his primary care provider, Bennettsville ASPC, on Monday, August 22, 2011. Despite Claimant's allegation that he suffered from fever and convulsions during the preceding two days, his temperature on evaluation was 96.8 degrees. (Defs' APA, 36) Claimant reported to the practitioner that he had a temperature of 102.8 degrees with fever and chills the day before (meaning that his temperature dropped 6 degrees overnight). (*Id.*) The nurse practitioner at Bennettsville ASPC attempted to remove the abscess at the supposed bite site, but Claimant was unable to tolerate the procedure. Therefore, Claimant was scheduled for a surgical consult the following day with Dr. Chi Dai Chen, a surgeon. (Defs' APA, 36) Dr. Chen testified at his deposition that it would be unusual for a fever to drop so dramatically from one day to the next, and he testified that, "most of the time, when you have an infection, unless you get treated, the fever persists." (Depo, p. 11, lines 2-6)

Dr. Chen saw Claimant on August 23, 2011, and he diagnosed a 5x5 centimeter area of erythema with a central opening. Dr. Chen noted that Claimant "continues to complain of severe

pain and drainage from the wound. He also complains of associated symptoms of fever, nausea, and vomiting.... There is an opening with some underlying necrotic subcutaneous tissue. This is consistent with an abscess with surrounding cellulitis.” Dr. Chen admitted Claimant to the hospital and performed an excisional debridement and drainage of the left posterior thigh abscess under IV sedation and local anesthesia on August 24, 2011. During the procedure, Dr. Chen noted that the “underlying muscle appears to be viable.” Dr. Chen obtained a culture of the abscess during the debridement procedure, and the culture ultimately revealed a staph infection. Dr. Chen saw Claimant for follow-up visits on September 1 and 12, 2011. On those dates, Claimant complained only of soreness and mild tenderness at the abscess site, and there was no documentation of any neurologic or back pain complaints. On September 12, 2011, Dr. Chen released Claimant to return on an as-needed basis. (Defs’ APA, 43-51)

On September 19, 2011 (7 days after his medical release related to the supposed spider bite), Claimant presented to Dr. Walter Evans at Comprehensive Neurological Services, pursuant to the *pre-accident referral* of Dr. O’Dell for Claimant’s *preexisting* left foot/ankle/leg issues. Claimant complained of bilateral foot pain with an onset date of “5 months ago” (which would have been four months before the supposed spider bite). Claimant noted that the pain was worse in the left foot and heel, and Dr. Evans specifically noted: “*Pain preceded spider bite.*” (emphasis added) Dr. Evans also noted “no radiation,” “no sensory loss,” “no motor weakness,” and “balance and gait intact.” Due to Claimant’s preexisting bilateral (but left greater than right) symptoms, Dr. Evans ordered nerve conduction studies of Claimant’s bilateral legs, but these studies were apparently never performed in relation to his pre-existing symptoms. (Defs’ APA, 86-88) *Critically*, Dr. Evans, Claimant’s own neurologist, indicated his *memory was intact* at the time of evaluation.

Claimant returned to Dr. O'Dell for his preexisting and ongoing left foot/ankle problems on September 29, 2011 (18 days after his medical release related to the supposed spider bite). At that time, Dr. O'Dell noted the following: *"He was also recently bitten by a spider on his thigh and having extensive I&D performed. This has now healed."* (emphasis added) Dr. O'Dell noted a *"healed thigh wound,"* and that *"neurovascular function distally is intact."* (emphasis added) Dr. O'Dell recommended heel padding, flexibility exercises, and anti-inflammatories, and he noted that Claimant should return for immobilization in a fracture boot if his complaints persisted. (Defs' APA, 82-83)

Despite Claimant's release from Dr. Chen and his active treatment for the preexisting left foot and leg problems, he renewed/continued with allegations of pain stemming from the August 17, 2011 supposed spider bite. Therefore, Defendants referred him to Marlboro Primary Care Associates on October 21, 2011. There, *Claimant completed a New Patient History Form, whereon he denied back pain, difficulty in walking, and numbness or tingling sensations. Claimant also denied having memory loss or confusion on the history form.* Claimant complained of left thigh pain which radiated into his leg and ankle. (Defs' APA, 52-56)

Claimant returned to his personal neurologist, Dr. Evans, for his neurologic left lower extremity pain on October 31, 2011. On this date, Claimant's subjective history changed from his September 19 visit to Dr. Evans, when Dr. Evans barely addressed the supposed spider bite with, "Pain preceded spider bite." In contrast, on October 31, Claimant reported, "The pain radiates to the left calf...feels like pins and needles in his left heel." Claimant further reported "the pins and needle pain came after the spider bite." Claimant's sensory, balance and gait were all noted to be intact, but Dr. Evans speculated as follows: "I suspect that we are dealing with late complications of the brown recluse spider bite." The October 31 record from Dr. Evans presents the first occasion when the *unseen spider* becomes the "brown recluse" spider. Finally, Dr. Evans again indicated Claimant had "Grossly normal intellect" with an intact memory; the

importance of these findings is addressed below. (Defs' APA, 89-91)

Claimant continued to follow with Marlboro Primary Care until November 16, 2011, at which time he was referred for a neurology consult due to his ongoing subjective complaints of pain and numbness in the left leg. (Defs' APA, 52-63)

On December 1, 2011, Claimant returned to Dr. O'Dell for his chronic and unrelated left lower extremity and Achilles tendonitis pain, and Dr. O'Dell noted that Claimant "states has been somewhat improved with the use of immobilization at this point." Dr. O'Dell also noted that Claimant's "neurovascular function distally is intact," and "distal sensation is normal to sensory evaluation in all distributions." (Defs' APA, 84-85)

Per the referral from Marlboro Primary Care, and in good faith, Defendants authorized treatment with a neurologist. However, according to a notation from Marlboro Primary Care, Defendants had no reasonable choice in the neurologist because Dr. R. Joseph Healy is the only neurologist in Florence who accepts workers' compensation patients. Dr. Healy evaluated Claimant initially on February 13, 2012, and his handwritten note states: "Spider bite 8-17-2011...brown recluse...Left leg pain since...Left thigh abscess and cellulitis...Left Achilles tendonitis wore boot and then LBP...no LB injury." (quoted as directly as possible) (Defs' APA, 66) At reevaluation on March 14, 2012, Dr. Healy wrote:

The patient developed left leg pain at the time which appears to be due to a non-discogenic sciatica. I have explained to him how pressure and mass affect in the left thigh would involve the sciatic nerve. *I am unclear whether there was any direct involvement by extension of his abscess. ... The patient states that he does have low back pain. He thinks began when he was wearing his boot for his left Achilles tendonitis. He is unclear of when this actually started* (emphasis added) (Defs' APA, 64)

Dr. Healy referred Claimant for an MRI of the lumbar spine, which was performed on April 16, 2012. The lumbar MRI showed mild degenerative changes with no disc herniation or severe central canal stenosis. Despite Dr. Healy's initial impression pertaining to Claimant's left leg complaints ("I am unclear whether there was any direct involvement by extension of his

abscess.”), he ultimately opined that Claimant’s sciatica and neuropathic left leg pain were caused by the abscess’ compression of the sciatic nerve. Dr. Healy’s treatment is best described by his statement on April 16, 2012: “...at this point we need to control his pain.” (Defs’ APA, 64-72) On August 15, 2012, Claimant’s attorney held a 25 minute telephone conference with Dr. Healy, and on August 20, 2012, Claimant’s attorney met with Dr. Healy privately prior to Dr. Healy’s deposition. Despite Dr. Healy’s initial observation that Claimant’s low back pain developed after he wore a boot for left Achilles tendonitis, after his 2 conversations with Claimant’s attorney, he opined that Claimant’s low back pain was related to the supposed spider bite.

III. Surveillance

Defendants obtained surveillance evidence of Claimant on *March 27, 2012*. Defendants contend the surveillance depicts Claimant walking without any sign of limp or difficulty. Claimant was observed driving to a gas station with his wife in the passenger seat. *Claimant then drove to a collision repair center, where he remained for approximately six (6) hours.* While at the repair center, Claimant was observed standing over an automobile for long periods of time, and bending at the waist on multiple occasions. Claimant was then observed driving to a grocery store and entering to make a purchase, before he ultimately returned to his home after being away for more than six and a half (6.5) hours.

IV. Deposition of Claimant

Following the *March 27, 2012 surveillance*, the parties took *Claimant’s deposition on May 31, 2012*. Regarding his alleged functional limitations, Claimant testified:

- He struggles to walk
- Walks with a pronounced limp
- Must stand after he has been seated for 15-20 minutes
- Must sit when he has been standing for 15-20 minutes
- Spends most of every day laying down
- Without medication, pain is 10/10. With medication, pain is 7-8/10.
- He cannot work at all, and he cannot even perform light duty work

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- He is completely unable to do anything productive
- Degree of disability is 10/10
- Claimant testified he had only been able to drive his car "a couple of times" since the accident, and his wife drives the car if they go anywhere

When asked about prior motor vehicle accidents, Claimant demonstrated his ability to recall details by testifying to his involvement in a MVA in 2000 where he suffered a head injury and had a surgery to relieve bleeding on his brain. Claimant testified he received \$25,000 from the at-fault driver's insurance company and he received \$25,000 from his own insurance company, but his medical bills were approximately \$58,000. Claimant stated that his wife was also in the accident, and she received \$25,000 in settlement.

Claimant testified that he went on a cruise vacation prior to the work accident in June of 2011. *Claimant testified he was also scheduled to take a cruise to the Bahamas in November of 2011, but he testified he was unable to go and his wife went without him. He testified he "sat at home" for the five days his wife was gone.*

Defendants had no indication at the time of Claimant's deposition that he would ultimately allege cognitive and memory problems to explain away his brazen misrepresentations. Even so, Claimant was asked a host of general background questions, which he readily answered without problem such as:

- Date of birth
- SSN
- Year of high school graduation
- Age when he started truck driving school and name of truck driving school
- Year he obtained his CDL
- His address and length of time at the address (15 or 16 years)
- Wife's maiden name
- Marriage date
- Ages of his children
- Amount owed on his mortgage (\$8,000)
- Amount owed on his truck (\$16,000)
- Amount owed on his wife's car (\$2,000)
- Name of attorney (Douglas Jennings) who represented him after his 2000 MVA
- 2000 MVA settlement amount and amount of his medical bills
- Amount received by his wife from the 2000 MVA

- Wife's prior employment history (Local Cash Advance, Parker's Used Cars, McLeod Hospital)
- His prior employment history (Horizon Tank Lines, Waccamaw Transport, HL Webb)
- Approximate date he began employment with Defendant-Employer
- Precise time (9:10 am) he was bitten on August 17, 2011

V. Carnival Cruise Records

Following the deposition, Defendants served a subpoena on Carnival Cruise Lines to obtain information related to Claimant's deposition testimony. Those records confirm that Claimant went on a cruise in June of 2011, prior to the accident, just as he testified at his deposition. However, the records also indicate that *Claimant did, in fact, go on a scheduled five night cruise on October 24, 2011.* The Carnival Cruise records provide a photograph of Claimant and indicate that he exited the ship during stops in ports. *He also spent time at the pool bar and had late nights at "Diamonds Disco" on the ship.*

The Cruise Line records also indicate that *Claimant booked another 5 night cruise to the Bahamas in March of 2012 (two months before his deposition), and he attended that cruise on June 9, 2012 (9 days after his deposition).* During this cruise, Claimant again exited the ship during stops in ports, and again enjoyed the pool bar, "Stars Bar", and "Diamonds Disco" *until the early morning hours.* While a specific question was not asked about future trips at Claimant's deposition, he failed to mention this cruise when testifying about any overnight trips he had taken since his work accident.

VI. Claimant's "Expert" Reports

After evidence of Claimant's brazen misrepresentations during his sworn deposition testimony were brought to light, Claimant conveniently alleged that he suffered from memory deficits as a result of the 2000 MVA. Claimant presented opinions from three different sources in his APA Submissions, all of which summarily excuse his lies and inconsistencies by attributing them to preexisting cognitive issues. (CI's APA #s 2, 3 & 4) On August 14, 2012, Nicholas A. Lind, a clinical psychologist, opined that "Mr. Hilton's reported memory deficits are

more likely than not, with as much certainty reasonable in the field of psychology, legitimate.” (CI’s APA, 43-44) On August 16, 2012, Dr. Tora Brawley, a clinical psychologist and neuropsychologist, opined that “it is believed that any discrepancies noted in his report of personal history or other areas are related to his cognitive deficits, rather than an attempt to purposely report incorrect information.” (CI’s APA, 32) On August 19, 2012, Dr. Donna Schwartz-Watts, a forensic psychiatrist, opined that “Mr. Hilton has severe cognitive impairments, including memory disturbance, confabulation and perseveration which can account for the obvious discrepancies in his deposition testimony.” (CI’s APA, 17) After their evaluations, all three experts completed a “check-the-box” questionnaire from Claimant’s attorney, where they each summarily explain away Claimant’s lies by relating them to his alleged cognitive deficits. Defendants maintain these reports lack any measure of credibility, and they undermine any reasonable notion of integrity. These “expert” reports are addressed further below.

VII. Deposition of Dr. Chen

The parties deposed Dr. Chen on August 23, 2012. Dr. Chen testified that *Claimant complained of no neurological symptoms or back pain* from the date of initial presentation on August 23, 2011, through the date of his release on September 12, 2011. Dr. Chen testified that if Claimant would have complained of any neurological symptoms, he would have noted them in the record. Dr. Chen testified that he has debrided approximately one thousand (1,000) abscesses in his career, and none of those cases have resulted in compression of the sciatic nerve. *Dr. Chen testified to a reasonable degree of medical certainty that Claimant’s left thigh abscess most probably would have not been sufficient to compress the sciatic nerve.* Dr. Chen testified *Claimant was at maximum medical improvement* from a surgical standpoint as of September 12, 2011, Claimant had no impairment, and Claimant had no work restrictions at the time of his release.

VIII. Deposition of Dr. Healy

The parties deposed Dr. Healy on August 20, 2012. Dr. Healy testified that the abscess most probably caused compression on the sciatic nerve, which caused neurological symptoms in Claimant's left leg and to the left foot. Dr. Healy also testified that those neurological symptoms extend to the low back. Dr. Healy testified that Claimant was not at maximum medical improvement, and he referred Claimant to Dr. Ezra Riber, a pain management physician who had already performed an IME for Claimant, for further evaluation and treatment. For a multitude of reasons which will be discussed below, Defendants believe that Dr. Healy's testimony is wholly unreliable and inconsistent.

IX. Hearing Testimony

At the hearing, Claimant testified that any inconsistencies or misrepresentations made during his deposition were unintentional and were the result of memory/cognitive deficits. He testified to having difficulty remembering numerous details surrounding his work accident and regarding his general background (information he recalled at his deposition), and he maintained that he did not intend to misrepresent any information during his workers' compensation claim. Again, as noted below, Defendants believe that Claimant has committed a fraud on the Commission, and his excuses given at the hearing fall woefully short of explaining away all of his lies, exaggerations and deceit.

ISSUES PRESENTED

- I. Whether Claimant has any credibility?**
- II. Whether the supposed spider bite wound on Claimant's left buttock caused injury components to his left leg and back, when the evidence shows that these conditions either preexisted the supposed spider bite or resulted from the preexisting conditions?**
- III. Whether Claimant reached MMI with no impairment related to the simple abscess wound on his left buttock on September 12, 2011, the date of his release from Dr. Chen's care?**

ARGUMENTS/DISCUSSION

I. Claimant has no credibility.

It is worth stating again: Defendants contend this is a case of fraud. This assertion is supported by objective facts which unhinge many facets of Claimant's sworn testimony and produce a thick web of inconsistent statements and unreliable opinions – even from a medical doctor and a host of purported “experts.”

Claimant alleges that the August 17, 2011 supposed spider bite caused injuries or aggravations to his:

1. Left upper thigh/buttock (situs of the bite);
2. Radiating pain from left upper thigh/buttock down left leg and into left foot;
3. Left hip;
4. Low back;
5. Pain in back and into bottom of shoulder; and,
6. Brain / Preexisting cognitive deficits (although this allegation did not arise until after Defendants obtained evidence of Claimant's misrepresentations. This issue was not before the commissioner at the January 3, 2013 hearing).

Following Claimant's May 31, 2012 deposition, Defendants requested and obtained further discovery, including records from Carnival Cruise Lines. On July 6, 2012, following receipt of the Carnival records, Defendants filed a Form 21 alleging that Claimant made direct

and material misrepresentations and asking for a termination of benefits. Shortly thereafter, Claimant began to allege memory problems, and he sought opinions from three different "experts" who would support his excuse for giving false testimony under oath. And, he even managed to gain opinions from these "experts" that an infected bump on his left buttock has somehow matriculated to his brain to aggravate his preexisting brain injury. *In good faith*, Defendants provided Claimant with medical treatment and disability benefits until the point when Claimant's deceit became apparent to any reasonable mind. Defendants submit that Claimant has effectively stolen nearly Fifty Thousand and 00/100 Dollars (\$50,000.00) and counting, while lounging with his family and friends, allowing parties at his home, and enjoying Caribbean cruise vacations.

Claimant attempts to "muddy the water" with his allegations of memory issues and physical brain damage. These issues are the "red herring" – they are the "smoke and mirrors." Do not lose sight of the fact that Claimant did not allege memory problems until he was caught in his deceit.

(a) Prior Foot/Ankle/Heel/Radiating Pain and Prior Neurologic Referral

At his deposition, Claimant specifically indicated that the only problems he was having prior to the spider bite were related to his Achilles tendon. He specifically denied foot, ankle, heel, or radiating pain into his calf, and he denied any prior neurologic referral (except a neurologic referral related to his 2000 MVA).

Dep. Tr. pg. 43, line 2 – pg. 44, line 12. (All emphasis added)

Q: But when you had that Achilles tendon pain, was the pain only in the Achilles tendon?

A: Yes, sir.

Q: Was it in the left foot?

A: In the Achilles tendon.

Q: *So it was not in the left foot?*

A: *No, sir.*

Q: Was it in the left ankle? I'm not trying to confuse you or confuse the two –

A: It was in the Achilles tendon.

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Q: Okay. That tendon on the back of your leg –

A: Right.

Q: Right above the heel?

A: Right.

Q: Did you have any pain in – going up into your calf or anything, or was it just literally right on the inch above your heel?

A: It was coming up a little bit, like an inch or two up from the Achilles tendon. The pain was radiating up.

Q: How far would it radiate up?

A: Two inches.

Q: Two inches, okay. So not all the way up to your calf then?

A: No, sir.

Q: Two inches above the Achilles tendon and did it radiate down?

A: No, sir.

Q: *Into the heel it did not?*

A: *No, sir.*

Dep. Tr. pg. 47, lines 15-19.

Q: Other than the left Achilles tendon issue, though, you've not had any prior issues, pain, problems, injuries to your left leg, foot or ankle?

A: No, sir.

Dep. Tr. pg. 52, lines 3-6.

Q: Have you ever been referred to a neurologist before treating with – or before this workers' comp claim arose on August 17, 2011?

A: No, sir.

In contrast to Claimant's deposition testimony, evidence shows he reported "foot trouble" as early as January 10, 2003. (Defs' APA, 93) Further, *just two months before the spider bite*, Claimant reported a "long-standing history of high arched foot and toe deformities. He knows his grandfather had similar deformities and has had foot problems." At that June 17, 2011 visit to Dr. O'Dell, Claimant complained of left *foot* and *heel* pain, along with tenderness when ambulating. Claimant also reported "occasional periods of *running in the left foot* related to decrease sensation in the toes and hands...." (emphasis added) Dr. O'Dell noted the following: "...given the crush family history of foot deformity in his age I would recommend at least consideration of a neurology workup..." (Defs' APA, 78, 79)

Claimant returned to Dr. O'Dell on July 28, 2011 (*only 21 days before the work accident*), with complaints of left cavus *foot* (high arch) and *ankle* pain. Claimant was also "*complaining of pain radiating up the back of his leg*." (emphasis added) Dr. O'Dell noted that Claimant "stated that he is still waiting for his appointment with Neuro for an evaluation." Very obviously, Claimant had suffered from longstanding foot and toe deformities, and he complained of pain in his left foot, heel, and ankle, which radiated up the back of his leg immediately prior to the work accident. Moreover, Claimant had not only been referred to a neurologist immediately prior to his work accident, but he had actually presented to a neurologist twice on his own before his sworn deposition testimony. Claimant remembered his longstanding foot problems and deformities when he visited his medical providers, but at his deposition, Claimant testified he had no prior problems except for specific Achilles tendon pain and a remote left ankle injury. Claimant did not "forget" about his prior foot and leg problems; he simply tried to hide them to substantiate his workers' compensation claim.

(b) Alleged Fever

At his deposition, Claimant testified that he suffered from a fever on the weekend immediately following the spider bite (8/20/11 & 8/21/11): "*Well, let me tell you what happened that weekend. I had high fever, convulsions, I couldn't even make water.*" (emphasis added) (Depo, p. 68, lines 18-20) Medical records from Marlboro Park Hospital from August 19, 2011, the Friday before Claimant's alleged fever and convulsions, indicate a temperature of 97.8 degrees with no fever, no chills, no fatigue, and no malaise. (Defs' APA, 30, 33) Medical records from Bennettsville ASPC from August 22, 2011, the Monday after Claimant's alleged fever and convulsions, indicate a temperature of 96.8 degrees. (Defs' APA, 36) Claimant reported to the physician that he had a temperature of 102.8 degrees with fever and chills the day before (meaning that his temperature fell 6 degrees overnight). (*Id.*) Dr. Chen testified at his deposition that it would be unusual for a fever to drop so dramatically from one

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day to the next, and he testified that, "most of the time, when you have an infection, unless you get treated, the fever persists." (Depo, p. 11, lines 2-6) Claimant began grossly exaggerating his symptoms within 5 days of the supposed spider bite.

(c) Alleged Restrictions/Limitations – Surveillance Evidence

Claimant outlandishly overstated his alleged pain, restrictions and limitations during his deposition.

Dep. Tr. pg. 76, line 22 – pg. 78, line 5.

Q: Tell me currently how bad your pain is on that same one to ten scale. Mild is one and ten is horrific.

A: It's ten, horrific, when I ain't taking my meds. But I took my meds before I left home so it's about an eight.

Q: That's a good way to put it. So tell me how bad it is on meds on average.

A: About a seven or eight.

Dr. Healy was shown Claimant's deposition testimony and was asked what the doctor would expect Claimant's pain level to be. Dr. Healy stated: "I wouldn't think that it would be a ten out of a ten...Probably a five out of a ten." Even Dr. Healy, an admitted advocate for Claimant, testified that Claimant's pain allegations were 100% higher than would be expected. Such an exaggeration has nothing to do with any alleged cognitive deficits, and instead, is merely another attempt to inflate his workers' compensation claim.

Claimant further testified about his pain and limitations as follows:

Dep. Tr. pg. 77, lines 12-20; pg. 77, line 24 – pg. 78, line 12. (All emphasis added)

Q: How long can you sit before you need to stand typically?

A: Fifteen, 20 minutes.

Q: And then you need to stand up?

A: Yes, sir.

Q: How long can you stand before you need to sit?

A: Fifteen minutes – 15, 20 minutes. *Most of the time I lay down.*

Q: So what time do you typically get up in the morning?

A: 7:30, eight o'clock.

Q: Then describe for me what you do in your day after that.

A: Basically nothing.

Q: *Do you spend most of the day laying?*

A: *Laying down.*

Q: *And is pretty much every day that bad?*

A: *Yes, sir.*

Q: If you're sitting after 15, 20 minutes at home do you stand up?

A: *Yes, sir. Ninety percent of the time at home I'm laying down on my right side.*

Dep. Tr. pg. 76, lines 17-21; pg. 102, lines 10-15. (All emphasis added)

Q: *I take it you do walk with a limp?*

A: *Yes, sir.*

Q: *Is it pronounced? I mean, do you struggle to walk?*

A: *Yes, sir.*

Q: Okay. Now, let me ask you this. My question is, are there times where you feel like you're probably having more of a limp than others, that you may be – some days or hours might be worse in terms of how you're walking than others?

A: It's pretty much the same all the time.

Dep. Tr. pg. 53, lines 2-11; pg. 54, lines 15-17; pg. 79, lines 20-23. (All emphasis added)

Q: *Do you have any problems driving?*

A: *I don't drive it.*

Q: Have you driven it since your accident at Flakeboard on August 17, 2011?

A: I drive it – I drove it for a time in Bennettsville and right back.

Q: So, literally, you've only driven it a couple of times since your accident?

A: Right. *Most of the time my wife does the driving.*

Q: *Does she normally drive if y'all are together or do you normally drive?*

A: *She drives.*

Q: Did she drive today?

A: Yes, sir.

Q: And, again, she typically drives?

A: All the time.

Dep. Tr. pg. 80, lines 2-4, lines 13-24; pg. 81, line 23 – pg. 82, line 2. (All emphasis added)

Q: Have you worked anywhere at all since that day?

A: *I can't work.*

Q: If we were to quantify being disabled on a one to ten scale like we did with pain and one is you might have a slight disability but you can still do your job and ten is completely disabled, at this point in time and for that matter since your accident – or since that last day of work on August 19th, 2011 how would you quantify your degree of disability in your mind?

A: A ten.

Q: Completely unable to do anything productive?

A: Yes, sir.

Q: You do not believe you can work currently?

A: No, sir.

Q: Not even light duty?

A: No sir.

Surveillance evidence of Claimant on March 27, 2012 is contrary to Claimant's exaggerated testimony. Defendants contend the surveillance depicts Claimant walking on multiple occasions without limp or difficulty. The surveillance also shows Claimant driving to a collision repair center with his wife in the passenger seat, where he remained for nearly six (6) hours. Claimant is shown standing over an automobile at the collision shop for long periods of time, and bending at the waist on multiple occasions.

(d) Carnival Cruise Lines

At his deposition, Claimant testified to having taken a cruise in June of 2011, but he specifically denied having taken any other cruises during the year:

Dep. Tr. pg. 87, line 23 – pg. 88, line 5; pg. 88, lines 10-19; pg. 89, lines 17-23; pg. 90, lines 2-20. (All emphasis added)

Q: Was this the only one you went in June of – in the year 2011?

A: *My wife went again, but I didn't go.*

Q: *So you had another cruise in 2011?*

A: *My wife did.*

Q: Your wife, forgive me. When did she go on another one?

A: In November.

Q: Were you scheduled to go, or was this a wife only girls only –

A: *I was scheduled to go but I didn't go.*

Q: And who did – did she go with anyone?

A: She went with some friends.

Q: Who were they?

A: I don't remember. *I know she went with Steve and Wanda Frazier.*

Q: Who are they?

A: They're some friends.

Q: The cruise in November of 2011, were they the only friends scheduled to go with you, Steve and Wanda?

A: Yes.

Q: *And the cruise was to be for you, your wife Michelle, and Steve and Wanda?*

A: *Right.*

Q: *But your wife went alone without you?*

A: *Right.*

Q: Did anybody take your spot?

A: No, sir.

Q: Did you get your money back?

A: No, sir.

Q: How long was that cruise for?

A: Five days.

Q: *What did you do during the time?*

A: *Sat at home.*

Q: Since your cruise in June of 2011 have you been on a cruise through today?

A: No, sir.

Q: And other than you going to Charleston to see your mother, that's the only time you've been away from home overnight since your accident in August of 2011?

A: Correct.

Despite Claimant's firm and decisive testimony that he was unable to attend the cruise in late 2011, records of Carnival Cruise Lines indicate Claimant did in fact go on the scheduled five night cruise on October 24, 2011. (Defs' APA, Exh. A) Claimant exited the ship during stops at ports and he spent time at the Diamonds Disco on the ship. The Carnival Cruise records further indicate that Claimant attended another five day cruise in June of 2012.

After his allegedly debilitating spider bite, Claimant has taken two (2) cruises to the Bahamas, all while continuing to receive workers' compensation benefits. However, the Single Commissioner notes that "the Carnival Cruise Line data offers limited insight as to Mr. Hilton's activity level during these cruises." (Order, FOF #43) The Single Commissioner missed the point; Claimant blatantly lied about his attendance on the October 2011 cruise to misrepresent his limitations, exaggerate his symptoms, and conceal his lack of ongoing injury stemming from the August 17, 2011 supposed spider bite. Is it reasonable to believe that Claimant remembered: (1) Scheduling a cruise; (2) Approximate date of the cruise; (3) Names of the friends who accompanied he and his wife on the cruise; (4) Name of the street his friends live on; (5) Name of the company his friends own; and, (6) Duration of the cruise, but forget that he actually went on the cruise? Even Claimant's medical advocate, Dr. Healy, reviewed Claimant's deposition testimony and stated: "I would think he would know if he went on the cruise." It is obvious that Claimant chooses his "forgetfulness" at the most appropriate times to benefit his workers' compensation claim. No other conclusion can be reached.

(e) Prior Low Back Pain and Car Accidents

At his deposition, Claimant specifically denied ever having any pain, problems, conditions, or injuries to his lower back prior to the spider bite, except that he was "pretty sure" he had back and leg pain after his 2000 MVA, "but after a period of time [he] didn't have any problems no more." (Depo, p. 41, lines 11-14; p. 17, lines 6-10) Claimant also denied involvement in any car accidents after the year 2000. (Depo, pp. 20-21) However, medical records of Marlboro Park Hospital dated January 10, 2003, indicate Claimant was involved in a motor vehicle accident where his vehicle collided head-on with another car. (Defs' APA, 10-17) Claimant reported lower back pain which radiated to his bilateral legs, and he underwent lumbar x-rays at the hospital. (*Id.*)

Following the 2003 car accident, Claimant underwent twenty-one (21) chiropractic visits at Palmetto Wellness and Injury Center, and he had diagnoses of sprain/strain injuries to his lumbar, thoracic, and cervical spine. (Defs' APA, 92-108) Claimant's chiropractor opined that Claimant was totally disabled for twenty-two (22) days following the 2003 car accident, and that Claimant was partially disabled for another seventy-six (76) days. (*Id.*) Claimant's chiropractor ultimately assigned Claimant a five percent (5%) permanent impairment to his back on account of the 2003 car accident. (*Id.*) Despite Claimant's hospital visit and x-rays, his twenty-one (21) chiropractic visits, his ninety-eight (98) days of disability, and the five percent (5%) permanent impairment to his back, Claimant testified under oath at his deposition that he had no prior low back pain and no car accidents after the year 2000. Again, Claimant's forgetfulness is opportunity driven.

(f) Prior Left Leg Problems

Claimant denied ever experiencing any pain, problems or injuries to his left leg prior to the spider bite (except that he was "pretty sure" of leg pain following the 2000 MVA, left Achilles tendon pain, and left ankle surgery to remove metal from a lawn mower accident).

(Depo, p. 41, lines 1-6, p. 47, lines 15-19) However, Claimant was seen at Marlboro Park Hospital on November 28, 2001 with complaints of left knee and thigh pain after being struck by a sledge hammer. (Defs' APA, 1-8) Claimants' left thigh was noted to be swollen and he underwent x-rays of his left knee, and he was written out of work for three (3) days. (*Id.*) Claimant was seen again at Marlboro Park Hospital on August 1, 2006, with complaints of left lower extremity swelling, and he was scheduled to undergo a venous duplex study of the left leg. (Defs' APA, 18-19) Claimant was seen again at Marlboro Park Hospital on October 13, 2008, where he underwent x-rays of the left knee due to "trauma." (Defs' APA, 28)

(g) Additional Surveillance

Additional surveillance evidence was obtained on October 20, 2012. On that date, a party and live band were held in a building on Claimant's property, which lasted late into the evening. Claimant admittedly attended the party.

(h) Claimant's Explanation for his Dishonesty also Lacks Credibility

i. Claimant's Deposition Testimony vs. Hearing Testimony

Defendants' chief position at the hearing was Claimant's lack of credibility. Claimant's chief excuse for his lack of credibility was that his "forgetfulness" arose from the 2000 MVA and resulting brain injury. Again, Claimant did not allege memory problems in this case until he needed an explanation for his dishonesty. In that regard, it's worth comparing excerpts of Claimant's deposition testimony to excerpts of his hearing testimony.

Claimant presented to his neurologist, Dr. Bruce Solomon, on February 11, 2011, approximately six (6) months before the spider bite. At that time, Claimant complained of potential seizures, along with memory loss and mood swings, but it was noted that "attention, concentration are intact. Short-term memory is slightly deficient." (CI's APA, 88) *When Claimant was questioned by his attorney about this visit at his May 2012 deposition (before he knew of the surveillance and prior to receipt of other impeaching evidence), he testified to the*

following:

Dep. Tr. pg. 93, line 3 – pg. 94, line 2. (All emphasis added)

Q: Now, I wanted to ask you one other thing because I got some records that came from up there and it looks like most of these records are 2000, 2001. I see a records that was sometime around February '11, it looks like Dr. McInnis may have sent you over there to see him, and that would have been a year and a half ago, roughly?

A: Yeah. I had forgot about that and I'm glad you brought that to my attention. *I just went to make sure everything was all right. I wasn't having no problems, I just went.*

Q: It says something in here about you've seen him in the past and says: *He feels he may be having seizures, feels light-headed?*

A: Right.

Q: *Did that problem continue?*

A: *No, sir.*

Q: *And did he give you, I guess, a clean bill of health, so to speak?*

A: He done what they call EEG and that's the test to see if you were having any seizures and *he said I was fine.*

Q: All right. Okay. *So, really, after seeing him he didn't limit you in any way?*

A: *No, sir.*

However, when Claimant was questioned by Defense Counsel about the very same visit at the hearing, he testified to the following:

Hr'g Tr. pg. 83, lines 2-7 (All emphasis added)

Q: ...why did you go back?

A: *Because I was having memory problems and mood swings.*

Q: *Specifically for memory problems and mood swings, right?*

A: *Yes, sir.*

Claimant's story conveniently changed once his credibility was questioned and he was in front of a Commissioner. At his deposition, it did not serve him to exaggerate his cognitive deficits, so he told the truth: he went to Dr. Solomon for suspected seizures and he was released with a clean bill of health following a normal EEG. However, once it would serve him to exaggerate his memory issues at the hearing, Claimant testified that he went to Dr. Solomon specifically because he was having memory and mood problems.

Moreover, *at the deposition, Claimant remembered* many details with relative ease, including *the exact time (9:10) of the spider bite, the exact date of his wedding*, the age of his three daughters, the day of the week the accident occurred on (Wednesday), the amount of

money he received from the at-fault driver in his 2000 car accident, the amount of money his wife received from that accident, how many acres he owns, a chronology of his entire work history, and even his wife's work history. However, *at the hearing, Claimant alleged that he could not recall the day of the week the accident occurred on* and that he *could not recall the year of his marriage.*

ii. Medical Evidence Contradicting Claimant's Explanation

On June 17 and July 28, 2011, Claimant was seen by Dr. O'Dell, and it was noted on both occasions that "mood and affect were appropriate," and Claimant was "alert and oriented x 3." (Defs' APA, 78-81) On August 19, 2011, Claimant's mental status at Marlboro Park Hospital was noted to be "alert and oriented times 3 (person, place & time)." (Defs' APA, 34) At Bennettsville ASPC on August 22, 2011, Claimant was again noted to be "alert and oriented." (Defs' APA, 36) On August 23, 2011, Claimant was noted to be "alert and oriented, times 3" at Marlboro Park Hospital. (Defs' APA, 46) At Carolina Surgical Associates on September 1 and 12, 2011, Claimant was noted to be neurologically "grossly intact" with "no sensory/motor deficits."

Claimant presented to Dr. Evans at Comprehensive Neurological Services on September 19, 2011 (7 days after his medical release for the supposed spider bite), where it was noted that Claimant was "alert and oriented x 3," he was noted to have "*grossly normal intellect*," his *memory was "intact*," he had "no sensory loss," he had "no motor weakness," and his balance and gait were "intact." (emphasis added) (Defs' APA, 87) On September 29, 2011, Claimant was seen back by Dr. O'Dell, and it was again noted that Claimant's "mood and affect were appropriate," and that Claimant as "alert and oriented x 3." (Defs' APA, 82) At Bennettsville ASPC on October 3, 2011, it was noted that "neurologic evaluation reveals – awake, alert and cooperative." (Defs' APA, 38)

Claimant presented to Marlboro Primary Care Associates on October 21, 2011, where he completed and signed an intake form. On that form, *Claimant checked "No" for memory loss or confusion*, indicating that he was not currently experiencing any of those conditions. (Defs' APA, 53) Claimant made four total visits to Marlboro Primary Care, none of which documented any problems with memory (there is a box on MPCA records for "memory" which was never checked by the physician). (Defs' APA, 55-62)

Claimant returned to Dr. Evans for neurological evaluation on October 31, 2011, where it was noted that Claimant was "alert and oriented x 3," he was noted to have "*grossly normal intellect*" and his *memory was "intact."* (emphasis added) (Defs' APA, 90) Claimant returned to Dr. O'Dell on December 1, 2011, where it was again noted that Claimant's "mood and affect were appropriate," and Claimant was "alert and oriented x 3." (Defs' APA, 84) *Claimant was seen by Dr. Healy in February, March, April and May of 2012, and none of Dr. Healy's reports note any cognitive issues or problems with memory.* (Defs' APA, 64-71; Cl's APA, 9)

If Claimant's alleged memory issues were so dramatic as to cause the forgetfulness and inconsistencies alleged, surely the examinations of the physicians noted above, which includes two neurologists, would have detected a problem. Similarly, if his memory issues and cognitive deficits were so severe, Defendants are baffled that Claimant would fail to mention his problems at his deposition. It was not until *after* Defendants discovered all of the inconsistencies that Claimant's memory allegations arose.

iii. Claimant's Purported "Experts"

After Claimant received the Form 21, wherein Defendants sought to terminate benefits due in part to Claimant's direct and material misrepresentations, Claimant was evaluated by three purported "experts" to justify his dishonesty. Claimant's "experts" summarily excuse his lies and inconsistencies by attributing them to preexisting cognitive issues. (Cl's APA #s 2, 3 & 4) These reports are unreliable.

Nicholas A. Lind

On August 14, 2012, Nicholas A. Lind, a clinical psychologist, evaluated Claimant. During his evaluation of Claimant, Dr. Lind specifically noted the following: *"Judgment appears good. Attention/Concentration is characterized by no identifiable difficulty attending or maintaining focus within the interview."* (emphasis added) (CI's APA, 42) Despite this statement, Dr. Lind completed a questionnaire on November 8, 2012, which was sent to him by Claimant's attorney, whereby he opined that Claimant's cognitive deficits "most probably negatively affect and/or impair his *behavioral judgment*, including the manner in which he responds to stressors and conducts his daily activities." (emphasis added) (CI's APA, 48) These statements are contradictory on their face. They cannot be reconciled, and Dr. Lind's entire report is undermined by his willingness to complete a check-the-box questionnaire which directly contradicts his own report.

Furthermore, on the questionnaire sent to him by Claimant's attorney, Dr. Lind also checked "Yes" for the statement that "inconsistencies/inaccuracies arising in connection with [Claimant's] testimony, as well as any inconsistent/inaccurate information he has provided when questioned as to prior events and/or statements (i.e., requiring reliance on his memory), are most probably the result of this physical brain damage, rather than a purposeful/intentional/volitional attempt to mislead." (*Id.*) *It appears that Dr. Lind did not even review Claimant's deposition transcript*, yet he entirely writes off any inaccuracies to Claimant's alleged cognitive deficits. Dr. Lind's opinions, along with his completion of the check-the-box questionnaire from Claimant's attorney, demonstrate that his opinions are clearly biased and unreliable.

Tora Brawley

On August 16, 2012, Dr. Tora Brawley, a clinical psychologist and neuropsychologist, evaluated Claimant. Dr. Brawley specifically noted the following: *"During the interview, Mr. Hilton had difficulty correctly recalling some personal information and would defer to his*

wife. He was unable to report the length of their marriage and could not correctly report the chronology of his work history.” As noted above, *Claimant had no problem with any of these tasks at his deposition on May 31, 2012.* Again, only once his lies were discovered did Claimant’s alleged memory problems actually become an issue, and Dr. Brawley’s report is clearly based on Claimant’s inaccurate report and exaggerated symptoms.

As with Dr. Lind, Dr. Brawley completed a check-the-box questionnaire sent to her by Claimant’s attorney, whereby she also opined that “inconsistencies/inaccuracies arising in connection with [Claimant’s] testimony, as well as any inconsistent/inaccurate information he has provided when questioned as to prior events and/or statements (i.e., requiring reliance on his memory), are most probably the result of this physical brain damage, rather than a purposeful/intentional/volitional attempt to mislead.” (Cl’s APA, 34) *However, it appears that Dr. Brawley did not review Claimant’s deposition transcript either.*

Donna Schwartz-Watts

On August 19, 2012, Dr. Donna Schwartz-Watts opined that Claimant “has severe cognitive impairments, including memory disturbance, confabulation and perseveration which can account for the obvious discrepancies in his deposition testimony.” (Cl’s APA, 17) Dr. Schwartz-Watts completed the same check-the-box questionnaire from Claimant’s attorney, whereby she also opined that any inconsistencies or inaccuracies were attributable to Claimant’s cognitive deficits.

Summarily, all three “experts” opine the following: Claimant has cognitive deficits, so if he lies, it *must* be attributable to his deficits. The flaw in these reports is that they do not account for any variable except for Claimant’s alleged cognitive deficits. The reports are oversimplifications and completely assume that everything that Claimant says is honest and truthful. The reports do not account for Claimant’s obvious motive to lie and misrepresent his allegations.

The Single Commissioner followed along with Claimant's "experts" and simply found that Claimant has cognitive deficits, and therefore, all of his misrepresentations *must* have been involuntary. Just like Claimant's experts, the Single Commissioner failed to consider Claimant's motive for lying, and this was error, as the preponderance of the evidence clearly proves that Claimant has made intentional and material misrepresentations throughout his claim in order to prolong a simple abscess injury and continue to receive benefits which he does not deserve. There are times when common sense and simple logic outweigh the opinions of "experts," who highlight evidence supporting their patient's cause – even when that evidence is in the form of self-serving statements from an interested party. This is one of those times.

II. The supposed spider bite caused an abscess to Claimant's left thigh/buttock only.

(a) Claimant's preexisting neurologic left leg pain is not related to the supposed spider bite of August 17, 2011.

Just two months before the spider bite, on June 17, 2011, Claimant was seen by Dr. O'Dell with complaints of left foot and heel pain which began three months earlier. Claimant complained of heel pain with tenderness when ambulating, and Claimant reported a "long-standing history of high arched foot and toe deformities." Claimant also reported "occasional periods of *running in the left foot* related to decrease sensation in he toes...." (emphasis added) At that time (again, just two months before the spider bite), Dr. O'Dell was already recommending "consideration of a neurology workup to evaluate for testing for Charcot-Marie-Tooth disease." As noted in the Footnote above, Charcot-Marie-Tooth disease is a hereditary disorder which damages the nerves, and the disease is often associated with high arches and early neurologic symptoms in the feet. Very clearly, Dr. O'Dell was already having significant suspicions that Claimant suffered from neurologic problems by June 17, 2011.

On July 28, 2011, less than a month before the spider bite, Claimant returned to Dr. O'Dell with complaints of left high arch and ankle pain. Claimant was also "complaining of *pain radiating up the back of his leg.*" (emphasis added) Dr. O'Dell noted that Claimant

“stated that he is still waiting for his appointment with Neuro for an evaluation.” Claimant suffered from “radiating” and “running” pains and sensations in his left foot and left leg in the two months directly preceding the spider bite. Despite the obvious neurologic symptoms preceding the spider bite, the Single Commissioner seemed to place great weight on Dr. O’Dell’s diagnosis of Achilles tendonitis. The Commissioner disregarded the fact that Dr. O’Dell was referring Claimant to a neurologist and that Dr. O’Dell had already noted his suspicion of Charcot-Marie-Tooth disease, and instead, the Commissioner incorrectly indicates that Claimant’s preexisting left foot and leg pain was “attributed to Achilles tendonitis.” (Order, FOF #9)

The Single Commissioner notes the following in his Order with regards to Claimant’s radiating pain: “the diagnosis as of July 28, 2011 was ‘Achilles Tendonitis...’ On that date, Mr. Hilton reported the pain (that Dr. O’Dell had diagnosed to be reflective of ‘Achilles Tendonitis’) radiated up the back of his leg...” (Order, FOF #8) This finding is clearly erroneous. Nowhere in Dr. O’Dell’s records does he indicate that Claimant’s radiating pain is “reflective of ‘Achilles Tendonitis.’” In fact, a review of his records indicates the opposite. Dr. O’Dell is an orthopaedist, and he continued to treat Claimant for the orthopaedic problem of Achilles tendonitis. However, Dr. O’Dell continued to refer Claimant to a neurologist. Had Dr. O’Dell believed that Claimant’s only diagnosis was Achilles tendonitis, and that Claimant’s “radiating” and “running” pain was “reflective of ‘Achilles Tendonitis,’” the referral to a neurologist would have been unnecessary. Indeed, *even Dr. Healy testified that “the clawing, the changes in the structure mechanically in the left foot means that there is a neuropathic problem by definition.”* (Depo, p. 34, lines 19-21, emphasis added) The Single Commissioner’s finding that Claimant’s prior radiating and running pains were attributable to Achilles tendonitis is wholly unsupported by the evidence, and it is clear from the record that Claimant suffered from notable neuropathic left leg problems in the two months directly preceding the spider bite.

(b) Claimant's low back pain is not related to the supposed spider bite of August 17, 2011.

A review of the record reveals four potential causes for Claimant's low back pain: (1) Claimant's preexisting low back problems, (2) Claimant's altered gait from his preexisting left foot problems, (3) Claimant's preexisting and unrelated neurologic left leg conditions, or (4) compression of the sciatic nerve caused by the abscess on Claimant's left buttock. The evidence lends more support to any of the first three potential causes of Claimant's low back pain than to the abscess, and the Single Commissioner's finding that the back pain is related to the spider bite cannot stand.

(1) *Preexisting low back problems*: Claimant was involved in a motor vehicle accident in January of 2003, whereby he injured his low back. Claimant's chiropractor opined that Claimant was totally disabled for twenty-two (22) days following the 2003 car accident, and that Claimant was partially disabled for another seventy-six (76) days. Claimant's chiropractor ultimately assigned Claimant a five percent (5%) permanent impairment to his back on account of the 2003 car accident, and the chiropractor noted the following: "It is a common observation in cases such as these to see remissions and exacerbations for no apparent external reason. Due to a structural weakening of the spinal column, traumatically induced, Mr. Hilton can anticipate future recurrence of the pain in his cervical, thoracic and lumbar regions from time to time... There is little anyone can do to prevent this." (Defs' APA, 92-108)

(2) *Altered gait*: Claimant first complained of low back pain to Dr. Healy in March of 2012, and Dr. Healy specifically noted that Claimant believed that the low back pain "began when he was wearing his boot for his left Achilles tendonitis." Claimant began suffering from left foot/ankle/Achilles problems at least as early as March 1, 2011. In reality, Claimant's left foot problems probably began much earlier, as Claimant reported to Dr. O'Dell a "long-standing history of high arched foot and toe deformities." At his deposition, Claimant testified to the following: "The back and stuff didn't start immediately because I guess where I'm lying 000092"

not putting my pressure all on my left leg and the way I'm walking has got my back and hip hurting." (Depo, p. 73, lines 1-4) He further testified that he walks with a pronounced limp and that he even struggles to walk. (Depo, p. 76, lines 17-21)

Dr. Healy testified at his deposition that Claimant was suffering from a moderate limp at the time of his first visit with Dr. Healy on February 13, 2012, and that it would probably take approximately a year for an altered gait to cause back pain. At the time of Claimant's first complaint of back pain on February 13, 2012, Claimant had been suffering from left foot problems for at least eleven (11) months (onset date of 3/1/11 noted on Dr. O'Dell's first record). Furthermore, 2008 x-rays of Claimant's left foot had already revealed hammertoe and other deformities, so it is clear that Claimant suffered from left foot deformities and problems for many years. Claimant's chiropractor had already indicated that Claimant could expect exacerbations of his low back pain, and Claimant's altered gait could certainly be expected to cause such an exacerbation. It is no surprise that Claimant eventually began to experience back pain as his left foot problems continued to worsen. While Claimant himself has attributed his back pain to his altered gait, the Single Commissioner ultimately accepted Dr. Healy's opinions, which are unfounded and biased, as outlined below.

(3) *Preexisting neurologic conditions:* As outlined above, it is clear Claimant was suffering from some form of neurologic left leg problems prior to the apparent spider bite. In light of Dr. Chen's testimony that the spider bite was not significant enough to compress the sciatic nerve, any potential sciatic nerve involvement is clearly more attributable to the neurologic problems which Claimant was already experiencing prior to August of 2011, rather than to a far-fetched opinion that the small abscess on Claimant's buttock compressed and damaged his sciatic nerve.

(4) *Spider bite:* The only evidence to support the supposed spider bite theory is the unreliable testimony of Dr. Healy (see below). However, a common sense review of the

evidence must lead to the conclusion that the spider bite is not the most probable cause of Claimant's low back pain, or his left leg pain for that matter. The EMG studies indicated that the tibialis anterior, lateral gastroc, and medial gastroc muscles (the calf muscles and the muscle that runs along the shin area) were not receiving proper nerve impulses, which would be indicative of a neuropathic process. *However, the nerve conduction study revealed a normal sciatic nerve.* The EMG findings are not surprising in light of Claimant's foot deformities and preexisting neurologic conditions, and in fact, it is likely that the findings of the EMG study were present prior to the spider bite (an EMG/NCS was already recommended for Claimant's unrelated left foot/leg symptoms). The Single Commissioner's reliance on the EMG study and Dr. Healy's opinions was not supported by the preponderance of the evidence, and Dr. Healy's compression theory is the least likely cause of Claimant's alleged low back pain.

III. Claimant reached MMI on September 12, 2011, with no impairment related to the supposed spider bite of August 17, 2011.

(a) Dr. Chen's medical opinions are credible, unbiased, and consistent with the record.

At his deposition, Dr. Chen testified very clearly, succinctly and credibly that Claimant's abscess was not large enough to compress the sciatic nerve, and that Claimant reached MMI from a surgical standpoint with no permanent impairment or work restrictions on September 12, 2011. Dr. Chen testified that the leg consists of the skin, then a layer of subcutaneous fat, then the muscle, and he testified that he viewed the underlying muscle in Claimant's leg during the debridement procedure, and he noted it to be healthy and unaffected by Claimant's staph infection:

Dep. Tr. pg. 21, lines 14-23 (All emphasis added)

Q. Doctor, was there any indication that the supposed venom or the infection affected anything below the fat level in Mr. Hilton's body?

A. No.

Q. *So, was there any indication once you got in there and looked at it that it affected the muscle or even below the muscle?*

A. *No. The muscle was viable.*

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Q. *And when you say viable, you mean healthy?*

A. Yes.

Dr. Chen then testified that the sciatic nerve is much deeper than the muscle in Claimant's leg, and judging the size of Claimant's abscess (1 x 1 cm.), the abscess would not have been large enough to have compressed or damaged Claimant's sciatic nerve:

Dep. Tr. pg. 22, lines 5-12. (All emphasis added)

Q. *Where is the sciatic nerve in relation to the muscle?*

A. *It's a lot deeper.*

Q. *It's a lot deeper?*

A. *I mean, it's deeper than where I want to be.*

Q. *Inches deeper into the leg?*

A. *Sciatic, yes, a little bit more on the deeper side, yes.*

Dep. Tr. pg. 27, line 24 – pg. 28, line 13; pg. 29, lines 3-14. (All emphasis added)

Q. *Doctor, you noted the size a second ago. The wound was about 1 by 1 centimeter?*

A. Yes.

Q. *Is that size, the size of that would at this point significant enough to compress any nerves deep within the leg such as the sciatic nerve?*

A. No.

Q. *Just out of curiosity, was the 5 by 5 centimeter abscess that you saw on August 23rd, 2011 significant enough to compress any nerves deep within the leg such as the sciatic nerve?*

A. *The answer is no, but the abscess is not 5 by 5. The redness is 5 by 5.*

Q. *So, the abscess is smaller than 5 by 5?*

A. Yes.

Q. *Doctor, can you state to a reasonable degree of medical certainty that the 5 by 5 centimeter area of redness and the lesser abscess itself most probably was not large enough to compress the sciatic nerve?*

A. Yes.

Q. *Doctor, would you say that the 1 by 1 area that you saw on September 12th, 2011, most probably was not large enough to compress the sciatic nerve, and I mean centimeter, 1 by 1 centimeter, to a reasonable degree of medical certainty?*

A. Yes.

Dr. Chen testified that he has performed approximately one thousand (1,000) debridement procedures throughout his career, and he has never seen an abscess similar to Claimant's which caused compression to the sciatic nerve:

Dep. Tr. pg. 67, lines 9-19; pg. 67, line 25 – pg. 68, line 1. (All emphasis added)

Q. Doctor, are debridement procedures routine for you or not?

A. Yes.

Q. And do you see abscesses routinely in your practice?

A. Yes.

Q. How many a year, ballpark it, 100?

A. Probably.

Q. And do these abscesses typically result in debridement procedures if you're involved?

A. A majority.

Q. *So, how many abscesses have you seen?*

A. *A thousand.*

Dep. Tr. pg. 68, lines 5-8. (All emphasis added)

Q. *Have you ever seen an abscess like the one Mr. Hilton presented to you with that caused compression of the sciatic nerve.*

A. *No.*

As outlined in Claimant's medical records above, Claimant made absolutely no complaints of back or neurologic pain or symptoms during any of his visits with Dr. Chen. Dr. Chen testified that, if Claimant's abscess had caused compression and damage to the sciatic nerve, Dr. Chen would have expected to see symptoms of the compression by the time that Claimant was released on September 12, 2011:

Dep. Tr. pg. 28, line 20 – pg. 29, line 2. (All emphasis added)

Q. *And if it had been large enough to compress the sciatic nerve and cause symptomology, would you have expected to hear of those complaints at the time of your first evaluation, August 23rd, 2011, and certainly post-op on September -- I believe it was 1st, 2011, and definitely by September 12th, 2011?*

A. *Yes.*

Dep. Tr. pg. 29, lines 15-24. (All emphasis added)

Q. *Doctor, if there had been neurological symptoms either from the abscess and some sort of compression or from any venom going into the leg, would you have expected to see neurological symptoms prior to the date of your release of him on September 12th, 2011?*

A. *Yes, I would think so.*

Q. *And can you say that to a reasonable degree of medical certainty that it is most probably true?*

A. *Yes.*

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Dep. Tr. pg. 70, lines 8-14. (All emphasis added)

Q. *Doctor, just assuming that would have happened, that the abscess was in fact large enough to do such a thing, compress the sciatic nerve, would you have expected to see symptomology of that compression by the time you released him on September 12th, 2011?*

A. Yes.

Lastly, Dr. Chen opined that Claimant reached MMI from a surgical standpoint on September 12, 2011, with no permanent impairment related to Claimant's simple abscess:

Dep. Tr. pg. 29, line 25 – pg. 30, line 12.

Q. Doctor, on September 12th, 2011, from a surgical perspective, would you have considered him to be at maximum medical improvement or as good as he's going to get from a surgical perspective, so to speak?

A. Yes.

Q. And Doctor, I don't see that it's noted on your record of September 12th, 2011, but what would have been his release to work? Would it have been with any restrictions, or would you have released him without restriction as of this date, September 12th, 2011?

A. Probably without restriction.

Dep. Tr. pg. 30, lines 23-25; pg. 24, lines 1-12. (All emphasis added)

Q. *So, as of September 12th, 2011, you considered him from a surgical perspective to be at maximum medical improvement without work restrictions?*

A. Yes.

Q. Can you state that to a reasonable degree of certainty that it is most probably true?

A. Yes.

Q. *And Doctor, would you have expected any impairment to have come from the spider bite and the resulting procedure?*

A. No.

Q. Doctor, can you state that to a reasonable degree of medical certainty that it is most probably true?

A. Yes.

Dep. Tr. pg. 70, lines 18-21.

Q. It's still your opinion that when you released him on September 12th, 2011, that he was at maximum medical improvement from a surgical perspective?

A. Yes.

While Dr. Healy's deposition testimony and opinions are wrought with inconsistencies and obvious bias, as discussed below, Dr. Chen's testimony is completely unbiased and matter-of-fact. Very simply, Dr. Chen looked at the medical evidence before him, used his common sense and medical experience treating abscesses, and rendered a simple and credible opinion. Nonetheless, the Single Commissioner disregarded Dr. Chen's deposition testimony, and this was error.

Dr. Chen's testimony is clearly more credible than that of Dr. Healy, and a review of the medical evidence fully supports Dr. Chen's opinions; this cannot be said of Dr. Healy's opinions. Summarily, the medical evidence reveals the following: (1) preexisting deformities in Claimant's foot which are proof of an underlying neuropathic problems; (2) preexisting neuropathic symptoms (running/radiating) in Claimant's left foot and leg in the two months preceding the spider bite; (3) a minor abscess and staph infection on Claimant's upper thigh; (4) a simple debridement procedure which was no different than the 1,000 others Dr. Chen has performed; and (5) a successful recovery from the simple debridement procedure resulting in Claimant's release at MMI on September 12, 2011.

(b) Dr. Healy's medical opinions and testimony are inconsistent and unreliable.

The Single Commissioner largely relied on the opinion of Dr. Healy to make his award. Dr. Healy ultimately opined that the abscess from Claimant's supposed spider bite compressed Claimant's sciatic nerve, thereby causing non-discogenic sciatica. The opinion of Dr. Healy, however, is based on speculation, and on Claimant's subjective and dishonest allegations. If Claimant suffers from non-discogenic sciatica, it is clearly the result of his preexisting and unrelated neuropathic problems, as evidenced by his longstanding left foot and leg conditions.

Claimant's attorney had two (2) conferences (telephonic and in person) with Dr. Healy prior to Dr. Healy's August 20, 2012 deposition. At his deposition, Dr. Healy testified that Claimant did not report having had any sciatic or radiating type of pains in his left leg prior to the spider bite. Dr. Healy went on to testify that, if Claimant did have preexisting radiating or

sciatic-type pains prior to the spider bite, it could change his opinion that Claimant's non-discogenic sciatica was caused by the spider bite:

Dep. Tr. pg. 10, line 3-10. (All emphasis added)

Q. What about left leg pain, generally?

A. *I don't think that he had had previous left leg radiating pain. That would suggest a sciatic problem.*

Q. *And if he had pre-existing radiating pains in the left leg, would that change any opinions you may have formed in this case?*

A. *It could.*

Dep. Tr. pg. 33, lines 7-18. (All emphasis added)

A. And he reports occasional periods of running in the left foot related to decreased sensation in the toes and hands.

Q. And, Doctor, *would that be a neuropathic process* that you described earlier?

A. *Yes.*

Q. *That would that be a neuropathic process that he would have denied to you when you interviewed him?*

A. *Yeah. He didn't complain of that.*

Dep. Tr. pg. 34, lines 5-25; pgs. 35-37, lines 1-25; pg. 38, line 1-10. (All emphasis added)

Q. What would make you more concerned? What would make you question the cause of the etiology of his problems as being related to the spider bite, if he had prior radiating pain into the leg or in the leg?

A. Yeah. If he complained of previous pain that radiated in the leg. Things that would bring the sciatic nerve into question. You know, just intuitively, I can see where he had problems of a mechanical nature involving the left foot.

Q. But the occasional periods of running and decreased sensation certainly would require you to consider a neuropathic process?

A. *The clawing, the changes in the structure mechanically in the left foot means that there is a neuropathic problem by definition.*

Q. *But the radiation would perhaps cause you to question the etiology or the cause of his problems if he had that prior to the accident?*

A. *Yes.*

Q. Doctor, I'm going to show you Defendant's APA Page 80. What date is the medical record from Pee Dee Orthopaedics?

A. 7/28/11.

Q. So less than one month before the spider bite?

A. Right.

Q. If you would, read the history portion of the note into the record aloud.

A. Thomas Hilton is a 37 year old who returns with left cavus foot and ankle pain. He's complaining of pain radiating up the back of his leg.

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He states or stated he felt no relief from the FlectorPatch. He stated that he is still waiting for his appointment with neuro for an evaluation.

Q. Neurology?

A. Yes.

Q. Less than one month before the spider bite he is, in fact, complaining of pain radiating in the back of his leg?

A. Yes.

Q. And the sciatic nerve runs in the back of the leg?

A. Yes.

Q. *So that would be consistent with the sciatic nerve problem?*

A. *It could be, yes.*

Q. And at this point what we know based on his complaints at Pee Dee Orthopaedics when he first shows up on June 17th, he complains of a running in the foot?

A. Yes.

Q. And decreased sensation in the foot -- feet and hands, I believe, as well?

A. Correct.

Q. Indicative to a neuropathic process?

A. Yes.

Q. Then I think you opined that if there's radiating features to that prior to the accident, then that would give you pause or cause you to question whether or not there was sciatic involvement even prior to the spider bite?

A. I think that there could be, just based on the deformity that he has in his foot.

Q. *It does sound to you by July 28, 2011 that there appears to be some sciatic involvement at least at that point?*

A. *Yes.*

Q. And, Doctor, since the EMG studies that you performed -- I don't want to put words in your mouth, mild to moderate findings of the sciatica?

A. Correct.

Q. Because they were mild to moderate, couldn't this also be a mild to moderate sciatica that he's complaining of?

A. It could be.

Q. It's certainly severe enough to require him to go to an orthopaedic practice to have it evaluated?

A. Apparently, yes.

Q. And the orthopaedist or Dr. O'Dell -- I trust he's an orthopaedist -- thought it severe enough to refer him to a neurologist to have it evaluated?

A. Yes.

Q. Two months prior to the spider bite and less than one month before the spider bite?

A. Correct.

Q. Because we have the radiating features in the back of the leg, you believe there could be sciatic involvement based on that?

A. Yes.

Q. So then does that lead us to Mr. Hilton's credibility as to the cause of problems?

A. Not very much.

Despite Dr. Healy's opinion that Claimant's foot deformities revealed a neuropathic problem "by definition," his opinion that there appeared to be involvement of the sciatic nerve prior to the spider bite, and his admission that he was unaware of the preexisting neuropathic problems prior to his deposition, the doctor went on to maintain that Claimant's non-discogenic sciatica was caused by the compression of the nerve from the spider bite.

Dr. Healy also testified that he was forced to rely on Claimant's subjective complaints of pain in order to form his diagnosis and opinions, and his sole basis for keeping Claimant out of work was Claimant's subjective complaints of pain. (Tr. pgs. 21, 24, 27) After opining that he was forced to rely solely on Claimant's subjective complaints, Dr. Healy was shown numerous inconsistencies and lies in Claimant's medical records and deposition testimony:

Dep. Tr. pg. 25, lines 12-23.

Q. Would you expect that he would contend that without pain medication his pain was a ten on a one to ten scale?

A. I wouldn't think that, but how people rate their pain, it depends on whether they've ever had pain. So I don't know how they rate it, but I wouldn't think that it would be a 10 out of a 10.

Q. What would you think it would be?

A. Probably a five out of a ten.

Q. So I got a hundred percent increase based on your observations and what he testified to?

A. That's what I would think...

Dep. Tr. pg. 28, lines 5-25; pg. 29, lines 1-9, 16-25.

Q. Doctor, does he specifically deny that the pain went up into his calf on Page 44?

A. Yes.

Q. Did he deny that the pain went into the heel, the preexisting pain that he had went into the heel on his deposition on Page 44?

A. He said that it didn't go into the heel.

Q. What does it mean if somebody comes in and complains of running in your feet? My foot feels like it's running, what does that mean?

A. The foot feels like it's running or a running sensation in the foot?

Q. When you're sitting still. I don't know. Sure. That's fine. Not when he's actually running. There's a running sensation in the foot and sitting still.

A. That usually suggests a neuropathic process.

Q. Is that the same process that you diagnosed here, a neuropathic process that you diagnosed as a result of the spider bite?

A. Yes.

Q. Did he describe to you any preexisting neuropathic-type process?

A. No.

Q. Would that have been a question that you and a neurologist would have asked him when he presented to you?

A. Yes.

Q. All right. Doctor based on the deposition excerpts that you looked at when describing the prior condition, the preexisting condition involving the left Achilles, do you agree his testimony was not that it went into the heel or the foot?

A. Correct.

Q. It was not that it went up into the leg or calf?

A. Correct.

Dep. Tr. pg. 31, lines 1-25; pg. 32, line 1, lines 5-15, lines 20-21. (All emphasis added)

Q. And, Doctor, is the date of that June 17, 2011?

A. Yes.

Q. And Doctor, that would be about two months exactly prior to the spider bite?

A. Yes.

Q. What is the chief complaint?

A. Left foot.

Q. That's all we see on there?

A. That's all it says.

Q. Okay. *Is that inconsistent with his deposition testimony?*

A. *I think it is.*

Q. All right. Let me show you Defendant's APA Page 78. This is a narrative dated June 17, 2011 from Pee Dee Orthopaedics. Is that the narrative for Mr. Hilton's presentation to Pee Dee Orthopaedics on June 17, 2011?

A. Yes.

Q. Doctor, what is the chief complaint listed in the narrative?

A. Left heel pain and bruising.

Q. *Doctor, is that inconsistent with his deposition testimony?*

A. *I think yes, it is.*

Q. Doctor, based on this narrative, was he also complaining of pain in the lateral part of the left foot, the lateral and posterior aspects of the left heel with tenderness with ambulation? And I'm trying to read upside down here as we go. Does he complain of pain in the foot as well?

A. Yes.

Q. Doctor, what does tenderness with ambulation mean? Tenderness with walking?

A. Yes.

- Q. That could create a limp?
A. Yes.

Dep. Tr. pg. 48, lines 13-25; pg. 49, lines 1-12. (All emphasis added)

- Q. Doctor, would it surprise you that when I took his deposition he said that he could stand for about 15 minutes before needing to sit, and sit for about 15 minutes before needing to stand, and that he laid down about 90 percent of the time in order to alleviate his pain?
A. I don't actually know. *I didn't get the felling he laid down 90 percent of the time.*

Q. *Is that inconsistent with the way he presents to you?*
A. *I think so.*
Q. Do you have any concerns with his credibility?
A. I haven't no.
Q. Do you now?
A. No. You know, again, I just don't think he's the brightest light on the tree. The ability to get a CDL doesn't make him brighter.
Q. What does brightness have to do with lying? Honestly, I ask you the question --
A. I think the fellow doesn't necessarily think about this and that. Whether he forgets, I don't know. I haven't made him out to not be truthful.

Dep. Tr. pg. 49, lines 22-25; pg. 50, lines 1-13. (All emphasis added)

- Q. What about, Doctor, if I asked in his deposition whether he had been away from home overnight since the August 17, 2011 spider bite, and what if he told me, yes, sir, one time, that was because I had to visit my mother who was in the hospital, other than that one time, I haven't been? And what if he told me he was actually scheduled to go on a cruise around November of 2011 with Carnival, but because of this spider bite he had to cancel the cruise. His wife still went. He didn't go. He stayed home and pretty much did nothing? What if I found out that wasn't the truth? Is that a brightness issue or a credibility issue?
A. It's hard to say. *That could be a credibility issue.*

After Dr. Healy was shown Claimant's deposition testimony denying that he went on the October, 2011 cruise, he offered the following:

Dep. Tr. pg. 54, lines 3-12. (All emphasis added)

- Q. Would you think that would be more of an issue with specifics like what friends when with him and the name of the road the friends lived on and the name of friend's business?
A. *I would think he would know if he went on the cruise.*

- Q. And if he did not tell the truth about this, would you be willing now to call his credibility into question?
- A. To some degree, probably.

Despite all of the testimony above, and despite agreeing that countless statements Claimant has made to medical providers and under oath are not truthful, Dr. Healy maintained that he had absolutely no reason to call Claimant's credibility into question:

Dep. Tr. pg. 59, lines 7-25; pg. 60, lines 1-25; pg. 61, lines 1-4. (All emphasis added)

- Q. In your opinion, now, after looking at his deposition testimony, his complaints to you, and the other records, would you question his credibility and veracity?
- A. Not to a large degree. Some degree, I think so, but I don't know. That's a lot of conjecture on my part as to what he should remember and what he shouldn't and what he was doing on a cruise and what he wasn't. You know, typically, as a physician we deal with the objective. And I'm pretty good in talking to patients to determine if they're exaggerating or if what they are telling me doesn't fit with what I see.
- Q. *In this case you're not dealing with the objective as a physician, are you, Doctor, you're dealing with the subjective, his complaint?*
- A. *Only with the pain complaint.*
- Q. You testified earlier that a person can have non-discogenic sciatica but not have pain, right?
- A. They can.
- Q. You prescribed him medication because he has pain, correct?
- A. Correct.
- Q. You're keeping him out of work because he says he has pain, right?
- A. Correct.
- Q. What I have provided you though, Doctor, is objective evidence that -- as a matter of fact, objectively his picture on the front of it that says he went on this cruise when he told me he didn't, fair?
- A. Right.
- Q. *You're dealing with subjective, I'm dealing with objective, fair?*
- A. *To some degree.*
- Q. *You're telling me it doesn't call into question his credibility?*
- A. *Not necessarily. I can't call the guy a liar for those reasons.*
- Q. *If somebody says, I didn't go on a cruise, yet they do, you can't call a guy a liar?*
- A. *I don't know the nature of -- you would think he would remember, but I don't know. I can't say that discredits everything that he ever told me.*

Dep. Tr. pg. 70, lines 23-25; pg. 71, lines 19-23. (All emphasis added)

Q. Is it your testimony that you believe Mr. Hilton?

A. I do.

Q. Are you an advocate for your patients?

A. Unless I, you know, find out otherwise. I'd say probably 80, 90 percent of the time I am.

Q. *Are you an advocate for Mr. Hilton?*

A. *Yeah, I am.*

Dep. Tr. pg. 131, lines 21-23; pg. 132, lines 2-7. (All emphasis added)

Q. *And not only is Mr. Hilton credible, but he's very credible?*

A. *Yes.*

Q. *It's satisfactory? You believe him and trust him? There's no reason not to?*

A. *I haven't seen it.*

Q. *No reason not to trust him or believe him?*

A. *Correct.*

Dr. Healy's deposition testimony and final medical conclusions in this case are simply incredible. A reading of his deposition transcript leads to only one conclusion: Dr. Healy is advocating for his patient, despite a mountain of evidence to the contrary. Dr. Healy admits that Claimant had preexisting sciatic-type neuropathic symptoms, he states that Claimant's preexisting "clawing, the changes in the structure mechanically in the left foot means that there is a neuropathic problem by definition," he admits that he must rely only on Claimant's subjective complaints of pain due to the lack of objective evidence, and he admits that Claimant has made numerous false statements throughout the life of the claim, yet the doctor ultimately opines that Claimant is credible and that the supposed spider bite compressed the sciatic nerve and is the cause of Claimant's problems. The doctor's testimony cannot be reconciled with the medical evidence; if Claimant suffers from non-discogenic sciatica, the medical evidence clearly demonstrates that the condition is the result of Claimant's underlying and preexisting neuropathic problems.

Lastly, Dr. Healy testified to the following:

Dep. Tr. pg. 41, lines 16-25; pg. 42, lines 1-8. (All emphasis added)

Q: Is there any way to know whether this specific spider bite is creating any sort of compression on the sciatic nerve and that's why he's still complaining of the problems? Any way to really know that?

A. *The surgeon probably would be the best one to tell what the nature of the bite was.*

Q. So will you defer to the surgeon regarding whether or not the abscess could have compressed the sciatic nerve?

A. If it's documented, you know, what the girth of the thigh is and things like that. If there's a way to tell, you know, what the nature of the bite was, how much swelling, things like that. He was the only one who was there.

Q. And he would have seen it with his own two eyes?

A. Correct.

Dr. Healy specifically indicates that the surgeon would be the best person to tell what the nature of the bite was and to determine if the bite was significant enough to compress the sciatic nerve. In this case, the surgeon was Dr. Chen, and Dr. Chen very plainly testified that Dr. Healy's compression theory is not possible in this case. Somewhere in all of the lies, the "expert" reports, the biased opinions, the inconsistencies, the memory allegations, and the conjecture of a supposed spider, the Single Commissioner lost sight of the simple and objective medical evidence in this case, all of which indicates that Claimant's simple abscess resolved without complication, and without any affect on the sciatic nerve, leg, or back.

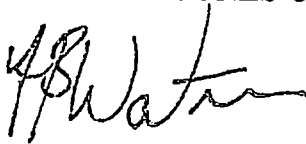
CONCLUSION

Claimant is not credible. He reached MMI on September 12, 2011 for the simple abscess on his thigh/buttock with no permanent impairment. Defendants request that the Appellate Panel reverse the findings of the Single Commissioner, and enter the following findings:

- (1) Claimant sustained injury to his left upper thigh/buttock only;
- (2) Claimant reached MMI with no impairment or restrictions related to the left upper thigh/buttock injury on September 12, 2011;
- (3) Claimant is not credible; as such, Defendants are entitled to terminate all benefits immediately and Defendants are entitled to a credit/reimbursement of all indemnity benefits paid after the date of MMI.

Respectfully submitted,

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Attorneys for Defendants

Date: August 16, 2013

BEFORE THE SOUTH CAROLINA
WORKERS' COMPENSATION COMMISSION

WCC FILE NO. 1111934

Thomas Chad Hilton,
Employee,
Claimant,

vs.

Flakeboard America Limited,

Employer,
and

Liberty Mutual Insurance,

Carrier,
Defendants.

CERTIFICATE OF SERVICE

I, Cheri Evans Coon, do hereby certify that I am the Legal Assistant to L. Brenn Watson, Esquire, attorney for the defendants with **WILLSON JONES CARTER & BAXLEY, P.A.** in Greenville, South Carolina, and that on the 16th day of August, 2013, I mailed the foregoing BRIEF OF DEFENDANTS/APPELLANTS (original and three copies to SC WCC) to the following by placing a copy thereof in the United States mail, first class, proper postage affixed thereto:

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STATE OF SOUTH CAROLINA)

COUNTY OF MARLBORO)

Thomas Chad Hilton,)

Employee/Claimant,)

vs.)

Flakeboard America Limited,)

Employer,)

and)

Liberty Mutual Insurance Company,)

Carrier/Defendants.)

BEFORE THE
SOUTH CAROLINA
WORKERS' COMPENSATION COMMISSION
WCC FILE NUMBER: 1111934

**CLAIMANT'S MEMORANDUM IN
OPPOSITION TO DEFENDANTS'
APPLICATION FOR REVIEW**

RECEIVED
OCT 10 2013
V. Deller
(FRONT DESK)
SC Workers' Comp Comm

STATEMENT OF THE CASE

This is an appeal from June 4, 2013 Order of the Honorable Avery B. Wilkerson, Jr., which, after exhaustively analyzing the medical evidence and the testimony received from several witnesses during an approximately five (5) hour hearing process, determined: (a) Claimant's, Thomas Chad Hilton's, admittedly compensable August 17, 2011 left buttocks/upper leg injury, which stemmed from a venomous spider bite, continued to produce back and radicular leg symptoms that required further treatment per his authorized physician, Dr. R. Joseph Healy; (b) he had not yet achieved maximum medical improvement; (c) Defendants, Flakeboard America Limited and Liberty Mutual Insurance Company, were obliged to authorize the additional treatment modalities provided/prescribed by Dr. Healy; and (d) Mr. Hilton remained temporarily totally disabled by the consequences of his compensable accident.

Additionally, Commissioner Wilkerson squarely/thoroughly addressed Defendants' unremitting contentions that Mr. Hilton is a "liar" who "has committed a fraud on the Commission", specifically finding: (a) "Mr. Hilton has been experiencing cognitive dysfunction since [a]... 2000 head trauma,

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which clearly produced some degree of physical brain damage (as evidenced by his post-motor vehicle accident pathology, need for brain surgery and the symptoms documented through . . . [a] February 11, 2011" neurological evaluation; (b) his "presentation (both live and through deposition) is completely consistent with the material level of cognitive dysfunction confirmed by . . . at least four duly qualified specialists"; (c) "the persistent symptoms referenced by . . . [a neurologist six months prior to his accident date], coupled with the unanimous opinions expressed by Drs. Healy, . . . [Donna M.] Schwartz-Watts, . . . [Tora L.] Brawley and . . . [Nicholas A.] Lind, firmly establish the presence of appreciable cognitive dysfunction prior to" his accident date; (d) "the inaccuracies/inconsistencies in his testimony, as well as incorrect/erroneous information he has provided in the context of this litigation, result from cognitive deficits produced by physical brain damage documented by . . . [these specialists], rather than a purposeful, intentional, volitional or preconceived attempt to mislead and/or knowingly provide false information"; (e) "this explanation for any alleged credibility issues is founded upon uncontradicted medical evidence (objectively and/or wholly validated through use of devices specifically aimed toward identifying malingering/embellishment)"; (f) "the current circumstances unquestionably verify the legitimacy of Mr. Hilton's cognitive loss, while dispelling any notion that the implications of his pre-existing brain damage were contrived"; (g) "the testimony and conduct which Defendants maintained warrants termination of Mr. Hilton's claim were/are neither volitional nor reflective of dishonesty"; and (h) "entry of a finding as to a lack of credibility is not warranted in this instance" (See, June 4, 2013 Order, Finding of Fact Nos. 50 and 54, pp. 39 – 41).

Essentially, Defendants maintain Commissioner Wilkerson: (a) ignored "brazen misrepresentations" that could only be indicative of "fraud"; (b) erroneously relied on uncontradicted

medical evidence that not only confirms the presence of **significant cognitive deficits** (the actual source of the inaccurate/erroneous statements they seek to characterize as “fraud”), but also validate Dr. Healy’s opinions as to the nature/scope of injuries produced by the August 17, 2011 compensable spider bite; and (c) has, **by properly relying on uncontradicted medical evidence to determine medically driven issues** “effectively . . . [become complicit in a scheme through which Mr. Hilton has] stolen nearly Fifty Thousand and 00/100 Dollars (\$50,000.00) and counting.”

However, Mr. Hilton would respectfully submit that Defendants’ arguments: (a) are founded upon vitriol, as opposed to the requisite medical evidence; (b) rather desperately seek to divert attention from the fact **the evidence relating to these medically driven issues (presence of cognitive deficits resulting from physical brain damage, causal relationship of symptoms/pathology and attainment of maximum medical improvement) simply fails to support their positions**; and (c) conveniently ignore “critical” opinions expressed by various specialists, including two authorized treaters, to the extent they display a lack of candor commensurate with any allegation of “misrepresentation” directed toward Mr. Hilton.

FACTS

A. OCCURRENCE OF A SPIDER BITE

While Defendants now deny Mr. Hilton’s mechanism of injury, describing the source of his wound as “the conjecture of a supposed spider”, unappealed Finding of Fact Nos. 1 and 4 verify: (a) “Mr. Hilton was **bitten in his buttocks/upper leg area by an insect** as he was operating [a] . . . tractor trailer”; (b) Marlboro Park Emergency Room personnel independently **observed** he exhibited “**a raised, round, red area with obvious bite mark in the center of the . . . [buttocks/upper leg] lesion**”, as well as “**skin discoloration (‘bright red’), tenderness and swelling (‘edematous’) in the ‘area surrounding the**

bite”; and (c) he “was diagnosed to have experienced a spider bite . . .” Additionally, Dr. Chi-Dai Chen’s deposition acknowledgements that “he had no reason to dispute Mr. Hilton was bitten by an insect on August 17, 2011”, as well as the fact “Mr. Hilton’s post-injury complaints/symptoms were ‘consistent with . . . ones that are commonly attributed to a Brown Recluse spider bite’” were not contested through Defendants’ June 17, 2013 Form 30.

Given these facts, as well as undisputed evidence as to the presence of an “obvious bite mark” in the area that ultimately required surgical debridement, the occurrence of a spider bite can hardly be denied.

B. INITIAL CONSEQUENCE OF SPIDER BITE

When this bite evolved into a “[l]arge, warm, red abscess . . . [area in the] left upper posterior thigh . . . [that measured] appro[ximately] . . . 5 inches in diameter [that was] . . . exquisitely painful”, Mr. Hilton was referred to Dr. Chen for surgical assessment (See, June 4, 2013 Order, Finding of Fact No. 5(p. 10)). This physician’s August 23, 2011 examination prompted hospitalization “[d]ue to the severity of his symptoms”, followed by surgical intervention that led to an “immediate finding of underlying neurcrotic fat”. (See, June 4, 2013 Order, Finding of Fact Nos. 6 & 7, p. 10). As Dr. Chen felt the wound itself had adequately healed by September 12, 2011, he placed Mr. Hilton on PRN status as of that date.

C. LEFT LEG INJURY COMPONENT

While Mr. Hilton had **admittedly** encountered and sought treatment for predominant left heel/ankle pain prior to his August 17, 2011 injury, consideration of various reports generated by Dr. Jason B. O’Dell of Pee Dee Orthopaedic Associates, P.A. (from whom he received medical care for this problem) verifies the diagnosis as of July 28, 2011 was “**Achilles Tendonitis**, a conclusion that had not changed as of December 1, 2011, the last day he received treatment from this orthopaedic surgeon

Significantly, a review of reports generated by Dr. W. James Evans of Comprehensive Neurologic Services, P.C. (to whom he was referred by Dr. O'Dell) reveals: (a) an acknowledgement as to the existence of pre-accident left foot pain, as well as apparent improvement of the upward radiation referenced by Dr. O'Dell; (b) worsening of Mr. Hilton's left foot pain; (c) he had subsequently begun experiencing "pins and needles pain . . . after the spider bite" (October 31, 2011); and (d) based upon the particular elements of Mr. Hilton's history, this neurologist characterized the newly developed left lower extremity symptoms as the "late complications of the brown recluse spider bite."

On February 13, 2012, Mr. Hilton was evaluated by Dr. Healy (authorized treater), who: (a) noted not only the presence of persistent left leg symptoms, but also the non-traumatic onset of low back pain; (b) performed an EMG, which revealed abnormal nerve function of the left leg that he characterized as "a non-discogenic sciatica". This authorized physician also ordered a lumbar MRI scan to further assess Mr. Hilton's back pain.

Inspection of Dr. Healy's notes/reports for the period April 16, 2012 through July 17, 2012 indicates: (a) his belief Mr. Hilton's left non-discogenic sciatica was the product of compression stemming from the initial consequences of his compensable brown recluse spider bite; (b) this condition was further compromising Mr. Hilton's gait, affecting the foot and the left ankle, and having a potentially aggravating impact on the pre-injury left Achilles tendon problem; and (c) Mr. Hilton was having difficulty obtaining authorization of this medication by Liberty Mutual.

In discussing the source of Mr. Hilton's current left leg symptoms, Dr. Healy verified: (a) an acknowledgement of pre-injury symptoms that were reflective of some degree of neuropathic pain (Healy Deposition, pp. 31 – 37; 43 – 44); (b) the pins and needles sensation Mr. Hilton was now experiencing, which was clearly indicative of neuropathic pain, had been neither reported nor identified by any

medical record prior to August 17, 2011 (Healy Deposition, pp. 95 & 100); (c) the pre-surgical findings (pain, redness, skin breakdown, swelling, bite marks, fever, nausea and vomiting) were not only indicative of a brown recluse spider bite, but also a “systemic effect” produced by the injected venom (Healy Deposition, pp. 76 – 79; 85, 87); (d) toxic venom of this nature can, in and of itself, create neuropathic pain of the type described by Mr. Hilton (Healy Deposition, pp. 41, 81 & 122); (e) the nature/degree of Mr. Hilton’s pre-surgical symptoms (swelling; size of abscess and surrounding inflammation) were also sufficient to create sciatic nerve compression, even in the absence of muscle tissue damage (Healy Deposition, pp. 80 & 88); (f) Mr. Hilton’s current left leg symptoms most probably, to a reasonable degree of medical certainty, result from the consequences of the August 17, 2011 spider bite (venom itself and/or nerve compression caused by pre-surgical wound development) and/or the aggravation/acceleration of preexisting pathology by the consequences of this bite (Healy Deposition, pp. 81 – 84, 89 – 90, 103); (g) the symptoms which temporally resulted from the spider bite, as well as the degree of necrosis documented during surgery, could not be faked (Healy Deposition, pp. 84 – 88); (h) the presence of neuropathic injury had been objectively verified by EMG testing (Healy Deposition, pp. 17 & 125); and (i) he was comfortable with his ability to render this opinion as to causal connection, indicating Mr. Hilton’s surgeon was in no better position to address this issue (Healy Deposition, pp. 70 & 90).

D. BACK INJURY COMPONENT

On August 9, 2012, Mr. Hilton was independently evaluated by Dr. Ezra B. Riber of Palmetto Pain Management, LLC, who: (a) was aware of all material aspects of Mr. Hilton’s post-injury history; (b) specifically noted the various symptoms which were exhibited prior to Dr. Chen’s surgery, as well as Dr. Evans’ belief the worsening of “pre-injury leg pain was the result of the spider bite”; (c) observed limited

lumbar range of motion “particularly with extension and concomitant left lateral flexion”; (d) discovered **“significant EHL weakness on the left consistent with an L5 radicular syndrome”**; (e) noticed Mr. Hilton’s gait favored the left lower extremity; and (f) felt **Mr. Hilton had developed “[c]ompensatory low back pain . . . following altered gait” with an associated lumbar facet syndrome.**

Based upon these findings and Mr. Hilton’s medical history, Dr. Riber: (a) recommended initial treatment of the radicular pain through a selective nerve root injection; (b) explained the **“clinical EHL weakness is certainly consistent with the results of the electrodiagnostic studies”**; (c) attributed the **current radiculopathy to “initial compression caused by the expanding wound, as well as the venom, which itself can certainly produce nerve root irritation and neuropathic pain”**; (d) referenced the previously documented “change in his premorbid symptom pattern” as a basis for **attributing** Mr. Hilton’s current neuropathic pain and the “likely compensatory” back pain **to the consequences of the spider bite**; and (e) determined Mr. Hilton had not reached maximum medical improvement, while indicating his work status would be “restricted to sedentary” activities with the ability “to change positions per tolerance.”

When questioned as to Mr. Hilton’s current back symptoms, Dr. Healy explained: (a) an understanding that “his walking was [not] . . . totally normal” pre-injury (Healy Deposition, p. 44); (b) the **consequences of the spider bite had further contributed to gait alteration** (Healy Deposition, p. 104); (c) while he noticed this gait disturbance, “it wasn’t dramatic” (Healy Deposition, p. 7); (d) **the video surveillance footage was consistent with his prior observations** (Healy Deposition, p. 63); (e) this gait disturbance had resulted in the development of mechanical low back pain (Healy Deposition, p. 72); (e) Mr. Hilton’s current back symptoms were compensatory (due to increased gait alteration attributable to neuropathic pain) and had “come on quicker than . . . might have otherwise [been] . . . expected” due to

the aggravating/accelerating impact of the causally related increase in neuropathic pain by the consequences of the brown recluse spider bite (Healy Deposition, pp. 103 – 104, 122 - 123); (g) the EHL weakness identified by Dr. Riber was a relatively objective finding that was consistent with the sciatica confirmed by electrodiagnostic studies and “absolutely” reflective of actual nerve dysfunction (Healy Deposition, pp. 119 – 121, 125 – 126); (i) Mr. Hilton required treatment of the nature outlined by Dr. Riber (Healy Deposition, p. 121); (j) given his longstanding professional relationship with Dr. Riber (who he characterized as “the guru” for pain management care), it was his wish that Mr. Hilton receive this treatment through Dr. Riber (Healy Deposition, pp. 119 & 122); and (k) Mr. Hilton had not yet achieved maximum medical improvement (Healy Deposition, p. 132).

E. PRESENCE OF SIGNIFICANT COGNITIVE DEFICITS

Commissioner Wilkerson’s review of Mr. Hilton’s May 31, 2012 (nearly two hour) deposition reveals that on direct examination, he: (a) disclosed the occurrence of a 2000 motor vehicle accident that produced a head injury initially resulting in a period of unconsciousness; (b) advised that it also required surgery for “. . . [s]ome bleeding”; (c) recalled only one physician visit following this surgery (for staple removal), while denying any problems associated with this head trauma since the single post-injury doctor visit; (d) admitted a June, 2011 vacation cruise, but required review of a card in his wallet to ascertain when this trip occurred; and (e) testified Dr. Healy had been the only neurologist from whom he had ever received treatment.

Additionally, Mr. Hilton testified: (a) the radiating left leg pain that was producing the pins/needles sensation in his foot had only begun some time after the August 17, 2011 spider bite and was distinguishable from the Achilles tendonitis sensations documented by Dr. O’Dell (which had actually extended upward approximately two inches beyond the ankle); (b) the current leg pain was

likewise not associated with an incident (small piece of metal became embedded in the skin around his left ankle) that had occurred some years prior (creating no residual problems); (c) the **back pain** referenced by Dr. Healy developed gradually and had not been present at the time of his August 17, 2011 injury; (d) his driving had substantially decreased since the accident date (estimating once a week when asked to specifically quantify); (e) typical periods of standing fell in the 15 – 20 minute range; (f) the majority of time at his home was spent laying down; (g) he had not joined his wife on a subsequent (October, 2011) cruise; and (h) his **appearance/the manner in which he walked, stood, etc. could vary**, particularly if he was having a “bad day”.

In this regard, inspection of records generated by Dr. Bruce S. Solomon of Pinehurst Neurology, P.A. reveals: (a) this motor vehicle accident resulted in “multiple trauma . . . [, including] a closed-head injury”; (b) his particular pathology involved “a subdural and epidural hematoma on the right” that required performance of a craniotomy; (c) receipt of Dilantin therapy for “subsequent seizures”, in conjunction with repeated neurological assessment following the 2000 head trauma; (d) he was medically restricted from resuming truck driving until June 13, 2001 ; and (e) Mr. Hilton was **continuing to experience “short-term memory problems”** (ex. “putting his keys in the refrigerator and a ham in the cabinet”) following this injury.

Significantly, on February 11, 2011 (approximately **six months before sustaining the spider bite**), Mr. Hilton was reevaluated by Dr. Solomon, who noted: (a) reports of persistent “memory loss”, as well as “**mood swings**”; (b) the absence of any complaints of “back pain”; and (c) slightly deficient short-term memory per clinical examination.

On August 12, 2012, Mr. Hilton underwent a forensic psychiatric evaluation by Dr. Donna Schwartz-Watts, a clinical professor of forensic psychiatry affiliated with the University of South Carolina

School of Medicine's Department of Neuropsychiatry and Behavioral Science. At that time, Dr. Schwartz-Watts also interviewed Mrs. Hilton, who reported: (a) her husband manifested "violent mood swings which are in part provoked by his lack of memory"; (b) aggressive denial when reminded of statements he could not remember; (c) activity reflective of confabulation, which she described as "a clinical symptom of cognitive impairment, [that] . . . is not volitional"; and (d) a "general expression of decreased . . . emotion . . . unless he is aggressive."

Dr. Schwartz-Watts also conducted a mental status examination, which verified: (a) Mr. Hilton "had cognitive impairment including difficulty with visual spatial design"; (b) "[h]e perseverated, . . . a clinical symptom of cognitive impairment"; (c) Mr. Hilton "had difficulty abstracting similarities between difficult objects"; (d) he also encountered "difficulty registering and recalling objects and required prompting and forced choice"; (e) poor performance "on a test of verbal fluency", which was also associated with perseveration; and (f) Mr. Hilton "gave a good effort" in connection with this assessment.

She further observed: (a) the presence of "end gaze nystagmus" (previously documented by Dr. Solomon); (b) "difficulty performing rapid alternating movements" (which could ultimately be accomplished with practice); (c) Dr. Solomon's records referenced various relevant factors (a right sided subdural and epidural hematoma with a resultant focal motor seizure disorder; "agusia and olfactory impairment"; "short-term memory problems"; "short-term memory impairment on neurological evaluation"); and (d) neuropsychological assessment was warranted.

In accordance with Dr. Schwartz-Watts' directive, Mr. Hilton underwent neuropsychological evaluation by Dr. Tora Brawley of the University of South Carolina School of Medicine's Department of Neuropsychiatry and Behavioral Science (August 16, 2012), who confirmed: (a) her awareness of the

fact “discrepancies . . . in his report of personal history facts . . . [had led to] accusations that he was purposefully being dishonest”; (b) “Mr. Hilton had difficulty correctly recalling some personal information . . . [d]uring the clinical interview”; (c) review of relevant medical records “revealed that he suffered both a subdural and epidural hematoma which required surgical evacuation via a right temporal craniotomy” in 2000; (d) memory issues following the 2000 head trauma; (e) reports of “continued problems with memory loss, mood swings, light headedness and sleep difficulties” to Dr. Solomon in February, 2011; and (f) “his difficulties have worsened following complications from a spider bite in August, 2011.”

In conjunction with this evaluation, Dr. Brawley, who currently serves as an assistant professor for the University of South Carolina School of Medicine, administered ten neuropsychological instruments, including “the Test of Memory Malinger,” which “revealed him to have significant deficits in many areas . . .” These deficits included “immediate verbal learning,” “immediate verbal memory for prose passages,” “recall of a complex figure,” “controlled verbal fluency,” “judgment of line orientation,” “nonverbal abstract reasoning and problem solving” and “trail making ability”.

Dr. Brawley also specifically explained that “[f]ormal effort testing was conducted and performance was completely within normal limits, indicating no evidence of an attempt to exaggerate or malingering cognitive symptoms.”

Based upon Mr. Hilton’s relevant medical history, her clinical interview and the results of this rather extensive neuropsychological testing, Dr. Brawley determined: (a) “testing results revealed the presence of severe cognitive deficits in many areas assessed, including memory”; (b) “[t]hese deficits are consistent with residual organic deficits from his previous head injury and have likely been exacerbated by more recent . . . physical injuries and psychosocial stressors”; (c) “[t]here was no

indication of an attempt to mangle on testing"; (d) "any discrepancies noted in his report of personal history or other areas are related to his cognitive deficits, rather than an attempt to purposely report incorrect information"; and (e) "[t]his [conclusion] . . . is further supported by documented reports and medical evidence of continued memory problems in February, 2011."

After considering these neuropsychological test results, in light of her own clinical finding, Mr. Hilton's medical history and the content of his deposition, Dr. Schwartz-Watts: (a) concluded "to a reasonably degree of medical certainty that Mr. Hilton has severe cognitive impairments, including memory disturbance, confabulation and perseveration which can account for the obvious discrepancies in his deposition testimony"; and (b) expressed "grave concerns about his competency to testify in these proceedings due to his memory deficits and inability to learn new information."

During this time period (August 14, 2012), Mr. Hilton was also evaluated by Dr. Nicholas A. Lind of Post Trauma Resources, who observed: (a) apparent memory impairment per mental status examination; (b) "Mr. Hilton's score of 84 . . . [on the MMPI-2-RF] is consistent with the memory problems expected from his 2000 head trauma"; (c) his "memory complaints are consistent with his described head injury and appear legitimate as determined by the validity measures of the psychological testing measures used in this evaluation"; (d) "Mr. Hilton's reported memory deficits are more likely than not, with as much certainty reasonable in the field of psychology, legitimate"; and (e) formal neuropsychological testing would better gauge "the validity and extent of Mr. Hilton's memory deficits"

In this regard, after reviewing "the findings and conclusions of Dr. Brawley's 16 August, 2012 neuropsychological evaluation", Dr. Lind (also a practicing neuropsychologist) agreed: (a) "[t]he results are consistent with the psychological evaluation . . . [he had] conducted on 14 August, 2012 and

suggests significant deficits in memory as well as executive and dexterity impairments"; and (b) "[t]his additional evidence confirms that Mr. Hilton's reported memory deficits are more likely than not, with as much certainty reasonable in the field of psychology, legitimate and explain the difficulties he continues to experience with recall of his history."

Additionally, Dr. Healy addressed Mr. Hilton's cognitive capacity, specifically confirming/concluding: (a) while the focus of his treatment had been the neuropathic pain component, he **had noticed clinical cognitive limitations** (Healy Deposition, p. 45); (b) it was not unusual for someone who has experienced head trauma of the nature Mr. Hilton sustained in 2000 to develop cognitive loss (Healy Deposition, p. 108); (c) persistent memory loss was actually "referenced as an ongoing symptom to a neurologist" before the August 17, 2011 accident date (Healy Deposition, pp. 109 - 110); (d) neuropsychological testing of the nature performed by Dr. Brawley included "not only specific tests, but actual portions of other tests, that are specifically geared towards ferreting out exaggeration and malingering" (Healy Deposition, p. 111); (e) the absence of malingering and exaggeration of cognitive symptoms, as well as the valid assessment of cognitive function verified by the neuropsychological test battery administered by Dr. Brawley were consistent with his own intuitive impressions (Healy Deposition, p. 112); (f) the results of this testing did not support allegations that Mr. Hilton's actions (including deposition testimony) were reflective of dishonesty and deceit (Healy Deposition, p. 112); (g) these test results were indicative of a "significant problem from the head injury" (Healy Deposition, p. 114); (h) his agreement with Dr. Brawley's determination "that any discrepancies noted in his report of personal history or other areas are related to cognitive deficits rather than an attempt to purposefully report incorrect information" (Healy Deposition, pp. 114 - 115); (i) his impressions were also consistent with those of Drs. Schwartz-Watts and Lind (Healy Deposition, pp. 115 - 116); (j) he

had no doubt Mr. Hilton was experiencing "noticeable cognitive damage secondary to brain injury . . . [which is] a very reasonable and more than likely explanation for . . . [the various factual] discrepancies" identified by Defendants (Healy Deposition, pp. 116 - 117); and (k) to a reasonable degree of medical certainty, he was "comfortable that [Mr. Hilton] in his efforts to receive treatment . . . and his testimony has done nothing contrived or purposeful, but rather that any of these discrepancies or conflicts are the results of his brain injury and results of cognitive deficits" (Healy Deposition, p. 128)

After considering the purportedly dishonest behavior alleged by Defendants, Dr. Healy similarly/consistently validated Mr. Hilton's credibility, testifying: (a) although he recognized the presence of certain discrepancies in Mr. Hilton's medical history, he had **no concerns as to this gentleman's credibility** (Healy Deposition, pp. 31 - 38, 45 - 49); (b) his participation in the October, 2011 cruise was an insufficient basis upon which to characterize Mr. Hilton as "a liar" (Healy Deposition, pp. 55 - 60); (c) the presence of **cognitive deficits** stemming from the prior brain injury was a **reasonable explanation for these alleged inconsistencies** (Healy Deposition, p. 117); (d) the need for cues (i.e., testifying accurately after looking at a card bearing the date of a prior cruise) "fits" as an explanation for Mr. Hilton's ability to recall certain information (Healy Deposition, pp. 117 - 118); (e) Mr. Hilton's **satisfaction of validity criteria**, including the **absence of malingering or exaggeration per applicable elements of the neuropsychological test battery administered by Dr. Brawley**, supported his belief there was **no indication this gentlemen was not credible** (Healy Deposition, pp. 112 - 113); (f) he **would "not . . . blindly support somebody who is faking, malingering or being less than candid"** (Healy Deposition, p. 127); and (g) Mr. Hilton was a credible patient (Healy Deposition, pp. 70 - 71, 106, 131 - 132).

Pursuant to questionnaire responses dated November 7, 2012, Dr. Schwartz-Watts confirmed: (a) "... [g]iven the nature/degree of his previous head trauma (involving both subdural and epidural hematoma requiring surgical evacuation via right temporal craniotomy), [her] ... clinical findings and the results of his valid neuropsychological testing, ... Mr. Hilton's current cognitive deficits (including severe memory compromise) most probably result from physical brain damage"; (b) "... [i]n view of the nature/degree of Mr. Hilton's previous head trauma, [her] ... clinical findings and the results of neuropsychological testing, ... the cognitive deficits attributable to this physical brain damage have most probably been aggravated by the consequences of his August 17, 2011 work related injury"; (c) "... [g]iven the nature/degree of Mr. Hilton's physical brain damage, [her] ... clinical findings and the results of neuropsychological testing, ... inconsistencies/ inaccuracies arising in connection with his testimony, as well as any inconsistent/inaccurate information he has provided when questioned as to prior events and/or statements (i.e., requiring reliance on his memory), are most probably the result of this physical brain damage, rather than a purposeful/intentional/ volitional attempt to mislead"; (d) "the cognitive deficits produced by Mr. Hilton's physical brain damage (including the aggravation created by the consequences of his August 17, 2011 work related injury) most probably negatively effect and/or impair his behavioral judgment, including the manner in which he responds to stressors and conducts his daily activities"; and (e) "lapses in behavioral judgment would also most probably be attributable to the aggravation of Mr. Hilton's cognitive deficits by the consequences of his August 17, 2011 work related injury"

A questionnaire executed by Dr. Brawley on November 8, 2012 similarly: (a) attributes "Mr. Hilton's current cognitive deficits (including severe memory compromise) ... [to] physical brain damage"; (b) recognizes "the cognitive deficits attributable to this physical brain damage have most

probably been aggravated by the consequences of . . . [Mr. Hilton's] August 17, 2011 work related injury"; (c) relates any "inconsistencies/inaccuracies arising in connection with his testimony, as well as any inconsistent/inaccurate information he has provided when questioned as to prior events and/or statements (i.e., requiring reliance on his memory) . . . [to] the result[s] . . . of this physical brain damage, rather than an purposeful/intentional/volitional attempt to mislead"; (d) recognized "the cognitive deficits produced by Mr. Hilton's physical brain damage (including the aggravation created by the consequences of his August 17, 2011 work related injury) most probably affect and/or impair his behavioral judgment, including the manner in which he responds to stressors and conducts his daily activities"; and (e) ties these "lapses in behavioral judgment . . . to his previous brain damage and the aggravation of Mr. Hilton's cognitive deficits by the consequences of his August 17, 2011 work related injury" Dr. Lind also offered identical opinions, from a neuropsychological standpoint, via questionnaire responses dated November 8, 2012.

Significantly, when asked to address these questions, Dr. Healy verified (agreed): (a) Mr. Hilton's "current cognitive deficits (including severe memory compromise) most probably result from physical brain damage"; (b) "the cognitive deficits attributable to this physical brain damage have most probably been aggravated by the consequences of Mr. Hilton['s] . . . August 17, 2011 work related injury"; (c) the testimonial inaccuracies (which Defendants alleged to be reflective of a knowing effort to deceive) "are most probably the result of this physical brain damage, rather than a purposeful/intentional/volitional attempt to mislead"; and (d) the negative impact Mr. Hilton's aggravated cognitive deficits are producing on his behavioral judgment.

F. DR. CHEN'S ADMISSIONS/CONCESSIONS

Shortly after deposing Dr. Healy, Defendants solicited Dr. Chen's testimony. While this general surgeon initially opined that he did not believe Mr. Hilton's abscess or area of inflammation was large enough to create compression on the sciatic nerve, he subsequently conceded: (a) he **neither was nor considered himself an expert in the field of neurology** (Chen Deposition, p. 38); (b) he likewise was **not an expert in terms of the ultimate implications of venomous bites** (Id.); (c) he had **no reason to dispute Mr. Hilton was bitten by an insect on August 17, 2011** (Chen Deposition, p. 41); (d) Mr. Hilton's post-injury complaints/symptoms were "consistent with . . . ones that are commonly attributable to a Brown Recluse spider bite" (Chen Deposition, p. 43); (e) the presence of the same reported symptoms upon which Dr. Healy had concluded Mr. Hilton was manifesting "a systemic effect" produced by spider venom (Chen Deposition, pp. 46 - 48); (f) the tissue damage discovered during surgery was consistent with the destructive process caused by venom or infection (Chen Deposition, p. 52); (g) "venom itself can create damage to an underlying nerve" (Id.); and (h) venom can likewise "create nerve irritation and neuropathic pain." (Chen Deposition, p. 53).

Dr. Chen also candidly acknowledged/agreed: (a) nerve root injury "would actually fall more within . . . a neurologist[s] . . . area of expertise than a surgeon's in terms of delineating etiology of nerve irritation or nerve damage" (Chen Deposition, pp. 53 - 54); (b) he would "normally defer to a neurologist in terms of making a conclusion as to what is the cause of nerve root damage in a scenario" (Chen Deposition, p. 54); (c) Dr. Healy's finding of non-discogenic sciatic per electrodiagnostic studies had "some degree of objectivity" (Id.); (d) he would defer to the specialist's (Dr. Healy's) opinion relative to the causal relationship of Mr. Hilton's non-discogenic sciatica and the consequences of the spider bite (Chen Deposition, pp. 54 - 55); (e) he did not "have the specialty

or knowledge to disagree with” Dr. Healy’s opinion (Chen Deposition, p. 55); (f) Dr. Evans’ opinion that Mr. Hilton’s current left lower extremity symptoms represented the late complication of a brown recluse spider bite was consistent with Dr. Healy’s conclusion “in terms of etiology” (Chen Deposition, p. 57); (g) he would likewise defer to Dr. Evans’ opinion on this point (Id.); and (h) he did not “hold [him]self . . . out as being an expert in [n]eurology (Id.).

This physician further testified: (a) identification of the source of nerve damage identified by an EMG was outside his area of expertise (Chen Deposition, p. 60); (b) he did not possess the expertise to decide the question of causation (Chen Deposition, p. 60 - 61); (c) he was consequently deferring to the neurologist “in terms of cause and effect as far as what . . . [Mr. Hilton’s] current problems are and how they relate to the spider bite” (Chen Deposition, p. 61); (d) any opinions offered in response to defense counsel’s questions on this point were “really . . . outside [his] . . . area of specialization and expertise” (Chen Deposition, p. 65); and (e) given this lack of expertise, he “would defer to the [n]eurologist . . . as to his determination of the source of [Mr. Hilton’s] . . . symptoms” (Chen Deposition, p. 76).

G. LAY TESTIMONY RELATING TO COGNITIVE LOSS

Given Mr. Hilton’s well-documented cognitive deficits, Commissioner Wilkerson found the testimony of his wife proved to be particularly enlightening. Specifically, Mrs. Hilton: (a) corroborated the circumstances surrounding her husband’s 2000 head trauma (from a standpoint of someone who was in the vehicle at the time of impact, on the scene following his ejection from their vehicle and present for most of his treatment); (b) noted Mr. Hilton had changed following this accident; (c) provided examples of the cognitive problems he had exhibited following the 2000 head trauma; (d) acknowledged his recollection of events occurring prior to the 2000 accident remained good;

(e) outlined the "routine" they had implemented to facilitate her husband's continued employment rather than pursuing disability benefits; (f) confirmed Mr. Hilton's cognitive compromise had not resolved with the passage of time and remained problematic, to the extent they had returned to Dr. Solomon in the hope of obtaining medical assistance approximately six months prior to the August 17, 2011 spider bite; and (g) indicated his memory lapses, mood swings, level of agitation, ability to measure time, attention/focus and frequency of inaccuracy had clearly worsened following the spider bite.

She further verified: (a) Mr. Hilton's inability to recall the October, 2011 cruise (absent reviewing something to prompt his memory) was **not unusual**; (b) her husband's physical activities were noticeably limited during each of the cruises; (c) while she and her husband drank alcohol and generally remained at one of the on-ship venues (as opposed to in the cabin) during the cruises, he did not engage in dancing or spend appreciable times on his feet; (d) she was present during a portion of the March 27, 2012 surveillance period; and (e) **actually observing Mr. Hilton sitting (either in her vehicle or on a sofa inside Mr. Covington's building) during her husband's March 27, 2012 visit to this location.**

Mrs. Hilton's testimony was substantially **corroborated by Mr. Covington**, a longtime friend of her husband. When questioned as to his observations/impressions, Mr. Covington explained: (a) he had been afforded ample opportunity to interact with Mr. Hilton both before and after the 2000 head trauma; (b) Mr. Hilton exhibited no difficulties with memory, focus, mood disturbance, etc. prior to the 2000 accident; (c) **noticeable changes had occurred subsequent to this accident, particularly involving memory and Mr. Hilton's reaction to these memory deficits**; and (d) **the nature of Mr. Hilton's pre-August 17, 2011 memory dysfunction had caused him to question how his friend was still being allowed to operate a tractor trailer.**

H. COMMISSIONER WILKERSON'S PERSONAL ASSESSMENT OF MR. HILTON'S TESTIMONY, VIDEO SURVEILLANCE AND EVIDENCE OBTAINED FROM CARNIVAL CRUISE LINE

During exhaustive cross-examination, Mr. Hilton was noticeably confused and did not always remember what he had said during his previous deposition. He actually apologized more than once for inaccurate/incorrect statements made during the deposition, including his failure to remember going on the October, 2011 cruise. Mr. Hilton also recalled certain elements of his post-head trauma medical history (involving not only treatment received for the August 17, 2011 spider bite, but also previous health issues), while confirming his wife generally attended medical appointment with him in order to assist in the provision of information.

Commissioner Wilkerson also considered records generated by Carnival Cruise Lines, determining this data offered limited insight as to Mr. Hilton's activity level during these cruises. Essentially, the records confirm unspecified purchases during the duration of the cruise (several of which occurring after midnight), but generally do not differentiate between purchases of food/beverages, services, etc.

Additionally, he reviewed the video surveillance footage submitted by Defendants. While the surveillance involved observing Mr. Hilton at multiple locations, the bulk of this footage focused on several hours spent at Mr. Covington's place of business ("Collision Repair Center") during the afternoon of March 27, 2012. The surveillance depicts Mr. Hilton standing for finite periods of time, walking short distances, engaging in limited bending/leaning and sitting in a vehicle. This time-stamped footage (conducted between 11:47 AM and 6:25 PM) also contains segments, totaling well over an hour, where Mr. Hilton is either sitting or completely out of sight.

I. RESOLUTION OF DISPUTED FACTUAL ISSUES

After thoroughly reviewing all evidence of record and observing each of the witnesses during the course of the hearing, Commissioner Wilkerson specifically found: (a) “Mr. Hilton’s presentation (both live and through deposition) is completely consistent with the material level of cognitive dysfunction confirmed by Drs. Healy, Schwartz-Watts, Brawley and Lind”; (b) “the inaccuracies/inconsistencies in his testimony, as well as incorrect/erroneous information he has provided in the context of this litigation, result from cognitive deficits produced by physical brain damage documented by at least four duly qualified specialists, rather than a purposeful, intentional, volitional or preconceived attempt to mislead and/or knowingly provide false information”; (c) “Mr. Hilton has been experiencing cognitive dysfunction since the 2000 head trauma, which clearly produced some degree of physical brain damage (as evidenced by his post-motor vehicle accident pathology, need for brain surgery and the symptoms documented through February 11, 2011)”; (d) “the persistent symptoms referenced by Dr. Solomon in 2011, coupled with the unanimous opinions expressed by Drs. Healy, Schwartz-Watts, Brawley and Lind, firmly establish the presence of appreciable cognitive dysfunction prior to August 17, 2011”; (e) “these experts, as well as the lay testimony, also verify his current level of cognitive dysfunction”; (f) “this explanation for any alleged credibility issues is founded upon uncontradicted medical evidence (objective and/or wholly validated through use of devices specifically aimed toward identifying malingering/embellishment)”; and (g) “the current circumstances unquestionably verify the legitimacy of Mr. Hilton’s cognitive loss, while dispelling any notion that the implications of his pre-existing brain damage were contrived.”

He further found: (a) "great weight" should be afforded to the opinions expressed by Dr. Healy, particularly with respect to the issue of maximum medical improvement, as this authorized treater not only had the opportunity to assess Mr. Hilton on multiple occasions, but also considered Defendants' allegations (including the assertion his current left leg and back symptoms are purely the result of preexisting conditions) and the products of their surveillance"; (b) "after reviewing the surveillance footage and being apprised as to aspects of prior medical history which Defendants believe to be particularly relevant, Dr. Healy concluded Mr. Hilton had not achieved maximum medical improvement and required further treatment through Dr. Riber"; (c) "he similarly verified the consequences of Mr. Hilton's compensable injury continued to prohibit resumption of his pre-injury employment activities"; (d) "upon reviewing the results of neuropsychological testing, in light of his own clinical observations, Dr. Healy agreed Mr. Hilton's 2000 head trauma had produced appreciable cognitive deficits secondary to physical brain damage"; and (e) "Defendants' designated authorized treater likewise validated Mr. Hilton's credibility, repeatedly declining to endorse Defendants' contention that this gentleman had presented himself and/or testified in a dishonest, deceptive or misleading fashion."

He likewise found "Mrs. Hilton's testimony to be a key element in connection with my assessment of her husband's presentation", as she: (a) "provided a compelling account of the circumstances surrounding the 2000 head trauma, as well as its impact on Mr. Hilton's cognitive abilities (as compared to his prior state)"; (b) "convincingly outlined the nature/persistence of Mr. Hilton's cognitive dysfunction in a manner which was wholly consistent with his valid neuropsychological test results and the unanimous opinions expressed by the medical experts"; (c) "made no effort to disavow the occurrence of various activities which were the focus of Defendants'

credibility allegations, instead offering explanations for this conduct in the context of his longstanding cognitive problems”; and (d) “reliably noted the current state of his cognitive disorder.”

He also found: (a) “Mr. Hilton has not achieved maximum medical improvement relative to the consequences of his compensable accident, which continue to produce left leg and back symptoms”; (b) “his left leg and back symptoms proximately result from the aggravation of preexisting, nondisabling conditions by the consequences of his August 17, 2011 compensable accident”; (c) “Mr. Hilton requires further treatment for these injury components in accordance with Dr. Healy’s recommendations”; (d) “his receipt of this treatment is reasonable, medically necessary and geared toward lessening the ultimate period of disability produced by the consequences of his compensable accident”; (e) “the current circumstances warrant Dr. Healy’s continued service as Mr. Hilton’s authorized treating physician, as well as his receipt of particular treatment modalities identified and/or endorsed by this neurological specialist”; and (f) “Mr. Hilton remains temporarily totally disabled by the consequences of his compensable accident.”

He finally found: (a) : “any discrepancies, inconsistencies, errors, etc. in connection with either Mr. Hilton’s testimony or conduct result from the cognitive dysfunction confirmed by no less than four medical specialists”; (b) “the testimony and conduct which Defendants maintain warrants termination of Mr. Hilton’s claim were/are neither volitional nor reflective of dishonesty”; (c) “entry of a finding as to a lack of credibility is not warranted in this instance”; (d) “[he] . . . would not find him not to be credible”; (e) “the issues currently in dispute, including the presence of cognitive dysfunction explaining/rebutting Defendants’ allegations as to a lack of credibility, are clearly

medically driven"; and (f) "the evidence of record amply supports Mr. Hilton's contentions as to this issue"!

LEGAL ANALYSIS

I. COMMISSIONER WILKERSON PROPERLY DECLINED TO QUESTION MR. HILTON'S CREDIBILITY

From the outset, Defendants attempt to create an issue that simply does not exist through reference to a "supposed spider bite". (See, Brief of Defendants/Appellants, p. 15). As previously noted, unappealed findings contained in Commissioner Wilkerson's Order clearly identify a spider bite as the source of Mr. Hilton's wound. Consequently, the occurrence of a spider bite is **not "supposed", but rather the law of this case.** Matheson v. McCormac, 187 S.C. 260, 196 S.E. 2d 883, 884 (1938) (Characterizing this ruling as "the well-settled law in this state"); Graves v. CSA Medical Systems, Inc., 401 S.C. 63, 735 S.E. 2d 650, 653 (2012).

Additionally, notwithstanding Defendants' cavalier references to "a host of purported 'experts'", it is clear these experts (a neurologist, two neuropsychologist and a forensic psychiatrist), including Defendants' designated treater: (a) routinely engage in the assessment of cognitive function; (b) **unanimously agreed the inaccuracies/inconsistencies in testimony, as well as the incorrect/erroneous information referenced by Defendants, resulted from cognitive deficits produced by physical brain damage, rather than a purposeful, intentional, volitional or preconceived attempt to mislead and/or knowingly provide false information;** (c) similarly dispelled any notion that Mr. Hilton was either **malinger or fabricating the implications of his pre-existing brain damage;** and (d) verified the aggravating effects of the August 17, 2011 work related injury on Mr. Hilton's prior level of cognitive dysfunction.

Further, the cries of “red herring” and “smoke and mirrors” surely ring hollow when the evidence unequivocally establishes: (a) **Mr. Hilton sought neurological evaluation from Dr. Solomon for persistent “memory loss”, as well as “mood swings” six months before the August 17, 2011 trauma;** (b) he successfully satisfied all validity criteria associated with neuropsychological testing, including devices specifically aimed toward identifying malingering/embellishment; (c) they presented no contrary medical opinions on an issue that Commissioner Wilkerson correctly determined to be “medically driven”; (d) the “compelling” testimony elicited from Mrs. Hilton, as well as the unchallenged observations of Mr. Covington, were wholly consistent with the medical expert opinions; and (e) Commissioner Wilkerson’s personal appraisal of “Mr. Hilton’s presentation (both live and through deposition) . . . [was] completely consistent with the material level of cognitive dysfunction confirmed by Drs. Healy, Schwartz-Watts, Brawley and Lind” (See, June 14, 2013 Order, Finding of Fact No. 50, p. 38).

The contentious haranguing as to “issues” involving remote medical care, two limited vacations and the content of a March 27, 2012 surveillance video likewise ignore Commissioner Wilkerson’s findings that: (a) Mr. Hilton’s pre-accident symptoms (“as of July 18, 2011”) were determined by Dr. O’Dell to be reflective of “Achilles Tendonitis” (See, June 4, 2013 Order, Finding of Fact No. 8, p. 11); (b) while Dr. Evans acknowledged the presence of left foot pain (which Dr. O’Dell attributed to Achilles tendonitis) prior to August 17, 2011, Mr. Hilton “had subsequently began experiencing ‘pins and needles pain . . . after the spider bite’ (October 31, 2011)” (See, June 4, 2013 Order, Finding of Fact No. 9, p. 12); (c) after considering both pre-August 17, 2011 and post-accident symptoms, this neurologist characterized the newly developed left lower extremity symptoms as the ‘late complications of the brown recluse spider bite’” (Id.); (d) he reviewed all of the “medical records (dating back to 2001), which Defendants

maintain are relevant to the source of Mr. Hilton's current symptoms" (See, June 4, 2013 Order, Finding of Fact No. 41, p. 33 - 34); (e) Mr. Hilton's current left leg symptoms "**proximately result** from the aggravation of preexisting, nondisabling conditions by the consequences of his August 17, 2011 compensable accident" (See, June 4, 2013 Order, Finding of Fact No. 53, p. 41); (f) consideration of the records generated by Carnival Cruise Lines "**offers limited insight** as to Mr. Hilton's activity level during these cruises . . . [, as] the records . . . [e]ssentially confirm unspecified purchases during the duration of the cruise" (See, June 4, 2013 Order, Finding of Fact No. 43, p. 34); and (g) Mr. Hilton **was actually sitting during a substantial period** ("totally well over an hour") while under surveillance on March 27, 2012 (See, June 4, 2013 Order, Finding of Fact Nos. 44, 48 and 49, pp. 35, 37).

Frankly, the most succinct response to Defendants' incessant attacks on Mr. Hilton's credibility are best summed up through Finding of Fact No. 54 (p. 41), where, **after considering numerous medical records and presiding over a hearing process that spanned over five hours, Commissioner**

Wilkerson determined:

(a) any discrepancies, inconsistencies, errors, etc. in connection with either Mr. Hilton's testimony or conduct result from the cognitive dysfunction confirmed by no less than four medical specialists; (b) the testimony and conduct which Defendants maintain warrants termination of Mr. Hilton's claim were/are neither volitional nor reflective of dishonesty; (c) entry of a finding as to a lack of credibility is not warranted in this instance; (d) I would not find him not to be credible; (e) the issues currently in dispute, including the presence of cognitive dysfunction explaining/rebutting Defendants' allegations as to a lack of credibility, are clearly medically driven; and (f) the evidence of record amply supports Mr. Hilton's contentions as to this issue.

II. COMMISSIONER WILKERSON CORRECTLY FOUND/CONCLUDED MR. HILTON'S CURRENT LEFT LEG AND BACK SYMPTOMS PROXIMATELY RESULT FROM THE CONSEQUENCES OF HIS COMPENSABLE ACCIDENT

As previously noted, Dr. Healy, the authorized treating physician, attributed Mr. Hilton's current left leg symptoms to a radicular component resulting from the consequences of the August 17, 2011 spider bite, including the injected venom itself. (See, June 4, 2013 Order, Finding of Fact No. 30, p. 23). This opinion was shared by Dr. Riber, who "attributed the current radiculopathy to 'initial compression caused by the expanding wound, as well as the venom, which itself can certainly produce nerve root irritation and neuropathic pain'" (See, June 4, 2013 Order, Finding of Fact No. 18, p. 16 - 17). Each of these medical specialists similarly verified the causal relationship of Mr. Hilton's back symptoms through compensatory gait alteration. (See, June 4, 2013 Order, Finding of Fact Nos. 18 & 31, pp. 17 and 24).

While Defendants repeatedly argue that Dr. Chen unequivocally denied this causal connection, inspection of his testimony absolutely indicates otherwise. Specifically, Dr. Chen not only corroborated the factual basis for Dr. Healy's opinion relative to causation of the left leg injury component, but also repeatedly acknowledged: (a) his lack of expertise in the area of neurology; (b) the fact any of his previous opinions as to causation were "really . . . outside [his] . . . area of specialization and expertise"; and (c) his deference to the opinions expressed by Dr. Healy relative to causation. (See, June 4, 2013 Order, Finding of Fact Nos. 35 - 37, p. 28 - 30).

Given Dr. Chen's corroborative testimony, in light of this physician's repeated admissions as to his lack of expertise to render an opinion as to causation, Defendants' contention that Dr. Chen's opinions support their current position is devoid of either factual or legal basis.

STATE OF SOUTH CAROLINA)

COUNTY OF MARLBORO)

Thomas Chad Hilton,)

Employee,)

vs.)

Flakeboard America Limited,)

Employer,)

and)

Liberty Mutual Insurance Company,)

Carrier.)

BEFORE THE
SOUTH CAROLINA
WORKERS' COMPENSATION COMMISSION

CERTIFICATE OF SERVICE
WCC FILE NUMBER: 1111934

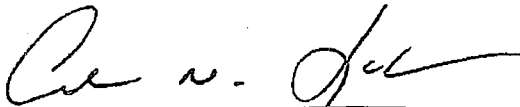
Andrew N. Safran, being first duly sworn, says that on the 21st day of December, 2012 he served the documents listed below on the persons listed below in the following fashion:

Documents: Claimant's Memorandum in Opposition to Defendants'
Application for Review

To: **HAND DELIVERED**
The Honorable Virginia L. Crocker
Judicial Director
South Carolina Workers' Compensation Commission
Post Office Box 1715
Columbia, South Carolina 29202-1715

VIA E-MAIL
L. Brenn Watson, Esquire
Willson, Jones, Carter & Baxley, P.A.
872 S. Pleasantburg Drive
Greenville, South Carolina 29607
LBWatson@wjlaw.net

This 10th day of October, 2013.


Andrew N. Safran
Post Office Box 12089
Columbia, South Carolina 29211
(803) 256-6689

000136

**DECISION AND ORDER
OF THE
APPELLATE PANEL
OF THE
SOUTH CAROLINA WORKERS' COMPENSATION COMMISSION**

**COMMISSION PANEL: THE HONORABLE SUSAN S. BARDEN, CHAIR; THE
HONORABLE GENE MCCASKILL; THE HONORABLE ANDREA C. ROCHE**

SCWCC FILE NO.: 1111934

Thomas Hilton,

Claimant

v.

Flakeboard America Limited,

Employer, and

Liberty Mutual Insurance Company,

Carrier, Defendants.

Hearing held in Columbia,
South Carolina on October 14th, 2013

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

Appearances: Andrew N. Safran, for Claimant

L. Brenn Watson, for Defendants

Filed:

May 21, 2014

STATEMENT OF THE CASE

The instant proceeding was initiated by Defendant/Employer's Form 21 Employer's Request for Hearing dated July 6, 2012 to address termination of temporary disability benefits pursuant S.C. Code §42-9-206(E) and to request credit for overpayment of temporary compensation pursuant to §42-9-210. Also at issue in the Defendant's pleading was whether: (a) Claimant reached MMI, (b) Claimant required further treatment for the consequences of his compensable accident; and (3) Claimant remains temporarily totally disabled. On October 30, 2012 Defendants also filed a Motion for Court Order to Compel the Department of Social Services to produce records in the above referenced matter.

In response, Claimant maintained: (a) any inconsistent and/or inaccurate statements contained in the record (deposition testimony or otherwise) were the product of significant cognitive deficits stemming from physical brain damage, rather than a purposeful/intentional/volitional attempt to mislead; (b) he had not achieved maximum medical improvement as to the consequences of his compensable accident; (c) Defendants were obliged to authorize the various treatment modalities which had been prescribed/recommended by Dr. Healy, their designated treating physician; and (d) he remained temporarily totally disabled.

On June 4, 2013, the single Commissioner issued his Decision and Order containing the following findings of fact and conclusions of law:

FINDINGS OF FACT

1. *On August 17, 2011, Mr. Hilton sustained a compensable injury to his left buttocks/upper leg area while transporting material, via tractor trailer, to a location in Virginia. Specifically, while en route to this delivery site, Mr. Hilton was bitten in his buttocks/upper leg area by an insect as he was operating the tractor trailer.*
2. *At the time he sustained this compensable injury, Mr. Hilton was performing duties arising out of and within the course and scope of his employment as a tractor trailer/delivery driver for Flakeboard America Limited, where had worked since May 3, 2010.*

3. After sustaining this injury, Mr. Hilton: (a) reported its occurrence to a representative of Flakeboard America Limited; (b) continued to experience buttocks/upper leg pain; (c) nonetheless completed his delivery assignment; and (d) ultimately returned to his Bennettsville, South Carolina home, where his wife observed evidence of an insect bite at the focal site of his pain.

4. Although he attempted to continue working, Mr. Hilton's symptoms (pain, swelling and redness emanating from the wound) persisted, to the extent he sought treatment through the Marlboro Park Hospital Emergency Room on August 19, 2011. As confirmed by a review of the records generated by this facility, he: (a) reported the sudden onset of buttocks/upper leg pain two days prior; (b) indicated he had since experienced "pain, redness, skin breakdown . . . [and] swelling [from a] single lesion . . . [that he attributed to] being bitten by a spider"; (c) exhibited "a raised, round, red area with obvious bite mark in the center of the . . . [buttocks/upper leg] lesion"; (d) also manifested skin discoloration ("bright red"), tenderness and swelling ("edematous") in the "area surrounding the bite"; (e) was diagnosed to have experienced a spider bite, for which he received an injection of Decadron, as well as a prescription for Percocet; and (f) was instructed to seek further treatment in the event his symptoms did not improve.

5. When his condition progressively worsened, Mr. Hilton was assessed at Agape Senior Primary Care (August 22, 2011), where he: (a) related the same history and mechanism of injury; (b) reported high fever the previous day; (c) exhibited a "[l]arge, warm, red abscessed . . . [area in the] left upper posterior thigh . . . [that measured] approx[imately] . . . 5 inches in diameter [and was] . . . exquisitely painful"; (d) received an injection of Marcaine into the center of this abscessed wound; and (d) was directed to Dr. Chi-Dai Chen for surgical assessment.

6. Upon initially examining Mr. Hilton (August 23, 2011), Dr. Chen: (a) noted persistent complaints "of severe pain and drainage from the wound . . . [with] associated symptoms of fever, nausea, and vomiting"; (b) observed "an area of erythema and induration on the left posterior thigh"; (c) similarly identified "an opening with some underlying necrotic subcutaneous tissue . . . consistent with an abscess with surrounding cellulitis"; and (d) admitted Mr. Hilton to the hospital "for IV antibiotics and . . . local debridement . . . [d]ue to the severity of his symptoms"

7. During the course of this August 24, 2011 procedure, Dr. Chen: (a) excised the skin overlying Mr. Hilton's abscess, which led to an "immediate finding of underlying

necrotic fat"; (b) engaged in "... [b]lunting dissection to breakdown any loculation and purulent draining" after excising this necrotic fat; and (c) obtained an intraoperative culture prior to washing the wound and packing this area "using moist gauze dressing, 4 x 4, and tape." Following this procedure, Dr. Chen inspected the wound on two occasions (September 1, 2011 and September 12, 2011) prior to placing Mr. Hilton on PRN status.

8. While Mr. Hilton had admittedly encountered and sought treatment for predominant left heel/ankle pain prior to his August 17, 2011 injury, consideration of various reports generated by Dr. Jason B. O'Dell of Pee Dee Orthopaedic Associates, P.A. (from whom he received medical care for this problem) verifies: (a) the diagnosis as of July 28, 2011 was "Achilles Tendonitis"; (b) on that date, Mr. Hilton reported the pain (that Dr. O'Dell had diagnosed to be reflective of "Achilles Tendonitis") radiated up the back of his leg; and (c) on December 1, 2011, the last day he received treatment from this orthopaedic surgeon, Dr. O'Dell's "FOCUSED EXAM. . . remain[ed] unchanged. . . [with] ongoing insertional pain and tenderness", which this physician continued to characterize as the product of "(Chronic). . . Achilles tendinitis."

9. A review of reports generated by Dr. W. James Evans of Comprehensive Neurologic Services, P.C. (to whom he was referred by Dr. O'Dell) reveals: (a) Mr. Hilton presented to Dr. Evans initially on September 19, 2011 with complaints of bilateral foot pain (worse on the left), mostly involving the heel, which had been present for five (5) months; (b) the upward radiation referenced by Dr. O'Dell had apparently improved, while "[p]ertinent negatives included decreased mobility, instability, limping, night pain, night-time awakening, numbness, swelling, weakness or foot drop"; (c) an acknowledgement that the left foot pain which Dr. O'Dell attributed to Achilles tendonitis was present prior to his August 17, 2011 spider bite (September 19, 2011); (d) by October 31, 2011, Mr. Hilton's left foot pain had worsened; (e) he had subsequently began experiencing "pins and needles pain . . . after the spider bite" (October 31, 2011); and (e) based upon the particular elements of Mr. Hilton's history, this neurologist characterized the newly developed left lower extremity symptoms as the "late complications of the brown recluse spider bite."

10. During this time period (October 21, 2011), Mr. Hilton began receiving authorized treatment for the ongoing left leg symptoms Dr. Evans had attributed to the spider bite through Marlboro Primary Care Associates. While treating at this facility:

(a) he was diagnosed to be suffering from "neuropathic" left leg pain; (b) Mr. Hilton did not receive appreciable benefit from prescribed medications; (c) staff members were apprised of his previously diagnosed left Achilles condition; and (d) he was ultimately referred for neurological consultation by Dr. Gopalbhai Vaghela of this practice.

11. On February 13, 2012, Mr. Hilton was evaluated by Dr. R. Joseph Healy (identified by Dr. Vaghela's assistant as the only neurologist in Florence that accepted workers' compensation cases), who: (a) noted not only the presence of persistent left leg symptoms, but also the non-traumatic onset of low back pain; (b) prescribed Gralise; and (c) recommended proceeding with electrodiagnostic studies. Significantly, the EMG element of this testing, which was performed on March 14, 2012, revealed abnormal nerve function of the left leg, which Dr. Healy characterized as "a non-discogenic sciatica", prompting him to again prescribe Gralise. This authorized physician also ordered a lumbar MRI scan to further assess Mr. Hilton's back pain.

12. Inspection of Dr. Healy's notes/reports for the period April 16, 2012 through July 17, 2012 indicates: (a) his belief Mr. Hilton's left non-discogenic sciatica was the product of compression stemming from the initial consequences of his compensable brown recluse spider bite; (b) this condition was further compromising Mr. Hilton's gait, affecting the foot and the left ankle, and having a potentially aggravating impact on the ~~pre-injury left Achilles tendon problem~~ ("he had problems with the left achilles tendon prior to the bite but he appears to have an achilles tendonitis at this point which may be from posturing of the left foot"); (c) the neuropathic pain condition was reaching a chronic phase (May 17, 2012); and (d) while the Gralise "help[ed] . . .", Mr. Hilton was having difficulty obtaining authorization of this medication by Liberty Mutual.

13. On May 31, 2012, Mr. Hilton was deposed by defense counsel. My review of this nearly two hour deposition reveals that on direct examination, Mr. Hilton: (a) disclosed the occurrence of a 2000 motor vehicle accident that produced a head injury initially resulting in a period of unconsciousness; (b) advised that it also required surgery for ". . . [s]ome bleeding"; (c) recalled only one physician visit following this surgery (for staple removal), while denying any problems associated with this head trauma since the single post-injury doctor visit; (d) admitted a June, 2011 vacation cruise, but required review of a card in his wallet to ascertain when this trip occurred; and (e) testified Dr. Healy had been the only neurologist from whom he had ever received treatment.

14. Additionally, Mr. Hilton testified: (a) the radiating left leg pain that was producing the pins/needles sensation in his foot had only begun some time after the August 17, 2011 spider bite and was distinguishable from the Achilles tendonitis sensations documented by Dr. O'Dell (which had actually extended upward approximately two inches beyond the ankle); (b) the current leg pain was likewise not associated with an incident (small piece of metal became embedded in the skin around his left ankle) that had occurred some years prior (creating no residual problems); (c) the back pain referenced by Dr. Healy developed gradually and had not been present at the time of his August 17, 2011 injury; (d) his driving had substantially decreased since the accident date (estimating once a week when asked to specifically quantify); (e) typical periods of standing fell in the 15 -- 20 minute range; (f) the majority of time at his home was spent laying down; (g) he had not joined his wife on a subsequent (October, 2011) cruise; and (h) his appearance/the manner in which he walked, stood, etc. could vary, particularly if he was having a "bad day".

15. In this regard, inspection of records generated by Dr. Bruce S. Solomon of Pinehurst Neurology, P.A. reveals: (a) this motor vehicle accident resulted in "multiple trauma . . . [including] a closed-head injury"; (b) his particular pathology involved "a subdural and epidural hematoma on the right" that required performance of a craniotomy; (c) receipt of Dilantin therapy for "subsequent seizures", in conjunction with repeated neurological assessment following the 2000 head trauma; (d) he was medically restricted from resuming truck driving until June 13, 2001 ; and (e) Mr. Hilton was continuing to experience "short-term memory problems" (ex. "putting his keys in the refrigerator and a ham in the cabinet") following this injury.

16. Significantly, on February 11, 2011 (approximately six months before sustaining the spider bite), Mr. Hilton was reevaluated by Dr. Solomon, who noted: (a) reports of persistent "memory loss", as well as "mood swings"; (b) the absence of any complaints of "back pain"; and (c) slightly deficient short-term memory per clinical examination.

17. On August 9, 2012, Mr. Hilton was independently evaluated by Dr. Ezra B. Riber of Palmetto Pain Management, LLC, who: (a) was aware of all material aspects of Mr. Hilton's post-injury history; (b) specifically noted the various symptoms which were exhibited prior to Dr. Chen's surgery, as well as Dr. Evans' belief the worsening of "pre-injury leg pain was the result of the spider bite"; (c) observed limited lumbar range of motion "particularly with extension and concomitant left lateral flexion"; (d) discovered

"significant EHL weakness on the left consistent with an L5 radicular syndrome"; (e) noticed Mr. Hilton's gait favored the left lower extremity; and (f) felt Mr. Hilton had developed "[c]ompensatory low back pain . . . following altered gait" with an associated lumbar facet syndrome.

18. *Based upon these findings and Mr. Hilton's medical history, Dr. Riber: (a) recommended initial treatment of the radicular pain through a selective nerve root injection; (b) explained the "clinical EHL weakness is certainly consistent with the results of the electrodiagnostic studies"; (c) attributed the current radiculopathy to "initial compression caused by the expanding wound, as well as the venom, which itself can certainly produce nerve root irritation and neuropathic pain"; (d) referenced the previously documented "change in his premorbid symptom pattern" as a basis for attributing Mr. Hilton's current neuropathic pain and the "likely compensatory" back pain to the consequences of the spider bite; and (e) determined Mr. Hilton had not reached maximum medical improvement, while indicating his work status would be "restricted to sedentary" activities with the ability "to change positions per tolerance."*

19. *On August 12, 2012, Mr. Hilton underwent a forensic psychiatric evaluation by Dr. Donna Schwartz-Watts, a clinical professor of forensic psychiatry affiliated with the University of South Carolina School of Medicine's Department of Neuropsychiatry and Behavioral Science. At that time, Dr. Schwartz-Watts also interviewed Mrs. Hilton, who reported: (a) her husband manifested "violent mood swings which are in part provoked by his lack of memory"; (b) aggressive denial when reminded of statements he could not remember; (c) activity reflective of confabulation, which she described as "a clinical symptom of cognitive impairment, [that] . . . is not volitional"; and (d) a "general expression of decreased . . . emotion . . . unless he is aggressive."*

20. *Dr. Schwartz-Watts also conducted a mental status examination, which verified: (a) Mr. Hilton "had cognitive impairment including difficulty with visual spatial design"; (b) "[h]e perseverated, . . . a clinical symptom of cognitive impairment"; (c) Mr. Hilton "had difficulty abstracting similarities between difficult objects"; (d) he also encountered "difficulty registering and recalling objects and required prompting and forced choice"; (e) poor performance "on a test of verbal fluency", which was also associated with perseveration; and (f) Mr. Hilton "gave a good effort" in connection with this assessment.*

21. She further observed: (a) the presence of "end gaze nystagmus" (previously documented by Dr. Solomon); (b) "difficulty performing rapid alternating movements" (which could ultimately be accomplished with practice); (c) Dr. Solomon's records referenced various relevant factors (a right sided subdural and epidural hematoma with a resultant focal motor seizure disorder; "agusia and olfactory impairment"; "short-term memory problems"; "short-term memory impairment on neurological evaluation"); and (d) neuropsychological assessment was warranted.

22. In accordance with Dr. Schwartz-Watts' directive, Mr. Hilton underwent neuropsychological evaluation by Dr. Tora Brawley of the University of South Carolina School of Medicine's Department of Neuropsychiatry and Behavioral Science (August 16, 2012), who confirmed: (a) her awareness of the fact "discrepancies . . . in his report of personal history facts . . . [had led to] accusations that he was purposefully being dishonest"; (b) "Mr. Hilton had difficulty correctly recalling some personal information . . . [d]uring the clinical interview"; (c) review of relevant medical records "revealed that he suffered both a subdural and epidural hematoma which required surgical evacuation via a right temporal craniotomy" in 2000; (d) memory issues following the 2000 head trauma; (e) reports of "continued problems with memory loss, mood swings, light headedness and sleep difficulties" to Dr. Solomon in February, 2011; and (f) "his difficulties have worsened following complications from a spider bite in August, 2011."

23. In conjunction with this evaluation, Dr. Brawley, who currently serves as an assistant professor for the University of South Carolina School of Medicine, administered ten neuropsychological instruments, including "the Test of Memory Malingering", which "revealed him to have significant deficits in many areas" These deficits included "immediate verbal learning", "immediate verbal memory for prose passages", "recall of a complex figure", "controlled verbal fluency", "judgment of line orientation", "nonverbal abstract reasoning and problem solving" and "trail making ability".

24. Dr. Brawley also specifically explained that "[f]ormal effort testing was conducted and performance was completely within normal limits, indicating no evidence of an attempt to exaggerate or malingering cognitive symptoms."

25. Based upon Mr. Hilton's relevant medical history, her clinical interview and the results of this rather extensive neuropsychological testing, Dr. Brawley determined: (a) "testing results revealed the presence of severe cognitive deficits in many areas assessed, including memory"; (b) "[t]hese deficits are consistent with residual organic deficits

from his previous head injury and have likely been exacerbated by more recent . . . physical injuries and psychosocial stressors"; (c) "[t]here was no indication of an attempt to malingering on testing"; (d) "any discrepancies noted in his report of personal history or other areas are related to his cognitive deficits, rather than an attempt to purposely report incorrect information"; and (e) "[t]his [conclusion] . . . is further supported by documented reports and medical evidence of continued memory problems in February, 2011."

26. After considering these neuropsychological test results, in light of her own clinical finding, Mr. Hilton's medical history and the content of his deposition, Dr. Schwartz-Watts: (a) concluded "to a reasonably degree of medical certainty that Mr. Hilton has severe cognitive impairments, including memory disturbance, confabulation and perseveration which can account for the obvious discrepancies in his deposition testimony"; and (b) expressed "grave concerns about his competency to testify in these proceedings due to his memory deficits and inability to learn new information."

27. During this time period (August 14, 2012), Mr. Hilton was also evaluated by Dr. Nicholas A. Lind of Post Trauma Resources, who observed: (a) apparent memory impairment per mental status examination; (b) "Mr. Hilton's score of 84 . . . [on the MMPI-2-RF] is consistent with the memory problems expected from his 2000 head trauma"; ~~(c) his "memory complaints are consistent with his described head injury and~~ appear legitimate as determined by the validity measures of the psychological testing measures used in this evaluation"; (d) "Mr. Hilton's reported memory deficits are more likely than not, with as much certainty reasonable in the field of psychology, legitimate"; and (e) formal neuropsychological testing would better gauge "the validity and extent of Mr. Hilton's memory deficits"

28. In this regard, after reviewing "the findings and conclusions of Dr. Brawley's 16 August, 2012 neuropsychological evaluation", Dr. Lind (also a practicing neuropsychologist) agreed: (a) "[t]he results are consistent with the psychological evaluation . . . [he had] conducted on 14 August, 2012 and suggests significant deficits in memory as well as executive and dexterity impairments"; and (b) "[t]his additional evidence confirms that Mr. Hilton's reported memory deficits are more likely than not, with as much certainty reasonable in the field of psychology, legitimate and explain the difficulties he continues to experience with recall of his history."

29. During the course of his August 20, 2012 deposition, Dr. Healy was extensively examined as to various contested issues, including the likely source of Mr. Hilton's current symptoms, additional medical needs and work status. He was also repeatedly questioned, through use of medical records and surveillance video footage, relative to various aspects of Mr. Hilton's credibility, particularly as it related to the consequences of his August 17, 2011 spider bite, his physical/functional capabilities and the deposition discrepancies.

30. In discussing the source of Mr. Hilton's current left leg symptoms, Dr. Healy verified: (a) an acknowledgement of pre-injury symptoms that were reflective of some degree of neuropathic pain (Healy Deposition, pp. 31 – 37; 43 – 44); (b) the pins and needles sensation Mr. Hilton was now experiencing, which was clearly indicative of neuropathic pain, had been neither reported nor identified by any medical record prior to August 17, 2011 (Healy Deposition, pp. 95 & 100); (c) the findings documented through pre-surgical treatment notes (pain, redness, skin breakdown, swelling, bite marks, fever, nausea and vomiting) were not only indicative of a brown recluse spider bite, but also a "systemic effect" produced by the injected venom (Healy Deposition, pp. 76 – 79; 85, 87); (d) toxic venom of this nature can, in and of itself, create neuropathic pain of the type described by Mr. Hilton (Healy Deposition, pp. 41,81 & 122); (e) the nature/degree of Mr. Hilton's pre-surgical symptoms (swelling; size of abscess and surrounding inflammation) were also sufficient to create sciatic nerve compression, even in the absence of muscle tissue damage (Healy Deposition, pp. 80 & 88); (f) Mr. Hilton's current left leg symptoms most probably, to a reasonable degree of medical certainty, result from the consequences of the August 17, 2011 spider bite (venom itself and/or nerve compression caused by pre-surgical wound development) and/or the aggravation/acceleration of preexisting pathology by the consequences of this bite (Healy Deposition, pp. 81 – 84, 89 – 90, 103); (g) the symptoms which temporally resulted from the spider bite, as well as the degree of necrosis documented during surgery, could not be faked (Healy Deposition, pp. 84 – 88); (h) the presence of neuropathic injury had been objectively verified by EMG testing (Healy Deposition, pp. 17 & 125); and (i) he was comfortable with his ability to render this opinion as to causal connection, indicating Mr. Hilton's surgeon was in no better position to address this issue (Healy Deposition, pp. 70 & 90).

31. When questioned as to Mr. Hilton's current back symptoms, Dr. Healy explained: (a) an understanding that "his walking was [not] . . . totally normal" pre-injury (Healy Deposition, p. 44); (b) the consequences of the spider bite had further contributed to gait alteration (Healy Deposition, p. 104); (c) while he noticed this gait disturbance, "it wasn't dramatic" (Healy Deposition, p. 7); (d) the video surveillance footage was consistent with his prior observations (Healy Deposition, p. 63); (e) this gait disturbance had resulted in the development of mechanical low back pain (Healy Deposition, p. 72); (f) Mr. Hilton's current back symptoms were compensatory (due to increased gait alteration attributable to neuropathic pain) and had "come on quicker than . . . might have otherwise [been] . . . expected" due to the aggravating/accelerating impact of the causally related increase in neuropathic pain by the consequences of the brown recluse spider bite (Healy Deposition, pp. 103 - 104, 122 - 123); (g) the EHL weakness identified by Dr. Riber was a relatively objective finding that was consistent with the sciatica confirmed by electrodiagnostic studies and "absolutely" reflective of actual nerve dysfunction (Healy Deposition, pp. 119 - 121, 125 - 126); (h) Mr. Hilton required treatment of the nature outlined by Dr. Riber (Healy Deposition, p. 121); (i) given his longstanding professional relationship with Dr. Riber (who he characterized as "the guru" for pain management care), it was his wish that Mr. Hilton receive this treatment through Dr. Riber (Healy Deposition, pp. 119 & 122); and (j) Mr. Hilton had not yet achieved maximum medical improvement (Healy Deposition, p. 132).

32. Additionally, Dr. Healy addressed Mr. Hilton's cognitive capacity, specifically confirming/concluding: (a) while the focus of his treatment had been the neuropathic pain component, he had noticed clinical cognitive limitations (Healy Deposition, p. 45); (b) it was not unusual for someone who has experienced head trauma of the nature Mr. Hilton sustained in 2000 to develop cognitive loss (Healy Deposition, p. 108); (c) persistent memory loss was actually "referenced as an ongoing symptom to a neurologist" before the August 17, 2011 accident date (Healy Deposition, pp. 109 - 110); (d) neuropsychological testing of the nature performed by Dr. Brawley included "not only specific tests, but actual portions of other tests, that are specifically geared towards ferreting out exaggeration and malingering" (Healy Deposition, p. 111); (e) the absence of malingering and exaggeration of cognitive symptoms, as well as the valid assessment of cognitive function verified by the neuropsychological test battery administered by Dr. Brawley were consistent with his own intuitive impressions (Healy Deposition, p. 112);

(f) the results of this testing did not support allegations that Mr. Hilton's actions (including deposition testimony) were reflective of dishonesty and deceit (Healy Deposition, p. 112); (g) these test results were indicative of a "significant problem from the head injury" (Healy Deposition, p. 114); (h) his agreement with Dr. Brawley's determination "that any discrepancies noted in his report of personal history or other areas are related to cognitive deficits rather than an attempt to purposefully report incorrect information" (Healy Deposition, pp. 114 - 115); (i) his impressions were also consistent with those of Drs. Schwartz-Watts and Lind (Healy Deposition, pp. 115 - 116); (j) he had no doubt Mr. Hilton was experiencing "noticeable cognitive damage secondary to brain injury . . . [which is] a very reasonable and more than likely explanation for . . . [the various factual] discrepancies" identified by Defendants (Healy Deposition, pp. 116 - 117); and (k) to a reasonable degree of medical certainty, he was "comfortable that [Mr. Hilton] in his efforts to receive treatment . . . and his testimony has done nothing contrived or purposeful, but rather that any of these discrepancies or conflicts are the results of his brain injury and results of cognitive deficits" (Healy Deposition, p. 128)

33. After considering the purportedly dishonest behavior alleged by Defendants, Dr. Healy similarly/consistently validated Mr. Hilton's credibility, testifying: (a) although he ~~recognized the presence of certain discrepancies in Mr. Hilton's medical history, he had~~ no concerns as to this gentleman's credibility (Healy Deposition, pp. 31 - 38, 45 - 49); (b) his participation in the October, 2011 cruise was an insufficient basis upon which to characterize Mr. Hilton as "a liar" (Healy Deposition, pp. 55 - 60); (c) the presence of cognitive deficits stemming from the prior brain injury was a reasonable explanation for these alleged inconsistencies (Healy Deposition, p. 117); (d) the need for cues (i.e., testifying accurately after looking at a card bearing the date of a prior cruise) "fits" as an explanation for Mr. Hilton's ability to recall certain information (Healy Deposition, pp. 117 - 118); (e) Mr. Hilton's satisfaction of validity criteria, including the absence of malingering or exaggeration per applicable elements of the neuropsychological test battery administered by Dr. Brawley, supported his belief there was no indication this gentleman was not credible (Healy Deposition, pp. 112 - 113); (f) he would "not . . . blindly support somebody who is faking, malingering or being less than candid" (Healy Deposition, p. 127); and (g) Mr. Hilton was a credible patient (Healy Deposition, pp. 70 - 71, 106, 131 - 132).

34. This authorized treating physician's testimony further establishes: (a) due to his causally related symptoms and the potentially impairing effects of medication, in light of the nature of his occupation, Mr. Hilton had been maintained on out-of-work status (Healy Deposition, pp. 18, 63 - 64, 67); (b) his primary instructions in terms of activities of daily living were to avoid "anything extreme", while attempting to function within tolerance levels (Healy Deposition, pp. 19, 66 - 67); (c) the surveillance video did not depict Mr. Hilton engaging in any unacceptable activity (Healy Deposition, pp. 66 & 74); and (d) although Mr. Hilton remained on out-of-work status, he had no objection to an attempt to engage in sedentary activity in accordance with Dr. Riber's recommendation (which he felt could be therapeutic) (Healy Deposition, p. 127)

35. Shortly after deposing Dr. Healy, Defendants solicited Dr. Chen's testimony. While this general surgeon initially opined that he did not believe Mr. Hilton's abscess or area of inflammation was large enough to create compression on the sciatic nerve, he subsequently conceded: (a) he neither was nor considered himself an expert in the field of neurology (Chen Deposition, p. 38); (b) he likewise was not an expert in terms of the ultimate implications of venomous bites (Id.); (c) he had no reason to dispute Mr. Hilton was bitten by an insect on August 17, 2011 (Chen Deposition, p. 41); (d) Mr. Hilton's post-injury complaints/symptoms were "consistent with . . . ones that are commonly attributable to a Brown Recluse spider bite" (Chen Deposition, p. 43); (e) the presence of the same reported symptoms upon which Dr. Healy had concluded Mr. Hilton was manifesting "a systemic effect" produced by spider venom (Chen Deposition, pp. 46 - 48); (f) the tissue damage discovered during surgery was consistent with the destructive process caused by venom or infection (Chen Deposition, p. 52); (g) "venom itself can create damage to an underlying nerve" (Id.); and (h) venom can likewise "create nerve irritation and neuropathic pain." (Chen Deposition, p. 53).

36. Dr. Chen also candidly acknowledged/agreed: (a) nerve root injury "would actually fall more within . . . a neurologist[s] . . . area of expertise than a surgeon's in terms of delineating etiology of nerve irritation or nerve damage" (Chen Deposition, pp. 53 - 54); (b) he would "normally defer to a neurologist in terms of making a conclusion as to what is the cause of nerve root damage in a scenario" (Chen Deposition, p. 54); (c) Dr. Healy's finding of non-discogenic sciatic per electrodiagnostic studies had "some degree of objectivity" (Id.); (d) he would defer to the specialist's (Dr. Healy's) opinion relative to the causal relationship of Mr. Hilton's non-discogenic sciatica and the

consequences of the spider bite (Chen Deposition, pp. 54 - 55); (e) he did not "have the specialty or knowledge to disagree with" Dr. Healy's opinion (Chen Deposition, p. 55); (f) Dr. Evans' opinion that Mr. Hilton's current left lower extremity symptoms represented the late complication of a brown recluse spider bite was consistent with Dr. Healy's conclusion "in terms of etiology" (Chen Deposition, p. 57); (g) he would likewise defer to Dr. Evans' opinion on this point (*Id.*); and (h) he did not "hold [him]self . . . out as being an expert in [n]eurology (*Id.*)

37. This physician further testified: (a) identification of the source of nerve damage identified by an EMG was outside his area of expertise (Chen Deposition, p. 60); (b) he did not possess the expertise to decide the question of causation (Chen Deposition, p. 60 - 61); (c) he was consequently deferring to the neurologist "in terms of cause and effect as far as what . . . [Mr. Hilton's] current problems are and how they relate to the spider bite" (Chen Deposition, p. 61); (d) any opinions offered in response to defense counsel's questions on this point were "really . . . outside [his] . . . area of specialization and expertise" (Chen Deposition, p. 65); and (e) given this lack of expertise, he "would defer to the [n]eurologist . . . as to his determination of the source of [Mr. Hilton's] . . . symptoms" (Chen Deposition, p. 76).

38. Pursuant to questionnaire responses dated November 7, 2012, Dr. Schwartz-Watts confirmed: (a) "~~... [g]iven the nature/degree of his previous head trauma~~ (involving both subdural and epidural hematoma requiring surgical evacuation via right temporal craniotomy), [her] . . . clinical findings and the results of his valid neuropsychological testing, . . . Mr. Hilton's current cognitive deficits (including severe memory compromise) most probably result from physical brain damage"; (b) ". . . [i]n view of the nature/degree of Mr. Hilton's previous head trauma, [her] . . . clinical findings and the results of neuropsychological testing, . . . the cognitive deficits attributable to this physical brain damage have most probably been aggravated by the consequences of his August 17, 2011 work related injury"; (c) ". . . [g]iven the nature/degree of Mr. Hilton's physical brain damage, [her] . . . clinical findings and the results of neuropsychological testing, . . . inconsistencies/ inaccuracies arising in connection with his testimony, as well as any inconsistent/inaccurate information he has provided when questioned as to prior events and/or statements (i.e., requiring reliance on his memory), are most probably the result of this physical brain damage, rather than a purposeful/intentional/ volitional attempt to mislead"; (d) "the cognitive deficits

produced by Mr. Hilton's physical brain damage (including the aggravation created by the consequences of his August 17, 2011 work related injury) most probably negatively effect and/or impair his behavioral judgment, including the manner in which he responds to stressors and conducts his daily activities"; and (e) "lapses in behavioral judgment would also most probably be attributable to the aggravation of Mr. Hilton's cognitive deficits by the consequences of his August 17, 2011 work related injury. . . ."

39. *A questionnaire executed by Dr. Brawley on November 8, 2012 similarly: (a) attributes "Mr. Hilton's current cognitive deficits (including severe memory compromise) . . . [to] physical brain damage"; (b) recognizes "the cognitive deficits attributable to this physical brain damage have most probably been aggravated by the consequences of. . . [Mr. Hilton's] August 17, 2011 work related injury"; (c) relates any "inconsistencies/inaccuracies arising in connection with his testimony, as well as any inconsistent/inaccurate information he has provided when questioned as to prior events and/or statements (i.e., requiring reliance on his memory) . . . [to] the result[s]. . . of this physical brain damage, rather than an purposeful/intentional/volitional attempt to mislead"; (d) recognized "the cognitive deficits produced by Mr. Hilton's physical brain damage (including the aggravation created by the consequences of his August 17, 2011 work related injury) most probably affect and/or impair his behavioral judgment, including the manner in which he responds to stressors and conducts his daily activities"; and (e) ties these "lapses in behavioral judgment . . . to his previous brain damage and the aggravation of Mr. Hilton's cognitive deficits by the consequences of his August 17, 2011 work related injury. . . ." Dr. Lind also offered identical opinions, from a neuropsychological standpoint, via questionnaire responses dated November 8, 2012.*

40. *Significantly, when asked to address these questions, Dr. Healy verified (agreed): (a) Mr. Hilton's "current cognitive deficits (including severe memory compromise) most probably result from physical brain damage"; (b) "the cognitive deficits attributable to this physical brain damage have most probably been aggravated by the consequences of Mr. Hilton[s] . . . August 17, 2011 work related injury"; (c) the testimonial inaccuracies (which Defendants alleged to be reflective of a knowing effort to deceive) "are most probably the result of this physical brain damage, rather than a purposeful/intentional/volitional attempt to mislead"; and (d) the negative impact Mr. Hilton's aggravated cognitive deficits are producing on his behavioral judgment.*

41. The undersigned also reviewed various medical records (dating back to 2001), which Defendants maintain are relevant to the source of Mr. Hilton's current symptoms. These records include: (a) November 28, 2001 notes from Marlboro Park Hospital that reference complaints of a left knee contusion; (b) January 10, 2003 reports from the same hospital that relate to low back pain following a motor vehicle accident; (c) chiropractic treatment records identifying receipt of spinal (cervical, thoracic and lumbar) care for soft tissue injury stemming from this motor vehicle accident (January 13, 2003 until March 29, 2003), as well as the chiropractor's assignment of a 5% impairment rating; (d) reports from Marlboro Park Hospital relative to the assessment/removal of the previously referenced piece of metal that had become embedded in Mr. Hilton's left ankle area; and (e) October 13, 2008 x-rays of Mr. Hilton's left foot and knee, which revealed on "an old fifth metatarsal fracture".

42. The undersigned also considered records generated by Carnival Cruise Lines, which reflect: (a) Mr. Hilton traveled on six cruises (ranging from three to five days in duration) from April 15, 2009 through early June, 2012; (b) two of these cruises occurred following his accident date; (c) he participated in an October 24, 2011 - October 29, 2011 cruise; (d) during the course of this cruise, various charges were incurred under the name of Michelle Hilton at several facilities on the ship ("Stars Bar", "Diamonds Disco", "Bogarts Café", "Wine Sensation", "Puttin on Ritz", and "Pool").

while other charges were attributed to Mr. Hilton's "FOLIO" number; (e) two others accompanied he and his wife on the June, 2012 cruise (which also lasted five days); and (f) on-ship charges (identifying substantially the same venues) were incurred through Mrs. Hilton's account.

43. However, the Carnival Cruise Line data offers limited insight as to Mr. Hilton's activity level during these cruises. Essentially, the records confirm unspecified purchases during the duration of the cruise (several of which occurring after midnight), but generally do not differentiate between purchases of food/beverages, services, etc.

44. Additionally, the undersigned reviewed the video surveillance footage submitted by Defendants. While the surveillance involved observing Mr. Hilton at multiple locations, the bulk of this footage focused on several hours spent at Mr. Covington's place of business ("Collision Repair Center") during the afternoon of March 27, 2012. The surveillance depicts Mr. Hilton standing for finite periods of time, walking short distances, engaging in limited bending/leaning and sitting in a vehicle. This time-

stamped footage (conducted between 11:47 AM and 6:25 PM) also contains segments, totaling well over an hour, where Mr. Hilton is either sitting or completely out of sight.

45. During exhaustive cross-examination, Mr. Hilton was noticeably confused and did not always remember what he had said during his previous deposition. He actually apologized more than once for inaccurate/incorrect statements made during the deposition, including his failure to remember going on the October, 2011 cruise. Mr. Hilton also recalled certain elements of his post-head trauma medical history (involving not only treatment received for the August 17, 2011 spider bite, but also previous health issues), while confirming his wife generally attended medical appointment with him in order to assist in the provision of information.

46. In this regard, I find Mr. Hilton's testimony remained consistent relative to: (a) his recollection that the previous incidents referenced by Defendants (involving his left leg and back) had not resulted in any permanent or long term symptoms/limitations; (b) his receipt of treatment from Dr. O'Dell for left leg symptoms prior to the August 17, 2011 accident date; (c) the distinction between symptoms attributable to Achilles tendonitis and the left leg pain which developed in the aftermath of the brown recluse spider bite; and (d) the nature of his current back symptoms.

47. Given Mr. Hilton's well-documented cognitive deficits, the testimony of his wife proved to be particularly enlightening. Specifically, Mrs. Hilton: (a) corroborated the circumstances surrounding her husband's 2000 head trauma (from a standpoint of someone who was in the vehicle at the time of impact, on the scene following his ejection from their vehicle and present for most of his treatment); (b) noted Mr. Hilton had changed following this accident; (c) provided examples of the cognitive problems he had exhibited following the 2000 head trauma; (d) acknowledged his recollection of events occurring prior to the 2000 accident remained good; (e) outlined the "routine" they had implemented to facilitate her husband's continued employment rather than pursuing disability benefits; (f) confirmed Mr. Hilton's cognitive compromise had not resolved with the passage of time and remained problematic, to the extent they had returned to Dr. Solomon in the hope of obtaining medical assistance approximately six months prior to the August 17, 2011 spider bite; and (g) indicated his memory lapses, mood swings, level of agitation, ability to measure time, attention/focus and frequency of inaccuracy had clearly worsened following the spider bite.

48. She further verified: (a) Mr. Hilton's inability to recall the October, 2011 cruise (absent reviewing something to prompt his memory) was not usual; (b) her husband's physical activities were noticeably limited during each of the cruises; (c) while she and her husband drank alcohol and generally remained at one of the on-ship venues (as opposed to in the cabin) during the cruises, he did not engage in dancing or spend appreciable times on his feet; (d) she was present during a portion of the March 27, 2012 surveillance period; and (e) actually observing Mr. Hilton sitting (either in her vehicle or on a sofa inside Mr. Covington's building) during her husband's March 27, 2012 visit to this location.

49. Mrs. Hilton's testimony was substantially corroborated by Mr. Covington, a longtime friend of her husband. When questioned as to his observations/impressions, Mr. Covington explained: (a) he had been afforded ample opportunity to interact with Mr. Hilton both before and after the 2000 head trauma; (b) Mr. Hilton exhibited no difficulties with memory, focus, mood disturbance, etc. prior to the 2000 accident; (c) noticeable changes had occurred subsequent to this accident, particularly involving memory and Mr. Hilton's reaction to these memory deficits; and (d) the nature of Mr. Hilton's pre-August 17, 2011 memory dysfunction had caused him to question how his friend was still being allowed to operate a tractor trailer.

50. ~~After thoroughly reviewing all evidence of record and observing each of the~~ witnesses during the course of the hearing, I specifically find: (a) Mr. Hilton's presentation (both live and through deposition) is completely consistent with the material level of cognitive dysfunction confirmed by Drs. Healy, Schwartz-Watts, Brawley and Lind; (b) the inaccuracies/inconsistencies in his testimony, as well as incorrect/erroneous information he has provided in the context of this litigation, result from cognitive deficits produced by physical brain damage documented by at least four duly qualified specialists, rather than a purposeful, intentional, volitional or preconceived attempt to mislead and/or knowingly provide false information; (c) Mr. Hilton has been experiencing cognitive dysfunction since the 2000 head trauma, which clearly produced some degree of physical brain damage (as evidenced by his post-motor vehicle accident pathology, need for brain surgery and the symptoms documented through February 11, 2011); (d) the persistent symptoms referenced by Dr. Solomon in 2011, coupled with the unanimous opinions expressed by Drs. Healy, Schwartz-Watts, Brawley and Lind, firmly establish the presence of appreciable cognitive dysfunction prior to April 17, 2011; (e)

these experts, as well as the lay testimony, also verify his current level of cognitive dysfunction; (f) this explanation for any alleged credibility issues is founded upon uncontradicted medical evidence (objective and/or wholly validated through use of devices specifically aimed toward identifying malingering/embellishment); and (g) the current circumstances unquestionably verify the legitimacy of Mr. Hilton's cognitive loss, while dispelling any notion that the implications of his pre-existing brain damage were contrived.

51. *I further find: (a) great weight should be afforded to the opinions expressed by Dr. Healy, particularly with respect to the issue of maximum medical improvement, as this authorized treater not only had the opportunity to assess Mr. Hilton on multiple occasions, but also considered Defendants' allegations (including the assertion his current left leg and back symptoms are purely the result of preexisting conditions) and the products of their surveillance; (b) after reviewing the surveillance footage and being apprised as to aspects of prior medical history which Defendants believe to be particularly relevant, Dr. Healy concluded Mr. Hilton had not achieved maximum medical improvement and required further treatment through Dr. Riber; (d) he similarly verified the consequences of Mr. Hilton's compensable injury continued to prohibit resumption of his pre-injury employment activities; (e) upon reviewing the results of neuropsychological testing, in light of his own clinical observations, Dr. Healy agreed Mr. Hilton's 2000 head trauma had produced appreciable cognitive deficits secondary to physical brain damage; and (f) Defendants' designated authorized treater likewise validated Mr. Hilton's credibility, repeatedly declining to endorse Defendants' contention that this gentleman had presented himself and/or testified in a dishonest, deceptive or misleading fashion.*

52. *I likewise find Mrs. Hilton's testimony to be a key element in connection with my assessment of her husband's presentation, as she: (a) provided a compelling account of the circumstances surrounding the 2000 head trauma, as well as its impact on Mr. Hilton's cognitive abilities (as compared to his prior state); (b) convincingly outlined the nature/persistence of Mr. Hilton's cognitive dysfunction in a manner which was wholly consistent with his valid neuropsychological test results and the unanimous opinions expressed by the medical experts; (c) made no effort to disavow the occurrence of various activities which were the focus of Defendants' credibility allegations, instead offering*

explanations for this conduct in the context of his longstanding cognitive problems; and (d) reliably noted the current state of his cognitive disorder.

53. I also find: (a) Mr. Hilton has not achieved maximum medical improvement relative to the consequences of his compensable accident, which continue to produce left leg and back symptoms; (b) his left leg and back symptoms proximately result from the aggravation of preexisting, nondisabling conditions by the consequences of his August 17, 2011 compensable accident; (c) Mr. Hilton requires further treatment for these injury components in accordance with Dr. Healy's recommendations; (d) his receipt of this treatment is reasonable, medically necessary and geared toward lessening the ultimate period of disability produced by the consequences of his compensable accident; (e) the current circumstances warrant Dr. Healy's continued service as Mr. Hilton's authorized treating physician, as well as his receipt of particular treatment modalities identified and/or endorsed by this neurological specialist; and (f) Mr. Hilton remains temporarily totally disabled by the consequences of his compensable accident.

54. I finally find: (a) any discrepancies, inconsistencies, errors, etc. in connection with either Mr. Hilton's testimony or conduct result from the cognitive dysfunction confirmed by no less than four medical specialists; (b) the testimony and conduct which Defendants maintain warrants termination of Mr. Hilton's claim were/are neither volitional nor reflective of dishonesty; (c) entry of a finding as to a lack of credibility is not warranted in this instance; (d) I would not find him not to be credible; (e) the issues currently in dispute, including the presence of cognitive dysfunction explaining/rebutting Defendants' allegations as to a lack of credibility, are clearly medically driven; and (f) the evidence of record amply supports Mr. Hilton's contentions as to this issue.

CONCLUSIONS OF LAW

1. The parties to this proceeding are subject to and bound by the provisions of the South Carolina Workers' Compensation Act.

2. On August 17, 2011, Mr. Hilton, an employee within the meaning of S.C. Code Ann. Section 42-1-130 (2002), sustained a compensable injury to his left leg within the meaning of S.C. Code Ann. Section 42-1-160 (2007), while performing duties arising out of and within the course and scope of his employment with Flakeboard America Limited, an employer within the meaning of S.C. Code Ann. Section 42-1-140 (1976). This injury

ultimately produced a back injury component, the consequences of which are likewise compensable per Section 42-1-160. See, *Whitfield v. Daniel Construction Company*, 226 S.C. 337, 83 S.E. 2d 460, 462 (1954); *Mullinax v. Winn-Dixie Stores, Inc.*, 318 S.C. 431, 458 S.E. 2d 76, 79 (Ct. App. 1995). (Every natural consequence of compensable injury is likewise compensable).

3. "Maximum medical improvement is a term used to indicate that a person has reached such a plateau that in the physician's opinion there is no further medical care or treatment which will lessen the degree of impairment." *O'Banner v. Westinghouse Electric Corporation*, 319 S.C. 24, 459 S.E. 2d 324, 327 (Ct. App. 1995); *Hall v. United Rentals, Inc.*, 371 S.C. 69, 636 S.E. 2d 876, 887 (Ct. App. 2006).

4. As previously noted, neither Dr. Healy (Defendants' designated treating physician) nor Dr. Riber believe Mr. Hilton has achieved maximum medical improvement as to the consequences of his compensable accident. Similarly, the parties have agreed the issue relating to the current source(s) of Mr. Hilton's cognitive dysfunction needs to be addressed by the Commission at a later date. Further, Dr. Chen's opinions: (a) limit any determination of maximum medical improvement to the August 24, 2011 debridement procedure itself; and (b) consistently defer to Dr. Healy's judgment/conclusions as to the effects of Mr. Hilton's neurologic/nerve injury. I consequently conclude the evidence of record firmly establishes Mr. Hilton has not achieved maximum medical improvement.

5. While Defendants argue Mr. Hilton's purported lack of credibility authorizes a determination that he has reached maximum medical improvement, I conclude: (a) achievement of maximum medical improvement is a purely medical determination (See: *Williams v. South Carolina Department of Mental Retardation*, 308 S.C. 438, 418 S.E. 2d 555 (Ct. App. 1992) (Commission finding of maximum medical improvement on date that did not coincide with medical evidence held erroneous); See also, *Collins v. Speedway Motor Sport Corp.*, 165 N.C. App. 113, 598 S.E. 2d 185, 191 (2004) ("MMI is a 'purely medical determination'")); and (b) the evidence of record clearly establishes he has not attained maximum medical improvement.

6. I also conclude: (a) the existence of physical brain damage in the context of the disputes currently before me is a medically driven issue (i.e., the allegations as to Mr. Hilton's lack of credibility); (b) the medical evidence of record, including opinions expressed by Mr. Hilton's designated authorized treating neurologist, unequivocally verifies any inaccuracies/inconsistencies in Mr. Hilton's testimony, as well as

incorrect/erroneous information he has provided in the context of this litigation, result from cognitive deficits produced by physical brain damage confirmed by four duly qualified medical specialists, rather than a purposeful, intentional, volitional or preconceived attempt to mislead and/or knowingly provide false information; (c) the lay witnesses have likewise provided convincing testimony as to the nature/impact of Mr. Hilton's previous and current levels of cognitive dysfunction(both following the 2000 motor vehicle accident and at present); and (d) an adverse credibility finding is neither warranted nor justified in this instance.

7. *Defendants are financially responsible for all causally related medical modalities which Mr. Hilton has heretofore received/undergone through Dr. Healy or any other authorized providers, as these modalities were reasonable, medically necessary and tended to lessen his period of disability within the meaning of S.C. Code Ann. Section 42-15-60 (A) (2007). In this regard, I also conclude: (a) Defendants are financially responsible for the additional medical treatment modalities provided/prescribed/recommended by Dr. Healy relative to Mr. Hilton's compensable left leg and back injury components, including the particular modalities identified by Dr. Riber; (b) Dr. Healy shall remain Mr. Hilton's designated/authorized treating physician for the purposes of this claim, notwithstanding the fact certain treatment modalities may be provided/performed by other specialists; and (c) the parties otherwise retain their respective rights per this statute.*

8. *I also conclude Mr. Hilton remains temporarily totally disabled within the meaning of S.C. Code Ann. Section 42-9-10 (2007).*

9. *I finally conclude that the issue involving whether the consequences of Mr. Hilton's compensable accident have produced injury components other than his left leg and back shall be held in abeyance pending further agreement of the parties or Order of this Commission. Resolution of the disputed average weekly wage/compensation rate issue shall similarly be held in abeyance.*

ORDER AND AWARD

Defendants shall: (a) continue to pay Mr. Hilton weekly temporary total disability compensation; (b) accept financial responsibility for all causally related medical modalities heretofore provided/prescribed by any authorized physicians/specialists in

connection with the treatment of his compensable injury components; (c) authorize Mr. Hilton's receipt of the causally related treatment modalities provided/prescribed by Dr. Healy; and (d) similarly accept financial responsibility for causally related medical modalities through other specialists in accordance with the prescriptions/recommendations of Dr. Healy, who shall remain Mr. Hilton's designated treating physician for the purposes of this claim.

ISSUES ON APPEAL

Defendant filed a Form 30 Request for Commission Review on June 17, 2013. Defendant requested the Commission review the single Commissioner's Decision and Order to address 54 questions of law or fact regarding the Commissioner's findings. The Form 30 with attachments is contained in the Commission's file.

FINDINGS OF THE FULL COMMISSION

This matter was heard before the above-mentioned South Carolina Workers' Compensation Commission Appellate Panel during the last term of Review. The Commissioners considered the matter and **Vacate and Remand** the Decision and Order to the Jurisdictional Commissioner to determine whether or not the Claimant is competent to testify and whether or not the Claimant needs a Guardian ad Litem pursuant to §42-15-55. They also order the Defendants to send the Claimant to a neurologist of their choice for an evaluation as to the causation and extent of the Claimant's problems.

ORDER

IT IS THEREFORE ORDERED that this matter is **Vacated and Remanded** to the Jurisdictional Commissioner for the purposes of making a determination as to whether or not the Claimant is competent to testify and whether or not the Claimant needs a Guardian ad Litem pursuant to §42-15-55. It is also Ordered that the Defendants to send the Claimant to a neurologist of their choice for an evaluation as to the causation and

extent of the Claimant's problems. Such evaluation shall be made available to the single Commissioner for his or her consideration.

AND SO IT IS ORDERED!


Commissioner Susan S. Barden, Chair


Commissioner Andrea C. Roche


Commissioner Gene McCaskill

Columbia, South Carolina

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 May 21, 2014

STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM THE SOUTH CAROLINA
WORKERS' COMPENSATION COMMISSION

Susan S. Barden, Commissioner
Gene McCaskill, Commissioner
Andrea C. Roche, Commissioner

W.C.C. FILE NO.: 1111934

RECEIVED

JUN 20 2014

SC Court of Appeals

Thomas Chad Hilton APPELLANT.

v.

Flakeboard America Limited, Employer, and Liberty Mutual Insurance Company,
Carrier RESPONDENTS.

NOTICE OF APPEAL

Thomas Chad Hilton hereby appeals the Decision and Order of the South Carolina Workers' Compensation Commission's Appellate Panel dated May 21, 2014, which vacates the decision of the Commission's hearing commissioner dated June 4, 2013. Pursuant to S.C. Code Ann. Section 42-17-60 (Supp. 2008), Mr. Hilton states the following grounds for the appeal, as well as the alleged errors of law:

1) The Appellate Panel erred as a matter of law in raising "issues" relative to the need for further neurological evaluation, the admissibility of Mr. Hilton's testimony, his competency and the need for a Guardian ad Litem because none of these issues were either raised to the single commissioner or preserved through any exceptions contained in Respondents' June 17, 2013 W.C.C. Form 30 Request for Commission Review.

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2) The Appellate Panel erred as a matter of law in raising "issues" relative to the need for further neurological evaluation, the admissibility of Mr. Hilton's testimony, his competency and the need for a Guardian ad Litem because its raising/considering these "issues" exceeded the statutory authority granted per S.C. Code Ann. Section 42-17-50 (2012 Supp.), as well as prior construction of this statute by our appellate courts and renders the May 21, 2014 Order null and void.

3) The Appellate Panel erred as a matter of law in raising "issues" relative to the need for further neurological evaluation, the admissibility of Mr. Hilton's testimony, his competency and the need for a Guardian ad Litem because its raising/considering these "issues" resulted in a denial of due process, as our appellate courts have consistently held that: (a) Appellate Panel review is limited to only those issues falling within the exceptions contained in Respondents' Form 30 Request for Commission Review; and (b) consideration of any other matters not preserved through these exceptions result in a denial of due process and renders the May 21, 2014 Order null and void.

4) The Appellate Panel erred as a matter of law in raising "issues" relative to the need for further neurological evaluation, the admissibility of Mr. Hilton's testimony, his competency and the need for a Guardian ad Litem because its raising/considering these "issues": (a) results in a violation of Article I, Section 22 of the South Carolina Constitution; and (b) renders the May 21, 2014 Order null and void.

5) The Appellate Panel erred as a matter of law in remanding this claim for further proceedings (allowing Respondents to obtain another neurological evaluation with concomitant determinations as to competency and need for appointment of Guardian ad Litem) because: (a) this action clearly resulted from impermissible raising/consideration of "issues" that were neither

presented to the single commissioner nor preserved through any exceptions contained in Respondents' June 17, 2013 W.C.C. Form 30 Request for Commissioner Review; (b) exceeded the authority granted through S.C. Code Ann. Section 42-17-50 (Supp.); (c) violated Article I, Section 21 of the South Carolina Constitution; (d) resulted in a denial of due process; and (e) rendered the May 21, 2014 Order null and void.

6) The Appellate Panel erred as a matter of law in issuing an Order which contained no findings of fact, conclusions of law or explanation as to the rationale for its ultimate ruling because this procedure violates: (a) the provisions of S.C. Code Ann. Sections 1-23-350 (2005) and 42-17-40 (1976, as amended), which require an Order of this nature to contain detailed factual findings, identification of controlling legal authorities and an explanation as to the underlying rationale for any rulings; and (b) various appellate court decisions that not only mandate the particular contents required by Sections 1-23-350 and 42-17-40, but also hold that Orders of the nature issued by the Panel in this instance are "illegal".

7) The Appellate Panel erred as a matter of law in vacating the single commissioner's June 4, 2013 Order in its entirety because: (a) inspection of Respondents' June 17, 2013 W.C.C. Form 30 Request for Commission Review clearly confirms that various factual findings contained in the single commissioner's Order, as well as certain legal conclusions, do not fall within the parameters of Respondents' exceptions; (b) these unappealed findings and conclusions are the law of this case; (c) any attempt to vacate these unappealed factual findings and legal conclusions not only exceeds the statutory authority granted by the General Assembly, but also violates Article I, Section 21 of the South Carolina Constitution and due process; and (d) this legally impermissible action is null and void.

8) The Appellate Panel erred in remanding this matter for the purposes referenced in the May 21, 2014 Order because: (a) none of these "issues" were preserved through the exceptions contained in Respondents' W.C.C. Form 30 Request for Commission Review; (b) any consideration of or action in connection with these "issues" not only exceeds the authority granted to the Commission by the General Assembly, but also violates Article I, Section 22 of the South Carolina Constitution and results in a violation of due process; (c) these legal errors render the May 21, 2014 ruling null and void; and (d) the implications of these legal errors (including nulling/voiding of May 21, 2014 Order) invalidate any further proceedings within the Commission.

9) The Appellate Panel erred in failing to conclude the issues relative to the source of Mr. Hilton's back symptoms and persistent left leg pain are "medically complex" within the meaning of S.C. Code Ann. Section 42-1-160 (2007), while also requiring proof through submission of "medical evidence" per S.C. Code Ann. Sections 42-9-35 (2007) and 42-15-60 (2007) because the plain language of each of these statutes, in light of the South Carolina Supreme Court's decision in Michau v. Georgetown County, 396 S.C. 589, 723 S.E. 2d 805 (2012), clearly verifies resolution of these issues absolutely required/hinged upon medical evidence.

10) The Appellate Panel erred in failing to conclude the issues relative to Mr. Hilton's current medical treatment needs are "medically complex" within the meaning of S.C. Code Ann. Section 42-1-160 (2007), while also requiring proof through submission of "medical evidence" per S.C. Code Ann. Sections 42-9-35 (2007) and 42-15-60 (2007) because the plain language of each of these statutes, in light of the South Carolina Supreme Court's decision in Michau v.

Georgetown County, 396 S.C. 589, 723 S.E. 2d 805 (2012), clearly verifies resolution of these issues absolutely required/hinged upon medical evidence.

11) The Appellate Panel erred in failing to conclude the issues relative to the presence and impact of physical brain damage and resulting cognitive deficits are “medically complex” within the meaning of S.C. Code Ann. Section 42-1-160 (2007), while also requiring proof through submission of “medical evidence” per S.C. Code Ann. Sections 42-9-35 (2007) and 42-15-60 (2007) because the plain language of each of these statutes, in light of the South Carolina Supreme Court’s decision in Michau v. Georgetown County, 396 S.C. 589, 723 S.E. 2d 805 (2012), clearly verifies resolution of these issues absolutely required/hinged upon medical evidence.

12) The Appellate Panel erred as a matter of law in failing to conclude Respondents had failed to submit any evidence which rebutted the single commissioner’s rulings relative to any medical issues (including, but not limited to, causation of Mr. Hilton’s current back and left leg symptoms, his current medical needs, Mr. Hilton’s present functional/work status, the presence of physical brain damage and the nature/impact of any cognitive deficits resulting from this physical brain damage) because: (a) a review of S.C. Code Ann. Sections 42-1-160 (2007), 42-9-35 (2007) and 42-15-60 (2007), in light of the South Carolina Supreme Court’s decision in Michau v. Georgetown County, 396 S.C. 589, 723 S.E. 2d 805 (2012), unquestionably verifies that the resolution of these issues require/hinges upon submission of medical evidence; and (b) Respondents introduced no competent evidence which specifically addressed any of these issues.

13) The Appellate Panel erred as a matter of law in failing to affirm Finding of Fact Nos. 1 – 7, 11, 14, 15, 18, 19, 20, 21, 23, 24, 26, 27, 29, 40, 41, 42 and 44, as well as Conclusion of Law Nos. 1 and 3 because: (a) none of these findings of fact or conclusions of law fall within

the parameters of the exceptions contained in Respondents' June 17, 2013 W.C.C. Form 30 Request for Commission Review; and (b) these unappealed factual findings and legal conclusions became an and are the law of this case.

14) The Appellate Panel erred as a matter of law in failing to affirm Finding of Fact Nos. 8 – 10, 12 – 13, 16 – 17, 22, 25, 28, 30 – 39, 43 and 45 – 54 because the only reasonable inference which may be gleaned from the evidence contained in the hearing record, including the medical evidence required by S.C. Code Ann. Sections 42-1-160 (2007), 42-9-35 (2007) and 42-15-60 (2007), firmly establishes the accuracy, viability and propriety of each of these factual findings.

15) The Appellate Panel erred as a matter of law in failing to affirm/adopt Conclusion of Law Nos. 2, and 4 -9 contained in the single commissioner's June 4, 2013 Order because: (a) each of these legal rulings is amply supported by the only reasonable inference arising from the evidence of record; and (b) these legal conclusions accurately reflect applicable/controlling legal authorities.

16) The Appellate Panel erred as a matter of law in failing to affirm Finding of Fact No. 8 because the only reasonable inference which may be gleaned from the evidence contained in the hearing record, including the medical evidence required by S.C. Code Ann. Sections 42-1-160 (2007), 42-9-35 (2007) and 42-15-60 (2007), firmly establishes the accuracy, viability and propriety of each of these factual findings.

17) The Appellate Panel erred as a matter of law in failing to affirm Finding of Fact No. 9 because the only reasonable inference which may be gleaned from the evidence contained in the hearing record, including the medical evidence required by S.C. Code Ann. Sections 42-1-

160 (2007), 42-9-35 (2007) and 42-15-60 (2007), firmly establishes the accuracy, viability and propriety of each of these factual findings.

18) The Appellate Panel erred as a matter of law in failing to affirm Finding of Fact No. 10 because the only reasonable inference which may be gleaned from the evidence contained in the hearing record, including the medical evidence required by S.C. Code Ann. Sections 42-1-160 (2007), 42-9-35 (2007) and 42-15-60 (2007), firmly establishes the accuracy, viability and propriety of each of these factual findings.

19) The Appellate Panel erred as a matter of law in failing to affirm Finding of Fact No. 12 because the only reasonable inference which may be gleaned from the evidence contained in the hearing record, including the medical evidence required by S.C. Code Ann. Sections 42-1-160 (2007), 42-9-35 (2007) and 42-15-60 (2007), firmly establishes the accuracy, viability and propriety of each of these factual findings.

20) The Appellate Panel erred as a matter of law in failing to affirm Finding of Fact No. 16 because the only reasonable inference which may be gleaned from the evidence contained in the hearing record, including the medical evidence required by S.C. Code Ann. Sections 42-1-160 (2007), 42-9-35 (2007) and 42-15-60 (2007), firmly establishes the accuracy, viability and propriety of each of these factual findings.

21) The Appellate Panel erred as a matter of law in failing to affirm Finding of Fact No. 17 because the only reasonable inference which may be gleaned from the evidence contained in the hearing record, including the medical evidence required by S.C. Code Ann. Sections 42-1-160 (2007), 42-9-35 (2007) and 42-15-60 (2007), firmly establishes the accuracy, viability and propriety of each of these factual findings.

22) The Appellate Panel erred as a matter of law in failing to affirm Finding of Fact No. 22 because the only reasonable inference which may be gleaned from the evidence contained in the hearing record, including the medical evidence required by S.C. Code Ann. Sections 42-1-160 (2007), 42-9-35 (2007) and 42-15-60 (2007), firmly establishes the accuracy, viability and propriety of each of these factual findings.

23) The Appellate Panel erred as a matter of law in failing to affirm Finding of Fact No. 25 because the only reasonable inference which may be gleaned from the evidence contained in the hearing record, including the medical evidence required by S.C. Code Ann. Sections 42-1-160 (2007), 42-9-35 (2007) and 42-15-60 (2007), firmly establishes the accuracy, viability and propriety of each of these factual findings.

24) The Appellate Panel erred as a matter of law in failing to affirm Finding of Fact No. 28 because the only reasonable inference which may be gleaned from the evidence contained in the hearing record, including the medical evidence required by S.C. Code Ann. Sections 42-1-160 (2007), 42-9-35 (2007) and 42-15-60 (2007), firmly establishes the accuracy, viability and propriety of each of these factual findings.

25) The Appellate Panel erred as a matter of law in failing to affirm Finding of Fact No. 30 because the only reasonable inference which may be gleaned from the evidence contained in the hearing record, including the medical evidence required by S.C. Code Ann. Sections 42-1-160 (2007), 42-9-35 (2007) and 42-15-60 (2007), firmly establishes the accuracy, viability and propriety of each of these factual findings.

26) The Appellate Panel erred as a matter of law in failing to affirm Finding of Fact No. 31 because the only reasonable inference which may be gleaned from the evidence contained in the hearing record, including the medical evidence required by S.C. Code Ann. Sections 42-1-

160 (2007), 42-9-35 (2007) and 42-15-60 (2007), firmly establishes the accuracy, viability and propriety of each of these factual findings.

27) The Appellate Panel erred as a matter of law in failing to affirm Finding of Fact No. 32 because the only reasonable inference which may be gleaned from the evidence contained in the hearing record, including the medical evidence required by S.C. Code Ann. Sections 42-1-160 (2007), 42-9-35 (2007) and 42-15-60 (2007), firmly establishes the accuracy, viability and propriety of each of these factual findings.

28) The Appellate Panel erred as a matter of law in failing to affirm Finding of Fact No. 33 because the only reasonable inference which may be gleaned from the evidence contained in the hearing record, including the medical evidence required by S.C. Code Ann. Sections 42-1-160 (2007), 42-9-35 (2007) and 42-15-60 (2007), firmly establishes the accuracy, viability and propriety of each of these factual findings.

29) The Appellate Panel erred as a matter of law in failing to affirm Finding of Fact No. 34 because the only reasonable inference which may be gleaned from the evidence contained in the hearing record, including the medical evidence required by S.C. Code Ann. Sections 42-1-160 (2007), 42-9-35 (2007) and 42-15-60 (2007), firmly establishes the accuracy, viability and propriety of each of these factual findings.

30) The Appellate Panel erred as a matter of law in failing to affirm Finding of Fact No. 35 because the only reasonable inference which may be gleaned from the evidence contained in the hearing record, including the medical evidence required by S.C. Code Ann. Sections 42-1-160 (2007), 42-9-35 (2007) and 42-15-60 (2007), firmly establishes the accuracy, viability and propriety of each of these factual findings.

31) The Appellate Panel erred as a matter of law in failing to affirm Finding of Fact No. 36 because the only reasonable inference which may be gleaned from the evidence contained in the hearing record, including the medical evidence required by S.C. Code Ann. Sections 42-1-160 (2007), 42-9-35 (2007) and 42-15-60 (2007), firmly establishes the accuracy, viability and propriety of each of these factual findings.

32) The Appellate Panel erred as a matter of law in failing to affirm Finding of Fact No. 37 because the only reasonable inference which may be gleaned from the evidence contained in the hearing record, including the medical evidence required by S.C. Code Ann. Sections 42-1-160 (2007), 42-9-35 (2007) and 42-15-60 (2007), firmly establishes the accuracy, viability and propriety of each of these factual findings.

33) The Appellate Panel erred as a matter of law in failing to affirm Finding of Fact No. 38 because the only reasonable inference which may be gleaned from the evidence contained in the hearing record, including the medical evidence required by S.C. Code Ann. Sections 42-1-160 (2007), 42-9-35 (2007) and 42-15-60 (2007), firmly establishes the accuracy, viability and propriety of each of these factual findings.

34) The Appellate Panel erred as a matter of law in failing to affirm Finding of Fact No. 39 because the only reasonable inference which may be gleaned from the evidence contained in the hearing record, including the medical evidence required by S.C. Code Ann. Sections 42-1-160 (2007), 42-9-35 (2007) and 42-15-60 (2007), firmly establishes the accuracy, viability and propriety of each of these factual findings.

35) The Appellate Panel erred as a matter of law in failing to affirm Finding of Fact No. 50 because the only reasonable inference which may be gleaned from the evidence contained in the hearing record, including the medical evidence required by S.C. Code Ann. Sections 42-1-

160 (2007), 42-9-35 (2007) and 42-15-60 (2007), firmly establishes the accuracy, viability and propriety of each of these factual findings.

36) The Appellate Panel erred as a matter of law in failing to affirm Finding of Fact No. 51 because the only reasonable inference which may be gleaned from the evidence contained in the hearing record, including the medical evidence required by S.C. Code Ann. Sections 42-1-160 (2007), 42-9-35 (2007) and 42-15-60 (2007), firmly establishes the accuracy, viability and propriety of each of these factual findings.

37) The Appellate Panel erred as a matter of law in failing to affirm Finding of Fact No. 52 because the only reasonable inference which may be gleaned from the evidence contained in the hearing record, including the medical evidence required by S.C. Code Ann. Sections 42-1-160 (2007), 42-9-35 (2007) and 42-15-60 (2007), firmly establishes the accuracy, viability and propriety of each of these factual findings.

38) The Appellate Panel erred as a matter of law in failing to affirm Finding of Fact No. 53 because the only reasonable inference which may be gleaned from the evidence contained in the hearing record, including the medical evidence required by S.C. Code Ann. Sections 42-1-160 (2007), 42-9-35 (2007) and 42-15-60 (2007), firmly establishes the accuracy, viability and propriety of each of these factual findings.

39) The Appellate Panel erred as a matter of law in failing to affirm Finding of Fact No. 54 because the only reasonable inference which may be gleaned from the evidence contained in the hearing record, including the medical evidence required by S.C. Code Ann. Sections 42-1-160 (2007), 42-9-35 (2007) and 42-15-60 (2007), firmly establishes the accuracy, viability and propriety of each of these factual findings.

40) The Appellate Panel erred as a matter of law in failing to affirm Finding of Fact No. 13 because the only reasonable inference which may be gleaned from the evidence contained in the hearing record firmly establishes the accuracy, viability and propriety of each of these factual findings.

41) The Appellate Panel erred as a matter of law in failing to affirm Finding of Fact No. 43 because the only reasonable inference which may be gleaned from the evidence contained in the hearing record firmly establishes the accuracy, viability and propriety of each of these factual findings.

42) The Appellate Panel erred as a matter of law in failing to affirm Finding of Fact No. 45 because the only reasonable inference which may be gleaned from the evidence contained in the hearing record firmly establishes the accuracy, viability and propriety of each of these factual findings.

43) The Appellate Panel erred as a matter of law in failing to affirm Finding of Fact No. 46 because the only reasonable inference which may be gleaned from the evidence contained in the hearing record firmly establishes the accuracy, viability and propriety of each of these factual findings.

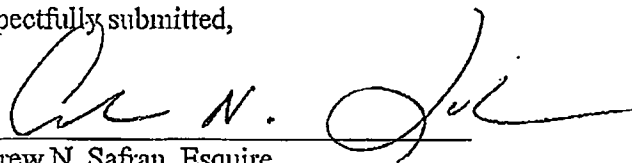
44) The Appellate Panel erred as a matter of law in failing to affirm Finding of Fact No. 47 because the only reasonable inference which may be gleaned from the evidence contained in the hearing record firmly establishes the accuracy, viability and propriety of each of these factual findings.

45) The Appellate Panel erred as a matter of law in failing to affirm Finding of Fact No. 48 because the only reasonable inference which may be gleaned from the evidence contained

in the hearing record firmly establishes the accuracy, viability and propriety of each of these factual findings.

46) The Appellate Panel erred as a matter of law in failing to affirm Finding of Fact No. 49 because the only reasonable inference which may be gleaned from the evidence contained in the hearing record firmly establishes the accuracy, viability and propriety of each of these factual findings.

Respectfully submitted,



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Attorney for Appellant

June 20, 2014

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872 S. Pleasantburg Drive
Greenville, South Carolina 29607
Attorney for Respondents

STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM THE SOUTH CAROLINA
WORKERS' COMPENSATION COMMISSION

Susan S. Barden, Commissioner
Gene McCaskill, Commissioner
Andrea C. Roche, Commissioner

W.C.C. FILE NO.: 1111934

Thomas Chad Hilton APPELLANT,

v.

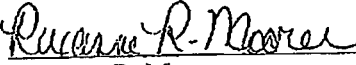
Flakeboard America Limited, Employer, and Liberty Mutual Insurance Company,
Carrier RESPONDENTS.

CERTIFICATE OF SERVICE

I, Roxanne R. Moorer, paralegal for Andrew N. Safran, Esquire, Attorney for Appellant, do hereby certify that on the 20th day of June, 2014, I caused to be filed, via hand delivery, the original and three (3) copies of the Appellant's Notice of Appeal with the Clerk of the South Carolina Court of Appeals. One (1) copy of the Appellant's Notice of Appeal was furnished to counsel for Respondents via first class mail at the following addresses:

L. Brenn Watson, Esquire
Willson, Jones, Carter & Baxley, P.A.
872 S. Pleasantburg Drive
Greenville, South Carolina 29607

South Carolina Workers' Compensation Commission
Judicial Department
Post Office Box 1715
Columbia, South Carolina 29202-1715


Roxanne R. Moorer
Post Office Box 12089
Columbia, South Carolina 29211
(803) 256-6689

June 20, 2014

000174

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM THE SOUTH CAROLINA
WORKERS' COMPENSATION COMMISSION

Susan S. Barden, Commissioner
Gene McCaskill, Commissioner
Andrea C. Roche, Commissioner

Appellate Case No. 2014-001357

Thomas Chad Hilton, Claimant.....Appellant,

v.

Flakeboard America Limited, Employer, and
Liberty Mutual Insurance Company, Carrier, Defendants.....Respondents.

MOTION TO DISMISS

L. Brenn Watson, Esq.
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872 S. Pleasantburg Drive
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Attorney for Respondents

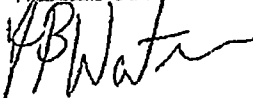
Pursuant to Rule 240 of the South Carolina Appellate Court Rules, Respondents now move to dismiss the appeal. This Motion is based on the following grounds:

1. The Single Commissioner of the Workers' Compensation Commission issued a Decision and Order on June 4, 2013. (Exhibit 1)
2. Respondents timely appealed the Order of the Single Commissioner to the Appellate Panel of the Workers' Compensation Commission, and oral arguments were heard before the Appellate Panel on October 14, 2013. (Exhibit 2)
3. The Appellate Panel issued a Decision and Order on May 21, 2014, vacating the Order of the Single Commissioner and remanding the claim back to the Single Commissioner for further proceedings. (Exhibit 2)
4. On June 30, 2014, Appellant filed a Notice of Appeal with the South Carolina Court of Appeals, appealing the May 21, 2014, Decision and Order of the Appellate Panel of the Workers' Compensation Commission. (Exhibit 3)
5. Pursuant to the Administrative Procedures Act, S.C. Code Ann. § 1-23-380(A), S.C. Code Ann. § 1-23-390, and *Bone v. U.S. Food Service*, 744 S.E.2d 552, 404 S.C. 67 (S.C. 2013), this appeal is interlocutory.

For the foregoing reasons, Respondents respectfully request the Court of Appeals dismiss Appellant's appeal with prejudice.

Respectfully submitted,

WILLSON JONES CARTER & BAXLEY, P.A.



L. Brenn Watson, Esquire
872 S. Pleasantburg Drive
Greenville, SC 29607
Attorney for Defendants

Date: July 17, 2014

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM THE SOUTH CAROLINA
WORKERS' COMPENSATION COMMISSION

Susan S. Barden, Commissioner
Gene McCaskill, Commissioner
Andrea C. Roche, Commissioner

Appellate Case No. 2014-001357

Thomas Chad Hilton, Claimant.....Appellant,

v.

Flakeboard America Limited, Employer, and
Liberty Mutual Insurance Company, Carrier, Defendants.....Respondents.

MEMORANDUM OF LAW IN SUPPORT OF
RESPONDENTS' MOTION TO DISMISS

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Attorney for Respondents

STATEMENT OF THE CASE

Appellant sustained an admitted injury by accident arising out of and in the course of his employment on August 17, 2011, when he was bitten by an insect on the left thigh/buttock. Respondents provided appropriate medical treatment and, on July 6, 2012, filed a Request for Hearing before the South Carolina Workers' Compensation Commission, arguing Appellant had reached maximum medical improvement (MMI) and was entitled to no additional benefits. On January 3, 2013, a hearing was held before Commissioner Avery B. Wilkerson (hereinafter, "Single Commissioner"). The Single Commissioner issued a Decision and Order on June 4, 2013, finding Appellant had not reached MMI and was entitled to ongoing temporary disability benefits and medical treatment.

Respondents timely appealed the Order of the Single Commissioner to the Appellate Panel of the South Carolina Workers' Compensation Commission (hereinafter, "Appellate Panel"), and oral arguments were heard before the Appellate Panel on October 14, 2013. The Appellate Panel issued a Decision and Order on May 21, 2014, vacating the Order of the Single Commissioner and remanding the claim back to the Single Commissioner for further proceedings. On June 30, 2014, Appellant filed a Notice of Appeal with the South Carolina Court of Appeals, appealing the May 21, 2014, Decision and Order of the Appellate Panel.¹ For the reasons set forth below, Appellant's appeal is interlocutory, and the appeal should be dismissed, with prejudice.

¹ Appellant has also filed a Petition for Writ of Certiorari with the South Carolina Supreme Court.

ARGUMENT

I. Appeals from the South Carolina Workers' Compensation Commission are controlled by the Administrative Procedures Act, and only final judgments of the Commission are appealable to the Court of Appeals.

"The Administrative Procedures Act (APA) was enacted in 1977 and 'purports to provide uniform procedures before State Boards and Commissions for judicial review after the exhaustion of administrative remedies.'" *Bone v. U.S. Food Service*, 744 S.E.2d 552, 556, 404 S.C. 67, 73 (S.C. 2013) (citing *Lark v. Bi-Lo, Inc.*, 276 S.C. 130, 132, 276 S.E.2d 304, 305 (1981)). The APA establishes the standard for judicial review of decisions of the South Carolina Workers' Compensation Commission. *Bone*, 744 S.E.2d 556; *Pierre v. Seaside Farms, Inc.*, 386 S.C. 534, 689 S.E.2d 615 (2010); *Lark*, 276 S.C. at 135, 276 S.E.2d at 306; *Eaddy v. Smurfit-Stone Container Corp.*, 355 S.C. 154, 584 S.E.2d 390 (Ct.App.2003).

Under section 1-23-380(A) of the APA, "[a] party who has exhausted all administrative remedies available within the agency and who is aggrieved by a *final decision* in a contested case is entitled to judicial review...." S.C.Code Ann. § 1-23-380(A) (Supp.2007) (emphasis added). Section 1-23-390 of the APA, governing further appellate review, provides: "An aggrieved party may obtain a review of a *final judgment* of the circuit court or the court of appeals pursuant to this article by taking an appeal in the manner provided by the South Carolina Appellate Court Rules as in other civil cases." S.C.Code Ann. § 1-23-390 (Supp.2012) (emphasis added).

In *Charlotte-Mecklenburg Hosp. Auth. v. S.C. Dep't of Health & Envt'l Control*, 387 S.C. 265, 692 S.E.2d 894, (2010), the Supreme Court of South Carolina reviewed an appeal from an Administrative Law Court and reasoned that appeals in administrative agency matters are governed solely by the APA, not by the general appealability statute of section 14-3-330(1), which permits review of "[a]ny intermediate judgment" involving the merits. *Charlotte-Mecklenburg*, 692 S.E.2d

at 894. The *Charlotte-Mecklenburg* Court further indicated that concepts applicable in general appeals were not applicable under the APA, as specialized statutes prevail over more general statutes. *Id.* The Supreme Court reviewed this scenario in the workers' compensation context in *Bone*, and after reviewing the Court's reasoning in *Charlotte-Mecklenburg*, the Court stated: "We apply this reasoning in concluding that the meaning of a 'final judgment' as used in section 1-23-390 is not defined by using the exceptions that are present in the general appealability statute, whether or not the statute is specifically referenced." *Bone*, 744 S.E.2d 557.

The term "final judgment" was specifically interpreted by the Supreme Court of South Carolina in *Bone* with regard to workers' compensation appeals:

This Court's jurisprudence is in accord with the definition of a final judgment found in *Black's Law Dictionary*. It defines a final judgment as "[a] court's last action that settles the rights of the parties and disposes of all issues in controversy, except for the award of costs ... and enforcement of the judgment."

Bone, 744 S.E.2d 558 (citing *Black's Law Dictionary* 919 (9th ed.2009)). The *Bone* Court further specified: "The legislature, in using a well-known term of art such as 'final judgment,' meant exactly what 'final judgment' has always been understood to mean: something that finally disposes of the whole subject matter of the action or terminates the action, leaving nothing to be done but to execute the judgment..." *Bone*, 744 S.E.2d 561.

In deciding *Bone*, the Supreme Court made it abundantly clear that (1) the APA governs appeals from the South Carolina Workers' Compensation Commission, and (2) a decision of the Workers' Compensation Commission is not appealable to the Court of Appeals until there has been a final judgment which disposes of the action entirely. In this case, there has been no such final judgment, and the May 21, 2014, Decision and Order is not immediately appealable to the Court of Appeals.

II. The May 21, 2014, Decision and Order of the Appellate Panel does not constitute a final judgment, and the Appellate Panel Order is not immediately appealable.

Appellant sustained an admitted injury on August 17, 2011, when he was bitten by an insect on the left thigh/buttock and developed an abscess. The abscess developed a staph infection, and Respondents provided appropriate medical treatment, including a simple debridement procedure to excise the abscess. On July 6, 2012, Respondents filed a Request for Hearing before the South Carolina Workers' Compensation Commission, alleging Appellant had reached MMI and was entitled to no additional benefits. Respondents further argued that Appellant had made purposeful and material misrepresentations with regard to the workers' compensation claim. On January 3, 2013, a hearing was held before Commissioner Avery B. Wilkerson, who issued a Decision and Order on June 4, 2013, finding Appellant had not reached MMI and was entitled to ongoing temporary disability benefits and medical treatment. The Single Commissioner found that Appellant's misrepresentations throughout the claim were attributable to a level of cognitive dysfunction, which stemmed from a prior motor vehicle accident and brain injury.

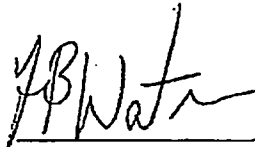
Respondents timely appealed the Order of the Single Commissioner to the Appellate Panel, and the Appellate Panel issued a Decision and Order on May 21, 2014, vacating the Order of the Single Commissioner and remanding the claim back to the Single Commissioner for determination of whether Appellant is competent to testify, or whether Appellant requires a Guardian *ad Litem*, pursuant to S.C. Code Ann. § 42-15-55. The Appellate Panel further ordered Respondents to provide a neurological evaluation for Appellant to address the issues of the cause and extent of Appellant's alleged conditions.

Appellant has now appealed the May 21, 2014, Decision and Order of the Appellate Panel, but it is plainly evident that the Order is not a final judgment, and it is not immediately appealable. The Supreme Court very specifically addressed this issue in *Bone*, and there can be no doubt that Appellant's appeal is interlocutory. Not only do *some* issues remain undetermined by the Workers' Compensation Commission, but *every single issue* remains undetermined at this juncture, as the Single Commissioner's Order was vacated and the claim remanded. As there has been no final judgment, the claim is not immediately appealable.

CONCLUSION

For the reasons set forth above, the May 21, 2014, Decision and Order of the Appellate Panel is not immediately appealable to the Court of Appeals, and Respondents respectfully request the appeal be dismissed, with prejudice.

Respectfully submitted,

A handwritten signature in black ink, appearing to read "LB Watson", written over a horizontal line.

L. Brenn Watson, Esq.
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872 S. Pleasantburg Drive
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(864) 527-3282

Attorney for Respondents

July 17, 2014

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM THE SOUTH CAROLINA
WORKERS' COMPENSATION COMMISSION

Susan S. Barden, Commissioner
Gene McCaskill, Commissioner
Andrea C. Roche, Commissioner

Appellate Case No. 2014-001357

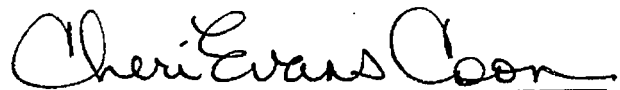
Thomas Chad Hilton, Claimant.....Appellant,

v.

Flakeboard America Limited, Employer, and
Liberty Mutual Insurance Company, Carrier, Defendants.....Respondents.

PROOF OF SERVICE

I certify that I have served the Motion to Dismiss and Memorandum in Support on Thomas Chad Hilton by depositing a copy in the United States Mail, postage prepaid, on July 17, 2014, addressed to his attorney of record, Andrew N. Safran, Esquire, Andrew N. Safran, LLC, Post Office Box 12089, Columbia, South Carolina 29211.



Cheri Evans Coon,
Legal Assistant to L. Brenn Watson
Willson Jones Carter & Baxley, P.A.
872 S. Pleasantburg Drive
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THE STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

APPEAL FROM THE SOUTH CAROLINA
WORKERS' COMPENSATION COMMISSION

Susan S. Barden, Commissioner
Gene McCaskill, Commissioner
Andrea C. Roche, Commissioner

W.C.C. FILE NO.: 1111934

APPELLATE CASE NO.: 2014-001357

Thomas Chad Hilton APPELLANT.

v.

Flakeboard America Limited, Employer, and Liberty Mutual Insurance Company,
Carrier, Defendants, ... RESPONDENTS.

APPELLANT'S RETURN TO RESPONDENTS'
MOTION TO DISMISS APPEAL

Andrew N. Safran
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Columbia, South Carolina 29211
(803) 256-6689
Attorney for Appellant,
Thomas Chad Hilton

RECEIVED

AUG 07 2014

SC Court of Appeals

000185

Pursuant to Rule 240 SCACR, Appellant, Thomas C. Hilton, requests the Court to deny Respondents', Flakeboard America Limited's and Liberty Mutual Insurance Company's Motion to Dismiss. In this regard, Mr. Hilton respectfully submits: (a) S.C. Code Ann. Section 1-23-380 (2012 Supp.) authorizes immediate review of an "intermediate agency action or ruling . . . if review of the final agency decision would not provide an adequate remedy"; (b) the South Carolina Workers' Compensation Commission's (appellate panel's) May 21, 2014 Order materially exceeded the scope of Respondents' appeal, requiring further action on unpreserved "issues", while extinguishing numerous unchallenged factual findings that had become the law of this case; (c) this attempt to compel *de novo* litigation of nondisputed points not only unconstitutionally exceeded the panel's statutory authority, but also unquestionably denied procedural due process; (d) these constitutional deficiencies necessarily render the May 21, 2014 Order null and void; (e) the panel's failure to include any factual findings or explanation of the rationale underlying its ruling, which leave the reasons underlying this decision to speculation and prevent judicial review, is unquestionably an unlawful/illegal procedure; and (f) the nature of these errors have so pervasively tainted this proceeding that review at a later stage would be inadequate.

STATEMENT OF THE CASE

As confirmed by a review of the "Statement of the Case" contained in the single commissioner's June 4, 2013 Decision and Order (Exhibit A), Respondents sought to terminate Mr. Hilton's temporary total disability compensation based upon three grounds: (a) "Claimant has made direct and material misrepresentations that directly pertain to his alleged disability"; (b) he was "not currently disabled, and ha[d] . . . not been disabled since September 12, 2011"; and (c) "[C]laimant . . . ha[d] reached maximum medical improvement with no impairment"

In response to these allegations, Mr. Hilton maintained: (a) any inconsistent and/or inaccurate statements contained in the record (deposition testimony or otherwise) were the product of cognitive deficits stemming from his physical brain damage, rather than a purposeful/intentional/volitional attempt to mislead; (b) he had not achieved maximum medical improvement as to the consequences of his compensable accident; (c) Respondents were obliged to authorize the various treatments which had been prescribed/recommended by Dr. R. Joseph Healy, their designated treating physician; and (d) he remained temporarily totally disabled at this time.

As these issues involve the impact of preexisting physical brain damage on Mr. Hilton's current functional status, receipt of further medical care and purported attainment of maximum medical improvement, it was incumbent upon the parties to present medical evidence in support of their respective positions. See, S.C. Code Ann. Sections 42-9-35 (2007) and 42-15-60 (2007); See also, Williams v. South Carolina Department of Mental Retardation, 308 S.C. S.C. 438, 418 S.E. 2d 555 (Ct. App. 1992) (Commission's finding of maximum medical improvement on date that was not identified by physician determined to be erroneous). Accord, Clark v. Wal-Mart, 163 N.C. 686, 594 S.E. 2d 433, 439 (2004), rev'd. on other grounds, 360 N.C. 41, 619 S.E. 2d 491 (2005) ("MMI is a purely medical determination").

Notwithstanding their awareness as to the standard of proof in this context, Respondents' medical evidentiary submissions were limited to: (a) the deposition testimony of Dr. Healy (the treating neurologist), who verified the presence/impact of Mr. Hilton's cognitive deficits, as well as the fact he had **not achieved maximum medical improvement**; (b) the deposition of Dr. Chi-Dai Chen (treating general surgeon), who ultimately acknowledged his lack of expertise as to the symptoms ("nerve irritation or nerve damage") for which Mr. Hilton had not reached maximum medical improvement per Dr. Healy, while deferring to the neurologist's opinion on this point; and (c) pre and post-injury medical

records generated by various providers. (See, June 4, 2013 Decision and Order, pp. 6 – 7, 22 – 30).

Additionally, Respondents: (a) **elicited testimony from Mr. Hilton as an adverse party witness during their case in chief (Exhibit B)**; (b) offered video surveillance footage; and (c) submitted records from Carnival Cruise Lines.

Mr. Hilton introduced: (a) opinions from four medical experts (authorized treating neurologist, forensic psychiatrist and two neuropsychologists) establishing, to a reasonable degree of medical certainty, both the presence of cognitive deficits resulting from physical brain damage and the fact Mr. Hilton's purported "misrepresentations" were the product of these cognitive deficits, rather than the fraudulent conduct alleged by Respondents; and (b) confirmation from both Dr. Healy and a pain management/non-operative spine specialist (Dr. Ezra B. Riber) relative to the causal relationship of Mr. Hilton's persistent physical (back and left leg) symptoms, as well as his need for further treatment and nonattainment of maximum medical improvement as to these injury components. (See, June 4, 2013 Decision and Order, pp. 16 – 28, 30 – 33). He similarly relied upon portions of Dr. Chen's deposition, particularly this physician's: (a) inability (due to lack of expertise) to identify the source of persistent neurologic symptoms; and (b) deference to Dr. Healy as to the causal relationship between these symptoms and the compensable accident. (See, June 4, 2013 Decision and Order, pp. 28 – 30).

After considering the medical evidence relative to these unquestionably complex medical issues (implications of physical brain on cognition; neurologic consequences of spider venom), the single commissioner entered an extremely detailed Order, which determined in pertinent part:

(a) great weight should be afforded to the opinions expressed by Dr. Healy, particularly with respect to the issue of maximum medical improvement, as this authorized treater not only had the opportunity to assess Mr. Hilton on multiple occasions, but also considered Defendants' allegations (including the assertion his current left leg and back symptoms are purely the result of preexisting conditions) and the products of their surveillance; (b) after reviewing the surveillance footage and being apprised as to aspects of prior medical history which Defendants believe to be particularly relevant, Dr. Healy concluded Mr.

Hilton had not achieved maximum medical improvement and required further treatment through Dr. Riber; (d) he similarly verified the consequences of Mr. Hilton's compensable injury continued to prohibit resumption of his pre-injury employment activities; (e) upon reviewing the results of neuropsychological testing, in light of his own clinical observations, Dr. Healy agreed Mr. Hilton's 2000 head trauma had produced appreciable cognitive deficits secondary to physical brain damage; and (f) Defendants' designated authorized treater likewise validated Mr. Hilton's credibility, repeatedly declining to endorse Defendants' contention that this gentleman had presented himself and/or testified in a dishonest, deceptive or misleading fashion. (See, June 4, 2013 Decision and Order, pp. 38 – 39).

He similarly found:

(a) any discrepancies, inconsistencies, errors, etc. in connection with either Mr. Hilton's testimony or conduct result from the cognitive dysfunction confirmed by no less than four medical specialists; (b) the testimony and conduct which Defendants maintain warrants termination of Mr. Hilton's claim were/are neither volitional nor reflective of dishonesty; (c) entry of a finding as to a lack of credibility is not warranted in this instance; (d) I would not find him not to be credible; (e) the issues currently in dispute, including the presence of cognitive dysfunction explaining/rebutting Defendants' allegations as to a lack of credibility, are clearly medically driven; and (f) the evidence of record amply supports Mr. Hilton's contentions as to this issue. (See, June 4, 2013 Decision and Order, pp. 41 – 42).

The single commissioner determined: (a) "achievement of maximum medical improvement is a purely medical determination"; (b) "the existence of physical brain damage in the context of the . . . [current] disputes . . . is a medically driven issue"; (c) "the medical evidence of record, including opinions expressed by Mr. Hilton's designated authorized treating neurologist, unequivocally verifies any inaccuracies/inconsistencies in Mr. Hilton's testimony, as well as incorrect/erroneous information he has provided in the context of this litigation, result from cognitive deficits produced by physical brain damage confirmed by four duly qualified medical specialists, rather than a purposeful, intentional, volitional or preconceived attempt to mislead and/or knowingly provide false information"; (d) the medical evidence upon which Respondents relied (Dr. Chen's opinions) "limit any determination of maximum medical improvement to the August 24, 2011 debridement procedure itself"; (e) Dr. Chen

“consistently defer[red] . . . to Dr. Healy’s judgment/conclusions as to the effects of Mr. Hilton’s neurologic/nerve injury”; and (f) the evidence of record (opinions expressed by Drs. Healy and Riber) “firmly establishes Mr. Hilton has not achieved maximum medical improvement”. (See, June 4, 2013 Decision and Order, pp. 41 and 43 – 44).

The Respondents appealed this decision to the commission’s appellate panel. Their Form 30 (Exhibit C) reveals a multitude of exceptions that focus on particular factual findings and associated legal rulings, as well as four “General Exceptions” addressing the parties’ basic disputes (attainment of maximum medical improvement, continued receipt of compensation, entitlement to further medical treatment and alleged lack of credibility/fraud). **None of these exceptions either assert or imply that Respondents were denied the opportunity to obtain further evaluation of Mr. Hilton by a physician of their choice, a right afforded by S.C. Code Ann. Section 42-15-80 (2007). Had this been their desire, Respondents could have: (a) directed him for evaluation during the approximately six month period which elapsed followed filing of their hearing request; or (b) elected to withdraw the hearing request to ensure they were afforded sufficient time to obtain this evaluation. In the same fashion, Respondents’ exceptions did not challenge Mr. Hilton’s competency to testify or allege that he required a Guardian ad Litem.**

AVAILABILITY AND STANDARD OF REVIEW

Section 1-23-380 provides in pertinent part:

A party who has exhausted all administrative remedies available within the agency and who is aggrieved by the final decision in a contested case is entitled to judicial review pursuant to this article and Article 1. This section does not limit utilization of or the scope of judicial review available under other means of review, redress or relief or trial *de novo* provided by law. **A preliminary, procedural or intermediate agency action or ruling is immediately reviewable if review of the final agency decision would not provide an adequate remedy.**

...

(5) The court shall not substitute its judgment for that of the agency as to the weight of the evidence on questions of fact. The court may affirm the decision of the agency or remand the case for further proceedings. The court may reverse or modify the decision if substantial rights of the appellant have been prejudiced because the administrative findings, inferences, conclusions or decisions are:

- (a) in violation of constitutional or statutory provisions;
- (b) in excess of statutory authority;
- (c) made upon unlawful procedure;
- (d) affected by other error of law; [or] . . .
- (f) arbitrary or capricious or characterized by abuse of discretion or clearly unwarranted exercise of discretion.
(Emphasis added).

**MAY 21, 2014 RULING EXCEEDED THE PANEL'S STATUTORY
AUTHORITY, DENIED PROCEDURAL DUE PROCESS AND RENDERED
THIS ORDER NULL AND VOID**

Although the Panel can obviously reweigh the evidence when rendering a decision, “. . . [o]nly issues within the application for review under S.C. Code Ann. Section 42-17-50 (1976) are preserved for” appellate purposes. See, Green v. City of Columbia, 311 S.C. 78, 427 S.E. 2d 685, 687 (Ct. App. 1993); Creech v. Ducane Company, 320 S.C. 559, 467 S.E. 2d 114, 116 (Ct. App. 1995). In its appellate capacity, the panel members: (a) “like well-behaved children, do not speak unless spoken to and do not answer questions they are not asked.” Langley v. Boyter, 284 S.C. 162, 325 S.E. 2d 550, 561 (Ct. App. 1984), quashed on other grounds, 286 S.C. 85, 332 S.E. 2d 100 (1985); Atlantic Coast Builders and Contractors, LLC v. Lewis, 398 S.C. 323, 730 S.E. 2d 282, 286 (2012); and (b) cannot disrupt unappealed factual findings, which “became and are the law of this case” Ham v. Mullins Lumber Company, 93 S.C. 66, 7 S.E. 2d at 15, 16 (1940); Smith v. South Carolina Department of Mental Health, 329 S.C. 485, 494 S.E. 2d 630, 639 (Ct. App. 1997).

The South Carolina Workers' Compensation Commission, a state administrative agency, "can only exercise those powers which have been conferred upon it by the South Carolina General Assembly." Triska v. Department of Health and Environmental Control, 292 S.C. 190, 355 S.E. 2d 531, 533 (1987); Bazzle v. Huff, 319 S.C. 443, 462 S.E. 2d 273, 274 (1995). See also, S.C. Const. art I, Section 22 (administrative agency must utilize "a mode or procedure prescribed by the General Assembly" Additionally, "Article I, Section 22 requires an administrative agency to give procedural due process to parties that come before it" Garris v. Governing Board of South Carolina Reinsurance Facility, 333 S.C. 432, 511 S.E. 2d 48, 52 (1998); South Carolina Ambulatory Surgery Center Association v. South Carolina Workers' Compensation Commission, 389 S.C. 380, 699 S.E. 2d 146, 152 (2010).

"If there is such a thing as due process of law, under it a litigant is entitled to notice of the issues to be met on trial, hearing or appeal." Ham, 7 S.E. 2d at 715; Green, 427 S.E. 2d at 687. "Administrative agencies are required to meet minimum standards of due process", which limits the Panel's focus to "[o]nly issues within the application for review", while restraining it from "rewr[iting] . . . the entire case." Smith, 494 S.E. 2d at 638; Green, supra.; Ham, supra.

The Respondents never sought to submit additional medical evidence before either the single commissioner or panel. They also: (a) consistently denied the presence of cognitive deficits in the face of unanimous medical opinion to the contrary; (b) neither disputed Mr. Hilton's competency to testify, nor asserted there was a need for appointment of a Guardian ad Litem; (c) were acutely aware the medical opinion upon which their contention of maximum medical improvement rested was fatally flawed; and (d) not only chose, but actually demanded, that the parties proceed with a merits hearing relative to these "medically driven" issues. (Exhibit D).

Despite these facts, the appellate panel essentially “rewrote the entire case.” (Exhibit F).

Specifically, the panel: (a) completely vacated the June 4, 2013 Decision and Order, notwithstanding the presence of numerous unappealed factual findings (including Finding of Fact Nos. 1, 2, 3, 4, 5, 6, 7, 11, 14, 15, 18, 19, 20, 21, 23, 24, 26, 27, 29, 40, 41, 42 and 44); (b) ordered Respondents to “send . . . [Mr. Hilton] to a neurologist of their choice for an evaluation as to the causation and extent of [his] . . . problems”; (c) remanded the claim “to the Jurisdictional Commissioner for the purposes of making a determination as to whether or not [Mr. Hilton] . . . is competent to testify and whether or not [he] . . . needs a Guardian ad Litem pursuant to §42-15-55”; and (d) declined to address those issues previously framed by the parties and preserved through Respondents’ Form 30. See, Ham, supra.

While Respondents maintain “every single issue remains undetermined at this juncture”, this argument ignores the facts: (a) the purpose of the January 3, 2013 hearing was to fully address all disputed issues; (b) the parties were afforded ample opportunity to submit all evidence which they deemed supportive of their respective positions; (c) Respondents never sought leave to submit, much less were denied the opportunity to present, additional evidence of the nature identified by the panel’s Order; (d) no exceptions which could conceivably be construed to seek further medical assessment or challenge Mr. Hilton’s competency to testify, were raised to either the single commissioner or panel; (e) absent the presence of a legal error of this nature, the panel was not empowered to erase an entire proceeding because it desired to reframe the issues or reshape the unchallenged content of the current record; (f) the materiality of the panel’s error is unquestionably highlighted by its determination to vacate the law of this case (See, Brunson v. American Koyo Bearings, 367 S.C. 161, 623 S.E. 2d 870, 872 (Ct. App. 2005) (“Brunson, however, is not required to relitigate unchallenged findings – which are the law of the case”)); and (g) the panel’s attempt to reinstate abandoned positions is fully violative of this Court’s rulings in Green, Creech and Smith.

Once the panel chose to expand the issues previously framed by the parties, invalidate the prior Order and materially alter essential aspects of this claim, it not only denied Mr. Hilton procedural due process, but it also unconstitutionally exceeded its statutory authority. Each of these violations renders the panel's May 21, 2014 void and without legal effect. Triska, 355 S.E. 2d at 533 ("Any action taken by . . . [an administrative agency] outside of its statutory and regulatory authority is null and void."); Bazzle, 462 S.E. 2d at 274 ("Actions by the commission . . . [which] exceeded their statutory authority . . . were null and void."); LaSalle Bank National Association v. Davidson, 386 S.C. 276, 688 S.E. 2d 121, 122 (2009) (Due process must be afforded "before any binding decree, order, or judgment can be made . . ."); Adams v. H.R. Allen, Inc., 397 S.C. 652, 726 S.E. 2d 9, 12 (Ct. App. 2012) (Proceeding which violated "constitutional guarantee of procedural due process . . . was a nullity . . ."); Ware v. Ware, 404 S.C. 1, 743 S.E. 2d 817, 822 (2013) ("A void judgment is one that, from its inception, is a complete nullity and is without legal effect.").

Given the nature of the panel's ruling, Mr. Hilton respectfully submits he has established multiple legal deficiencies per Section 1-23-380 (5). In view of this fact, the dispositive inquiry involves whether deferring review, pending completion of the administrative process, will provide Mr. Hilton with an adequate remedy.

"A general exception to the requirement of exhaustion of administrative remedies exists when a party demonstrates that pursuit of them would be a vain or futile act." Law v. South Carolina Department of Corrections, 368 S.C. 424, 629 S.E. 2d 642, 650 (2006); Storm M.H. ex rel. McSwain v. Charleston County Board of Trustees, 400 S.C. 478, 735 S.E. 2d 492, 497 (2012). "Another exception to the exhaustion requirement is recognized when an agency has acted outside of its authority." Brown v. James, 389 S.C. 41, 697 S.E. 2d 604, 611 – 612 (Ct. App. 2010).

As allowing Respondents to submit further evidence (notwithstanding the absence of any request for this “relief”), requiring a determination of competency (in the face of unanimous opinion as to diminished cognition and Respondents’ submission of Mr. Hilton’s testimony in their case in chief) and **extinguishment of no less than 23 factual findings that constituted the law of this case** exceeded the panel’s statutory authority, any further proceedings are null/void. The denial of procedural due process similarly renders any action per the May 21, 2014 Order meaningless from a legal standpoint. Additionally, delaying review will surely prejudice Mr. Hilton, who will necessarily be obliged to incur materially increased litigation expenses pending receipt of a final decision that will surely require reversal. Further, deferring adjudication of these issues will certainly indefinitely extend (likely for a period of years) the current litigation. Finally, declining to correct these obvious errors sews the seeds for a “groundhog day” scenario, as nothing will prohibit the panel from repeating the current action following remand.

THE ILLEGALITY OF THE PANEL’S ORDER WARRANTS **IMMEDIATE CONSIDERATION**

Respondents also suggest that as the May 21, 2014 ruling was not a “final decision” or “award” the panel was not obliged to enter findings of fact, identify applicable legal authorities or provide the rationale for its determinations. This position not only ignores the import of S.C. Code Ann. Section 42-17-40 (1976, as amended), but also numerous appellate court rulings.

Section 42-17-40 provides in pertinent part that the commission’s “award, together with a statement of the findings of fact, rulings of law and other matters pertinent to the questions at issue, must be filed” Additionally, S.C. Code Ann. Section 42-17-60 (2007) prescribes that any “award of the commission . . . may [be] . . . appeal[ed] . . . to the court of appeals.”

“The Workers’ Compensation Act should be read *in pari materia* when possible.” United Technologies v. South Carolina Second Injury Fund, 318 S.C. 213, 456 S.E. 2d 901, 904 (1995). As

Section 42-17-60 necessarily envisions various forms of "awards", including denial of compensation, this statute required inclusion of factual findings, legal ruling and explanation of the underlying rationale for any of the panel's determinations.

As recognized in Heater of Seabrook, Inc. v. Public Service Commission of South Carolina, 332 S.C. 20, 503 S.E. 2d 739, 742 (1998), given the "wide latitude . . . afforded . . . [to administrative agencies] in making decisions, . . . the writing of orders without sufficient detail or analysis, . . . can make their decisions as a practical matter unassailable on appeal." Recognizing this potential for "arbitrary or capricious" action on the part of the agency, the Court has "repeatedly emphasized the need for specificity in administrative orders." Id.

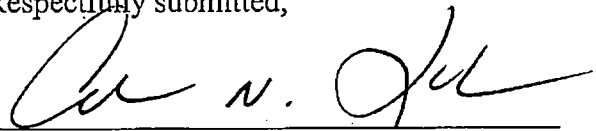
In this regard, it has been consistently held that the panel: (a) must make specific, express factual findings; (b) cannot rely upon implicit findings; and (c) "awards without . . . [these] specific findings do not comply with the requirements of the [workers' compensation] act and are illegal." Shealy v. Algernon Blair, Inc., 250 S.C. 106, 156 S.E. 2d 646, 648 (1967). The panel is obliged to explain the reasoning behind its rulings, rather than leave the rationale to speculation. Able Communications, Inc. v. South Carolina Public Service Commission, 290 S.C. 409, 351 S.E. 2d 151, 152 (1986); Kiawah Property Owners Group v. Public Service Commission of South Carolina, 338 S.C. 92, 525 S.E. 2d 863, 865 (1999).

Additionally, as even Respondents acknowledge Mr. Hilton will certainly be entitled to review of the panel's decision at some stage of these proceedings, both logic and these repeated admonitions dictate that: (a) the panel's Order contain sufficient factual findings, legal rulings and analysis to identify how it reached the current determination; and (b) the failure to do so at this juncture will ultimately necessitate reversal.

CONCLUSION

In this instance, the panel literally erased a prior proceeding to address "issues" that Respondents obviously deemed to be nonexistent. This action was not only constitutionally impermissible, but also violative of fundamental appellate principles. As these errors have irreparably tainted this litigation, to the extent all further action before the commission will be legally meaningless, Mr. Hilton respectfully requests that Respondents' Motion to Dismiss be denied.

Respectfully submitted,

A handwritten signature in black ink, appearing to read "A. N. Safran", written over a horizontal line.

Andrew N. Safran, Esquire
Post Office Box 12089
Columbia, South Carolina 29211
(803) 256-6689
Attorney for Appellant, Thomas Chad Hilton

THE STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

APPEAL FROM THE SOUTH CAROLINA
WORKERS' COMPENSATION COMMISSION

Susan S. Barden, Commissioner
Gene McCaskill, Commissioner
Andrea C. Roche, Commissioner

W.C.C. FILE NO.: 1111934

APPELLATE CASE NO.: 2014-001357

Thomas Chad Hilton APPELLANT.

v.

Flakeboard America Limited, Employer, and Liberty Mutual Insurance Company,
Carrier, Defendants, ... RESPONDENTS.

CERTIFICATE OF SERVICE

I, Roxanne R. Moorner, paralegal for Andrew N. Safran, Esquire, Attorney for Appellant, do hereby certify that on the 7th day of August, 2014, I caused to be filed, via hand delivery, the original and six (6) copies of the Appellant's Return to Respondents' Motion to Dismiss Appeal, with the Clerk of the South Carolina Court of Appeals. One (1) copy of the Appellant's Return to Respondents' Motion to Dismiss Appeal was furnished to counsel for Respondents via first class mail at the following address:

L. Brenn Watson, Esquire
Willson, Jones, Carter & Baxley, P.A.
872 S. Pleasantburg Drive
Greenville, South Carolina 29607


Roxanne R. Moorner
Post Office Box 12089
Columbia, South Carolina 29211
(803) 256-6689

August 7, 2014

000198

The South Carolina Court of Appeals

Thomas Chad Hilton, Claimant, Appellant,

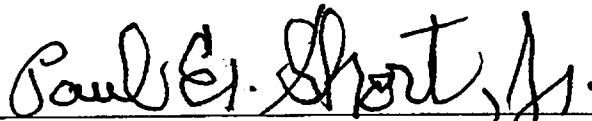
v.

Flakeboard America Limited, Employer, and Liberty
Mutual Insurance Company, Carrier, Defendants,
Respondents.

Appellate Case No. 2014-001357

ORDER

After careful consideration, Respondents' motion to dismiss is granted because the underlying order is not immediately appealable. *See* S.C. Code Ann. § 1-23-380 (Supp. 2013) (providing that a party may appeal after a *final decision* in a contested case).

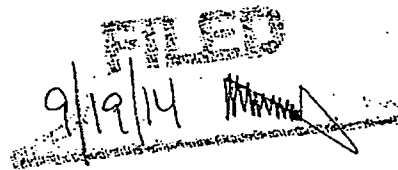


FOR THE COURT

Columbia, South Carolina

cc:

Andrew Nathan Safran, Esquire
Lawson Brenn Watson, Esquire



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000199

THE STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

RECEIVED

OCT 06 2014

APPEAL FROM THE SOUTH CAROLINA
WORKERS' COMPENSATION COMMISSION

SC Court of Appeals

Susan S. Barden, Commissioner
Gene McCaskill, Commissioner
Andrea C. Roche, Commissioner

W.C.C. FILE NO.: 1111934

APPELLATE CASE NO.: 2014-001357

Thomas Chad Hilton APPELLANT.

v.

Flakeboard America Limited, Employer, and Liberty Mutual Insurance Company,
Carrier, Defendants, ... RESPONDENTS.

PETITION FOR REHEARING

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Attorney for Appellant, Thomas Chad Hilton

000200

Pursuant to Rules 221 and 240, SCARC, Appellant, Thomas Chad Hilton, petitions this Court to Rehear and Reconsider its ruling in Thomas Chad Hilton, Claimant, Appellant, v. Flakeboard America Limited, Employer and Liberty Mutual Insurance Company, Carrier, Defendants, Respondents, filed September 19, 2014. Mr. Hilton asserts this Court overlooked and/or misapprehended the following points in dismissing his appeal from the South Carolina Workers' Compensation Commission appellate panel's (panel's) May 21, 2014 order:

1) The Court overlook/misconstrued the implications/effect of the panel's determination to vacate the single commissioner's June 4, 2013 order/award in its entirety, as this procedure: (a) exceeded the authority granted by the General Assembly through passage of S.C. Code Ann. Section 42-17-50 (1976, as amended), in violation of multiple rulings of our appellate courts; (b) unlawfully extinguished at least twenty-three (23) unappealed factual findings that constituted the law of this case; and (c) rendered the May 21, 2014 order null and void.

Our State's constitution provides in pertinent part that "[n]o person shall be finally bound by a judicial or quasi-judicial decision of an administrative agency affecting private rights . . . unless by a mode or procedure prescribed by the General Assembly" S.C. Const. art I, Section 22. In view of this limitation, the South Carolina Workers' Compensation Commission, a state administrative agency, "can only exercise those powers which have been conferred upon it by the South Carolina General Assembly." Triska v. Department of Health and Environmental Control, 292 S.C. 190, 355 S.E. 2d 531, 533 (1987); Bazzle v. Huff, 319 S.C. 443, 462 S.E. 2d 273, 274 (1995).

Although the panel can obviously reweigh the evidence when rendering a decision, ". . . [o]nly issues within the application for review under S.C. Code Ann. Section 42-

17-50 (1976) are preserved for” appellate purposes. See, Green v. City of Columbia, 311 S.C. 78, 427 S.E. 2d 685, 687 (Ct. App. 1993); Creech v. Ducane Company, 320 S.C. 559, 467 S.E. 2d 114, 116 (Ct. App. 1995). Consequently, the panel: (a) possesses only a qualified *de novo* review, to the extent it may only address the specific issues raised on appeal, but cannot “answer questions . . . [it is] not asked.” .” Langley v. Boyter, 284 S.C. 162, 325 S.E. 2d 550, 561 (Ct. App. 1984), quashed on other grounds, 286 S.C. 85, 332 S.E. 2d 100 (1985); Atlantic Coast Builders and Contractors, LLC v. Lewis, 398 S.C. 323, 730 S.E. 2d 282, 286 (2012); and (b) is prohibited from disrupting unappealed factual findings, which “became and are the law of this case” Ham v. Mullins Lumber Company, 93 S.C. 66, 7 S.E. 2d at 15, 16 (1940); Smith v. South Carolina Department of Mental Health, 329 S.C. 485, 494 S.E. 2d 630, 639 (Ct. App. 1997).

In this instance, Respondents: (a) never sought to submit additional medical evidence before either the single commissioner or panel; (b) consistently denied the presence of cognitive deficits in the face of unanimous medical opinion to the contrary; (c) neither disputed Mr. Hilton’s competency to testify, nor asserted there was a need for appointment of a Guardian ad Litem; (d) were acutely aware the medical opinion upon which their contention of maximum medical improvement rested was fatally flawed; and (e) not only chose, but actually demanded, that the parties proceed with a merits hearing relative to these “medically driven” issues.

Notwithstanding the absence of any contention that Respondents were denied the opportunity to present all pertinent evidence, had sought leave to obtain additional evidence, questioned Mr. Hilton’s legal competency or were unaware as to the scope of the January 3, 2013 hearing, the panel effectively “rewrote the entire case.” Specifically, the panel: (a) completely vacated the June 4, 2013 Decision and Order, despite the presence of numerous

unappealed factual findings (including Finding of Fact Nos. 1, 2, 3, 4, 5, 6, 7, 11, 14, 15, 18, 19, 20, 21, 23, 24, 26, 27, 29, 40, 41, 42 and 44); (b) ordered Respondents to “send . . . [Mr. Hilton] to a neurologist of their choice for an evaluation as to the causation and extent of [his] . . . problems”; (c) remanded the claim “to the Jurisdictional Commissioner for the purposes of making a determination as to whether or not [Mr. Hilton] . . . is competent to testify and whether or not [he] . . . needs a Guardian ad Litem pursuant to §42-15-55”; and (d) declined to address those issues previously framed by the parties and preserved through Respondents’ Form 30. See, Ham, supra.

These actions were clearly violative of longstanding precedent which has repeatedly admonished the commission/panel to refrain from exceeding the scope of exceptions raised through the W.C.C. Form 30. They similarly fell outside the statutory authority granted by the General Assembly, resulting in the May 21, 2014 order becoming “null and void.” Responsible Economic Development v. South Carolina Department of Health and Environmental Control, 371 S.C. 547, 641 S.E. 2d 425, 428 (2007).

Accordingly, Mr. Hilton respectfully requests this Court to grant his Petition, withdraw its prior Order, hear the matter on its merits and issue a decision reversing the panel’s order and requiring that any subsequent determination be limited to the issues raised by Respondents’ W.C.C. Form 30 and the current record, in light of applicable legal authorities.

2) The Court overlook/misconstrued the implications/effect of the panel’s determination to vacate the single commissioner’s June 4, 2013 order/award in its entirety, as this procedure: (a) exceeded the authority granted by the General Assembly through passage of S.C. Code Ann. Section 42-17-50 (1976, as amended), in violation of multiple rulings of our appellate courts; and (b) resulted in an unconstitutional violation of procedural due process.

Article I, Section 22 also “requires an administrative agency to give procedural due process to parties that come before it” Garris v. Governing Board of South Carolina Reinsurance Facility, 333 S.C. 432, 511 S.E. 2d 48, 52 (1998); South Carolina Ambulatory Surgery Center Association v. South Carolina Workers’ Compensation Commission, 389 S.C. 380, 699 S.E. 2d 146, 152 (2010).

“If there is such a thing as due process of law, under it a litigant is entitled to notice of the issues to be met on trial, hearing or appeal.” Ham, 7 S.E. 2d at 715; Green, 427 S.E. 2d at 687. “Administrative agencies are required to meet minimum standards of due process”, which limits the panel’s focus to “[o]nly issues within the application for review”, while restraining it from “rewr[iting] . . . the entire case.” Smith, 494 S.E. 2d at 638; Green, supra.; Ham, supra.

As previously noted, Respondents’ W.C.C. Form 30: (a) neither requests an opportunity to obtain additional medical evidence nor challenges the legal capacity Mr. Hilton (whose testimony was introduced in their case in chief) to testify; (b) specifically identified the factual findings it intended to challenge; and (c) did not afford Mr. Hilton even semblance of notice that the issues ultimately created by the panel, much less the unappealed factual findings, remained the subject of this litigation.

The panel’s determination to erase all aspects of the single commissioner’s order (including the law of this case), while directing the parties to obtain further evidence for the purpose of litigating “issues” it arbitrarily created was clearly violative of due process. As due process must be afforded “before any binding decree, order, or judgment can be made”, its denial rendered the May 21, 2014 order “a nullity”. LaSalle Bank National Association v. Davidson,

386 S.C. 276, 688 S.E. 2d 121, 122 (2009); Adams v. H.R. Allen, Inc., 397 S.C. 652, 726 S.E. 2d 9, 12 (Ct. App. 2012).

Accordingly, Mr. Hilton respectfully requests this Court to grant his Petition, withdraw its prior Order, hear this matter on its merits and issue a decision reversing the panel's Order and requiring that any subsequent determination be limited to the issues raised by Respondents' W.C.C. Form 30 and the current record, in light of applicable legal authorities.

3) The Court overlooked/misconstrued the effect of the panel's failure to include findings of fact, rulings of law or the rationale underlying its determinations to vacate the single commissioner's order in its entirety and allow Respondents to obtain additional unrequested evidence, as this process: (a) not only exceeded its statutory authority, but also unconstitutionally deprived Mr. Hilton of procedural due process (as outlined above); (b) ignored the provisions of S.C. Code Ann. Section 42-17-40 (1976, as amended), which have been routinely construed to require the entry of detailed factual findings, legal analysis and explanation of the reasoning behind the panel's ruling; and (c) led to the creation of an illegal order.

Section 42-17-40 provides in pertinent part that the commission's "award, together with a statement of the findings of fact, rulings of law and other matters pertinent to the questions at issue, must be filed" Additionally, S.C. Code Ann. Section 42-17-60 (2007) prescribes that any "award of the commission . . . may [be] . . . appeal[ed] . . . to the court of appeals."

"The Workers' Compensation Act should be read *in pari materia* when possible." United Technologies v. South Carolina Second Injury Fund, 318 S.C. 213, 456 S.E. 2d 901, 904 (1995). As Section 42-17-60 necessarily envisions various forms of "awards", including denial

of compensation, this statute required inclusion of factual findings, legal ruling and explanation of the underlying rationale for any of the panel's determinations. See, Brayboy v. Clark Heating Company, Inc., 306 S.C. 56, 409 S.E. 2d 767, 768 (1991) (Ruling that sufficiently detailed factual findings enabling a reviewing Court to determine presence of evidentiary support and consistency with controlling law were necessary where panel denied compensation entitlement.)

As recognized in Heater of Seabrook, Inc. v. Public Service Commission of South Carolina, 332 S.C. 20, 503 S.E. 2d 739, 742 (1998), given the "wide latitude . . . afforded . . . [to administrative agencies] in making decisions, . . . the writing of orders without sufficient detail or analysis, . . . can make their decisions as a practical matter unassailable on appeal." Recognizing this potential for "arbitrary or capricious" action on the part of the agency, the Court has "repeatedly emphasized the need for specificity in administrative orders." Id.

In this regard, it cannot be seriously disputed "that the Commission is responsible for making factual findings and addressing matters pertinent to the questions and issues before it." James v. Anne's, Inc., 390 S.C. 188, 701 S.E. 2d 730, 737 (2010). This obligation has been exhaustively held to include: (a) entry of specific/express factual findings; and (b) a prohibition against implicit findings. In fact, "awards without . . . [these] specific findings do not comply with the requirements of the [workers' compensation] act and are illegal." Shealy v. Algernon Blair, Inc., 250 S.C. 106, 156 S.E. 2d 646, 648 (1967). The panel is also obliged to explain the reasoning behind its rulings, rather than leave the rationale to speculation. Able Communications, Inc. v. South Carolina Public Service Commission, 290 S.C. 409, 351 S.E. 2d 151, 152 (1986); Kiawah Property Owners Group v. Public Service Commission of South Carolina, 338 S.C. 92, 525 S.E. 2d 863, 865 (1999).

In this instance, the panel's order: (a) contains no factual findings (other than a listing of the findings contained in the single commissioner's Order that were mysteriously vacated); (b) declined to identify the legal authority for any of its rulings; and (c) offers no explanation as to its reasoning for doing so.

Accordingly, Mr. Hilton respectfully requests this Court to grant his Petition, withdraw its prior Order, hear this matter on its merits and issue a decision reversing the panel's May 21, 2014 order, while requiring any further consideration to be limited to the current evidentiary record, issues raised by Respondents' W.C.C. Form 30 and applicable legal authorities.

4) The Court overlooked/misconstrued the provisions of S.C. Code Ann. Section 1-23-380 (Supp. 2013) in determining this statute simply provides "that a party may appeal after a *final decision* in a contested case". As a consequence of this oversight/misconstruction, the Court has inadvertently limited the scope of appeals authorized by Section 1-23-380, to the extent the absence of immediate review/correction of fundamental legal errors which provide the entire basis for the panel's ruling will realistically deprive Mr. Hilton of an adequate remedy as to the consequences of these errors at any later stage of the proceedings.

Specifically, Section 1-23-380 provides in pertinent part:

... A preliminary, procedural or intermittent agency action or ruling **is immediately reviewable** if review of the final agency decision would not provide the adequate remedy. (Emphasis added).

As recognized by the Supreme Court in Allen Packett v. Kittrell, 365 S.C. 332, 617 S.E. 2d 730, 734 (2005), the language of this statute "indicates that whether an intermediate action or ruling is immediately reviewable is to be decided on a case-by-case basis, *i.e.* whether a review of the final decision would not provide an adequate remedy." As the provisions of

Section 1-23-380 (A) are analogous to the exhaustion of administrative remedies concept, logic dictates that the exception should be similarly construed.

While administrative remedies must generally be exhausted prior to obtaining judicial review, two commonly recognized exceptions to this rule include circumstances where: (a) "an agency has acted outside of its authority." Brown v. James, 389 S.C. 41, 697 S.E. 2d 604, 611 – 612 (Ct. App. 2010); and (b) "a party demonstrates that pursuit of administrative remedies would be a vain or futile act." Brown, 697 S.E. 2d at 611; Storm M. H. ex rel. McSwain v. Charleston County Board of Trustees, 400 S.C. 478, 735 S.E. 2d 492, 497 (2012):

When the panel chose to expand the issues previously framed by the parties, invalidate the prior order and materially alter essential aspects of this claim, it not only denied Mr. Hilton procedural due process, but also unconstitutionally exceeded its statutory authority. Each of these violations renders the panel's May 21, 2014 order void and without legal effect. Triska, 355 S.E. 2d at 533 ("Any action taken by . . . [an administrative agency] outside of its statutory and regulatory authority is null and void." Bazzle, 462 S.E. 2d at 274 ("Actions by the commission . . . [which] exceeded their statutory authority . . . were null and void."); LaSalle Bank National Association, 688 S.E. 2d at 122 (Due process must be afforded "before any binding decree, order, or judgment can be made . . ."); Adams, 726 S.E. 2d at 12 (Proceeding which violated "constitutional guarantee of procedural due process . . . was a nullity . . ."); Ware v. Ware, 404 S.C. 1, 743 S.E. 2d 817, 822 (2013) ("A void judgment is one that, from its inception, is a complete nullity and is without legal effect.").

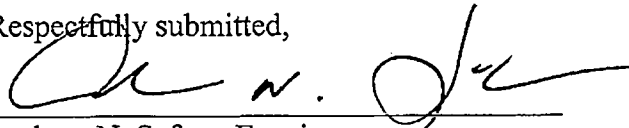
The panel's failure to include findings of fact, rulings of law and an explanation of its rationale similarly constitutes actions beyond its statutory authority, as: (a) an "award" within the meaning of Section 42-17-40 merely contemplates a determination of disputed issues;

(b) this statute does not authorize the arbitrary/unexplained process utilized by the panel; and (c) the illegality of the panel's order cannot be legitimately disputed.

Additionally, Mr. Hilton respectfully submits he has satisfied the alternative inadequate remedy exception, as the panel's actions will certainly require him to: (a) again establish facts that were the subject of unappealed findings extinguished by the panel in contravention of the law of the case doctrine; (b) relitigate issues that were not preserved for consideration by the panel; (c) necessarily be confronted with new evidence that would not be contained in the record but for the panel's determination to ignore these governing rules of procedure; (d) encounter a legally flawed decision making process that will necessarily be perpetuated given the rejection of governing procedure exemplified by the May 21, 2014 decision; and (e) face new arguments which will surely be advanced by Respondents in the hope of avoiding the legal ramifications of the current record.

Consequently, Mr. Hilton respectfully requests that this Court grant his Petition, withdraw/amend its prior Order, hear the matter on its merits and issue a decision reversing the panel's Order and requiring that any subsequent determination be limited to the issues raised by Respondents' W.C.C. Form 30 and the current record, in light of applicable legal authorities.

Respectfully submitted,



Andrew N. Safran, Esquire
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Columbia, South Carolina 29211
(803) 256-6689
Attorney for Appellant, Thomas Chad Hilton

THE STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

RECEIVED

OCT 06 2014

APPEAL FROM THE SOUTH CAROLINA
WORKERS' COMPENSATION COMMISSION

SC Court of Appeals

Susan S. Barden, Commissioner
Gene McCaskill, Commissioner
Andrea C. Roche, Commissioner

W.C.C. FILE NO.: 1111934

APPELLATE CASE NO.: 2014-001357

Thomas Chad Hilton APPELLANT.

v.

Flakeboard America Limited, Employer, and Liberty Mutual Insurance Company,
Carrier, Defendants, ... RESPONDENTS.

CERTIFICATE OF SERVICE

I, Roxanne R. Moorer, paralegal for Andrew N. Safran, Esquire, Attorney for Appellant, do hereby certify that on the 6th day of October, 2014, I caused to be filed, via hand delivery, the original and seven (7) copies of the Appellant's Petition for Rehearing, with the Clerk of the South Carolina Court of Appeals. One (1) copy of the Appellant's Petition for Rehearing was furnished to counsel for Respondents via first class mail at the following address:

L. Brenn Watson, Esquire
Willson, Jones, Carter & Baxley, P.A.
872 S. Pleasantburg Drive
Greenville, South Carolina 29607


Roxanne R. Moorer
Post Office Box 12089
Columbia, South Carolina 29211
(803) 256-6689

October 6, 2014

The South Carolina Court of Appeals

Thomas Chad Hilton, Claimant, Appellant,

v.

Flakeboard America Limited, Employer, and Liberty
Mutual Insurance Company, Carrier, Defendants,
Respondents.

Appellate Case No. 2014-001357

ORDER

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

H B Watson J.

John D. Beatty J.

Stephane C. McDonald J.

Columbia, South Carolina

cc: Andrew Nathan Safran, Esquire
Lawson Brenn Watson, Esquire

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SOUTH CAROLINA WORKERS' COMPENSATION COMMISSION

W.C.C. FILE #1111034

THOMAS CHAD HILTON	)	
	)	
CLAIMANT,	)	SC WORKERS' COMPENSATION COMMISSION
	)	
VS.	)	
	)	HEARING OF
FLAKEBOARD AMERICA	)	
LIMITED	)	THOMAS CHAD HILTON
	)	
EMPLOYER,	)	
	)	VS
AND	)	
	)	
LIBERTY MUTUAL FIRE	)	FLAKEBOARD AMERICA, LIMITED
INSURANCE	)	
CARRIER.	)	

This is the Transcript of the South Carolina Workers' Compensation Hearing of Thomas Chad Hilton versus Flakeboard America, Limited, taken before Gloria Davis, a Court Reporter and Notary Public in and for the State of South Carolina, commencing at the hour of 10:13 A.M., Thursday, January 3, 2013, at South Carolina Workers' Compensation Commission, 1333 Main Street Columbia, South Carolina.

COPY

REPORTED

BY

GLORIA DAVIS

PALMETTO COURT REPORTING
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APPEARANCES

FOR THE CLAIMANT:

Andrew N. Safran, Esquire
1224 Pickens Street
Columbia, SC 29211

FOR THE EMPLOYER/CARRIER:

L. Brenn Watson, Esquire
Willson Jones Carter & Baxley
872 South Pleasantburg Drive
Greenville, SC 29601

ALSO PRESENT:

Mr. Ian Gohean
Mr. Sammy Schillo

*Reporter's Note: -- Indicates incomplete thought or sentence, trailing off or interruption by speakers.

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I N D E X

WITNESSES

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EXHIBITS

For Defendant:

D-1 (Defendant's Exhibit Number One was marked for Identification)	
Received	211:15
D-2 (Defendant's Exhibit Number Two was marked for Identification)	
Received	211:17
Certificate	301

1 Commissioner Wilkerson: I knew it. See
2 there.

3 Mr. Watson: That's funny.

4 Commissioner Wilkerson: And I understand
5 why, I mean, it's -- not being derogatory in
6 nature it's just -- I just -- that's just it is
7 what it is.

8 Mrs. Hilton: Here?

9 Commissioner Wilkerson: Yes.

10 Court Reporter: Yes, ma'am.

11 Commissioner Wilkerson: Now, let me ask a
12 question before we get started. It's their 21 --

13 Mr. Safran: Yes.

14 Commissioner Wilkerson: -- okay. So, they
15 have the right, I'm thinking, to call your guy
16 first; am I wrong? You all correct me that under
17 procedures. I'm --

18 Mr. Watson: I think I have that right. What
19 -- I am happy to defer that right if Andy is
20 calling his client --

21 Commissioner Wilkerson: -- okay.

22 Mr. Watson: -- and if he's not I'll call
23 him. I just don't want to get stuck in some sort
24 of trickery.

25 Commissioner Wilkerson: Well, Andy ain't

1 going to trick you and you ain't going to trick
2 him but the question is, I think Andy said he's
3 not going to call him; is that --

4 Mr. Watson: Oh, he's not going to call him?

5 Mr. Safran: I haven't made up my mind but I
6 may not.

7 Mr. Watson: I'll call him.

8 Commissioner Wilkerson: -- but --

9 Mr. Watson: I'll -- I'll --

10 Commissioner Wilkerson: -- that was my --

11 Mr. Safran: Sure.

12 Commissioner Wilkerson: -- that was what I
13 thought I heard you -- you may not have put those
14 words in there.

15 Mr. Safran: No, I -- I --

16 Commissioner Wilkerson: I think you said --

17 Mr. Safran: -- I am reserving --

18 Commissioner Wilkerson: -- he can call him
19 if he wants to --

20 Mr. Safran: -- sure if he wants to that's --

21 Commissioner Wilkerson: -- so, I took that
22 to mean --

23 Mr. Safran: -- that's suits fine.

24 Mr. Watson: I'm calling him as an adverse
25 witness subject to cross-examination.

1 Commissioner Wilkerson: -- I understand but
2 you're going to call him first before we go here,
3 right?

4 Mr. Watson: Yes, sir.

5 Commissioner Wilkerson: That -- do what?

6 Mr. Watson: Yes, sir.

7 Commissioner Wilkerson: Yes, I thought -- I
8 thought that. Okay. Ma'am, you've got to go back
9 outside.

10 Mrs. Hilton: Okay.

11 Commissioner Wilkerson: I thought that was
12 going to be the case. I didn't want to get -- I
13 thought so but I just wanted to -- sir, I'm going
14 to go ahead and get you to get seated up here.
15 I'm going to have my Court Reporter swear you in

16 --

17 Mr. Hilton: Yes, sir.

18 Commissioner Wilkerson: -- and I'll get you
19 to raise your right hand and -- and she will swear
20 you in.

21 Whereupon;

22 Thomas Chad Hilton, being duly sworn and cautioned to
23 speak the truth, the whole truth and nothing but the truth,
24 testified as follows:

25 Court Reporter: Please state your full name

1 for the record.

2 witness: Thomas Chad Hilton.

3 Court Reporter: Thank you, sir.

4 Commissioner Wilkerson: Thank you, Mr.

5 Hilton. Mr. Watson?

6 Mr. Watson: Thank you, sir.

7 DIRECT EXAMINATION

8 By Mr. Watson:

9 Q. Mr. Hilton, good to see you again.

10 A. Good to see you.

11 Q. I understand, sir, that you were born on July 6th,
12 1974; is that right?

13 A. Yes, sir.

14 Q. You graduated high school from Marlboro County High
15 School, 1992, correct?

16 A. Yes, sir.

17 Q. After high school you started truck driver training
18 school with Builders Transport Company around the age
19 of twenty-one (21), right?

20 A. The best I can remember.

21 Q. You received your CDL driver's license around 1996,
22 1997 or thereabouts, correct, sir?

23 A. The best I can remember.

24 Q. Tell me this, do you have to renew your CDL driver's
25 license every so often?