

THE STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

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SC Court of Appeals

APPEAL FROM
SOUTH CAROLINA WORKERS' COMPENSATION COMMISSION

APPELLATE PANEL
The Honorable Susan S. Barden, The Honorable Aisha Taylor,
and The Honorable R. Michael Campbell, II

WCC NO. 1203594
Appellate Case No. 2014-002611

James B. Neff Employee/Appellant

v.

Lear's Welding & Fabrication, Inc.,
Employer and Bridgefield Casualty
Insurance Company c/o Summit
Holdings, Inc., Carrier/Respondents

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STATEMENT OF ISSUES ON APPEAL

- I. DID THE WORKERS' COMPENSATION COMMISSION ERR IN GIVING GREATER WEIGHT TO THE MEDICAL REPORTS AND DEPOSITION TESTIMONY OF DR. WILLIAM LEHMAN AS OPPOSED TO DR. SHADLEY SCHIFFERN; THE ERROR BEING THAT DR. LEHMAN SPECIFICALLY TESTIFIED THAT HE WOULD DEFER TO DR. SCHIFFERN WHO WAS AN EXPERT IN THE TREATMENT OF INJURIES OF THE TYPE SUFFERED BY CLAIMANT AND THE ORDER OF THE WORKERS' COMPENSATION COMMISSION COMPLETELY MIS-CHARACTERIZES THE TESTIMONY OF BOTH DR. LEHMAN AND DR. SCHIFFERN, FURTHER THE WORKERS' COMPENSATION COMMISSION CONCLUDED THAT MORE WEIGHT SHOULD BE GIVEN TO THE OPINION OF DR. LEHMAN BUT MISSTATED HIS OPINION.
- II. DID THE WORKERS' COMPENSATION COMMISSION ERR IN FINDING THAT CLAIMANT ADMITTED BEING NONCOMPLIANT WITH THE POST SURGERY INSTRUCTIONS FROM DR. LEHMAN; THE ERROR BEING THAT EVEN THOUGH CLAIMANT ADMITTED HE HAD GONE DEER HUNTING THERE IS NO EVIDENCE THAT ANY SUCH ACTIVITY HAD ANY EFFECT ON CLAIMANT'S CONDITION AND THERE IS NO EVIDENCE OF ANY TRAUMATIC INJURY OCCURRING DURING ANY "DEER HUNTING" THUS NO EVIDENCE THAT THE ALLEGED "DEER HUNTING" CONSTITUTES AN INTERVENING ACCIDENT.
- III. DID THE WORKERS' COMPENSATION COMMISSION ERR IN FINDING THAT CLAIMANT'S SUPPOSED ADMITTED NONCOMPLIANCE WITH THE MEDICAL INSTRUCTIONS OF DR. LEHMAN WAS THE DIRECT INTERVENING CAUSE OF THE PLATE BREAKING AND HIS CURRENT CLAVICLE CONDITION SUPPOSEDLY BASED ON THE MEDICAL RECORD AND DEPOSITION; THE ERROR BEING THAT THIS STATEMENT TOTALLY MIS-CHARACTERIZES DR. LEHMAN'S POSITION, FURTHER THE WORKERS' COMPENSATION COMMISSIONS' FINDING THAT DR. LEHMAN TESTIFIED TO A REASONABLE DEGREE OF MEDICAL CERTAINTY THAT CLAIMANT'S ALLEGED NON-COMPLIANCE WITH TREATMENT SPECIFICALLY DEER HUNTING AND NOT USING A SLING CAUSED THE PLATE IN HIS CLAVICLE TO BREAK RESULTING IN HIS CURRENT CONDITION; THE ERROR BEING THAT SUCH STATEMENT CONSTITUTES ONLY AN EXCERPT FROM DR. LEHMAN'S OPINIONS AND IS TAKEN OUT OF CONTEXT.

- IV. DID THE WORKERS' COMPENSATION COMMISSION ERR IN FINDING THAT THE GREATER WEIGHT OF THE EVIDENCE SUPPORTS THE CLAIMANT'S NON-COMPLIANCE WITH MEDICAL TREATMENT RESULTING IN AN INTERVENING CAUSE SUFFICIENT TO BREAK THE CHAIN OF CAUSATION BETWEEN HIS ACCIDENT OF APRIL 12, 2012 AND HIS CURRENT LEFT CLAVICLE CONDITION AND THAT CLAIMANT IS NO LONGER ENTITLED TO BENEFITS UNDER THE ACT; THE ERROR BEING THAT THIS VIOLATES THE SUBSTANTIAL WEIGHT OF THE EVIDENCE.
- V. DID THE WORKERS' COMPENSATION COMMISSION ERR IN FINDING THAT CLAIMANT'S SUPPOSED VIOLATION OF CLEAR MEDICAL INSTRUCTIONS PERTAINING TO HIS ALLEGED NEUROLOGICAL SYMPTOMS RESULT IN AN INTERVENING CAUSE TO BREAK THE CHAIN OF CAUSATION IN HIS CURRENT ALLEGED NEUROLOGIC CONDITION; THE ERROR BEING THAT THIS MIS-CHARACTERIZES DR. GOLDBERG'S RECORDS AND DR. GOLDBERG NEVER SUBMITTED TO DISCOVERY REQUESTS BY THE DEFENDANT RESULTING IN THEIR ATTEMPTING UNSUCCESSFULLY TO FIND A TREATING ENT DOCTOR IN SOUTH CAROLINA.
- VI. DID THE WORKERS' COMPENSATION COMMISSION ERR IN FINDING CLAIMANT TO BE LACKING IN CREDIBILITY; THE ERROR BEING THAT CLAIMANT'S CREDIBILITY IS ALL THE MORE REINFORCED BY HIS ADMISSIONS AGAINST INTEREST AND HIS INTERACTION WITH TREATING DOCTORS AND HIS IRRATIONAL TESTIMONY.
- VII. DID THE WORKERS' COMPENSATION COMMISSION ERR IN FINDING THAT CLAIMANT'S ENTITLEMENT TO TEMPORARY TOTAL DISABILITY BENEFITS TERMINATED ON OCTOBER 11, 2012 THE DATE ON WHICH DR. LEHMAN SUPPOSEDLY DISCOVERED THAT CLAIMANT'S ALLEGED NON-COMPLIANCE WITH MEDICAL TREATMENT AND THIS WAS SUFFICIENT TO BREAK THE CHAIN OF CAUSATION BETWEEN HIS ACCIDENT ON APRIL 12, 2012 AND HIS ALLEGED CONTINUED LEFT CLAVICLE AND NEUROLOGICAL CONDITION; THE ERROR BEING THAT CLAIMANT'S DISABILITY STILL FLOWED PROXIMATELY FROM HIS APRIL 12, 2012 ACCIDENT AND INJURY.

VIII. DID THE WORKERS' COMPENSATION COMMISSION ERR IN FINDING GLOBALLY THAT CLAIMANT IS NOT ENTITLED TO FURTHER BENEFITS UNDER THE ACT; THE ERROR BEING THAT CLAIMANT'S PRESENT CONDITION AND DISABILITIES AND IMPAIRMENTS EMANATED DIRECTLY AND PROXIMATELY FROM THE ACCIDENT AND INJURY OF APRIL 12, 2012 REGARDLESS OF ANY SUBSEQUENT ACTIVITIES.

CHRONOLOGY

April 12, 2012 Claimant James Neff was injured in a work related accident when a welding tank exploded.

April 21, 2012 The treating physician Dr. William Lehman diagnoses multiple injuries including a left clavicle fracture.

May 30, 2012 Dr. Lehman focuses on the clavicle as the Claimant's main medical issue.

July 12, 2012 Dr. Lehman references a continuing left clavicle non-union with persistent symptoms.

July 25, 2012 Dr. Lehman performs surgery on the left clavicle.

August 23, 2012 Dr. Lehman notes a definite gap in the area of the fracture with some concern regarding hardware failure and continued non-union and strongly suggests a bone stimulator.

August 24, 2012 Dr. Lehman writes a prescription for a bone stimulator due to non-union of the left clavicle.

September 14, 2012 Dr. Lehman indicated that Claimant had been

using a bone growth stimulator for the past week only and was utilizing an unfamiliar device.

October 2, 2012 Dr. Lehman's letter expresses dissatisfaction with the bone stimulator provided by the workers compensation carrier and states that the fixation plate had broken and perhaps an inadequate bone stimulator played a role in the breakage. Also indicates he was considering a referral to Dr. Shadley Schiffern.

October 11, 2012 Dr. Lehman saw the Claimant for the last time and indicated a preference for a referral to Dr. Shadley Schiffern.

February 18, 2013 Claimant saw Dr. Schiffern without authorization from the workers compensation carrier.

June 20, 2013 Claimant saw Dr. Schiffern again.

October 31, 2013 Dr. Schiffern executes an Affidavit expressing opinions in regard to the failure of treatment rendered to Claimant.

STATEMENT OF THE CASE

This was an admitted claim resulting from a work related

accident which occurred on April 12, 2012. Claimant was employed as a welder and was injured when a welding tank suddenly and violently exploded rendering him unconscious. He was initially transported by helicopter to a hospital trauma unit where he was hospitalized for approximately four (4) days. Claimant underwent multiple x-rays and CT scans and neurologic monitoring. His medical assessments included explosion injury with multiple trauma including closed head injury with persistent symptoms of vertigo and blurring vision, probable C7 spinous process cervical fracture, multiple rib fractures, left clavicle fracture with possible AC joint injury, stable elbow fracture, and left ulnar styloid fracture. (Dr. Lehman's Depo. P 33, Dr. Lehman's report dated April 21, 2012 - APA #1)

Claimant continued treatment with Dr. William Lehman who continued to note multiple traumas including head trauma and recommending a neurological follow-up. During a subsequent visit on May 30, 2012, Dr. Lehman focused on the clavicle as the main issue indicating that some sort of fixation with bone grafting would be required in order to achieve union of the fracture. As of the visit on July 12, 2012, Dr. Lehman referenced a continuing left clavicle non-union with persistent symptoms.

Dr. Lehman performed surgery on the left clavicle on July 25, 2012 some 3½ months after the accident and injury. At the visit of August 23, 2012, Dr. Lehman noted a definite gap in the

area of the fracture with such being of some concern regarding hardware failure and continued non-union. The doctor strongly suggested a bone stimulator to hopefully get union before the plate breaks - which he had seen happen. He specifically requested a bone stimulator on August 24, 2012 because there was no progression to healing (Depo. Lehman P 40 - 41, Exh. 1 Lehman's Depo).

On August 24, 2012 Dr. Lehman was concerned that union of the fracture had not been achieved because he was depending on the hardware, bone marrow and bone graft and the bone stimulator to hasten the process of healing. As of September 14, 2012, Dr. Lehman indicated that Claimant had been using a bone growth stimulator for the past week only and was utilizing an unfamiliar device from an alternative vendor authorized by the workers' compensation carrier but he noted a continuing fracture non-union. The doctor expressed specific dissatisfaction with the bone stimulator provided by the workers' compensation carrier in his letter of October 2, 2012 noting in a handwritten post script that the fixation plate had broken and perhaps an inadequate bone stimulator played a role in the breakage. He also indicated that he was considering a referral to Dr. Shadley Schiffern.

Dr. Lehman saw Claimant for the last time on October 11, 2012 expressing frustration at the apparent outcome of his treatment and suggesting a referral to another upper extremity

surgeon for possible revision including the usage of a steel plate which would provide less potential for breakage. He specifically named Dr. Shadley Schiffern of Ortho Carolina in regard to this treatment.

The workers' compensation carrier refused to approve a referral to Dr. Schiffern or any orthopaedic surgeon for further evaluation and treatment. Claimant saw Dr. Schiffern on his own on February 18, 2013 and the ensuing report indicated a left clavicle non-union with failed fixation and broken hardware and a recommendation for further treatment. The workers' compensation carrier continued to refuse to authorize any further orthopaedic treatment for Claimant and he visited Dr. Schiffern again on June 20, 2013 when his medical condition was essentially unchanged. Claimant has essentially been in orthopaedic limbo since that date.

Dr. Schiffern ultimately provided an opinion in regard to the causes and/or non-causes of the non-union of Claimant's clavicle and hardware failure and remains willing to undertake further treatment of Claimant including revision surgery.

ARGUMENTS

- I. The Workers' Compensation Commission erred in determining that the greater weight of the evidence supports the Claimant's alleged non-compliance with medical treatment resulted in an intervening cause sufficient to break the chain of causation between his accident of April 12, 2012 and his current left clavicle condition (combining and incorporating Statements of Issues on Appeal I - IV, VII and VIII).

"Every natural consequence which flows from a compensable injury unless the result of an independent or intervening cause sufficient to break the chain of causation is compensable." Sanders v. Wal-Mart Stores, 666 S.E.2d 297, 300 (Ct. App. 2008). In the present case, the Appellate Panel reversed the Hearing Commissioner who had concluded in his analysis of whether Claimant's alleged non-compliance resulted in an intervening accident which caused the plate to break included multiple factors. The Hearing Commissioner proceeded to conduct an analysis of each point of contention in this regard. He determined absolutely that the "foundational fact" was that Claimant had suffered an injury by accident which resulted in a broken left clavicle and no intervening event sufficient to break the chain of causation had occurred.

The Appellate Panel completely and utterly ignored this foundational fact and embarked on a misguided quest to find support for their apparently preordained position to determine that such an intervening break in the chain of causation had

occurred. In doing so, the Appellate Panel completely mischaracterized and excerpted out of context the evidence and testimony supplied by both Dr. Lehman and Dr. Schiffern.

Dr. Lehman stated that the bone was widely separated and biologic difficulty was a factor (in the failure) (Dr. Lehman's Depo. P 35). Dr. Lehman could only state that alleged non-compliance was a factor but could not apportion it as being the most proximate - most important factor (Dr. Lehman's Depo. P 71). Dr. Schiffern who was the upper extremity specialist to whom Dr. Lehman deferred - testified specifically that regardless of what Claimant did or didn't do compliance wise the bone was not healing expressing his opinion to a reasonable degree of medical certainty that any such activity (deer hunting) did not cause the non-union (Dr. Schiffern Depo. P 55).

Completely contrary to the Findings of the Appellate Panel, Dr. Lehman's testimony is replete with equivocation and speculation. Examples of the equivocation as to the causes of the non-union are contained on pages 23, 26 and 28 of his deposition where he asserts the questionable quality of the bone stimulator and concerns about a titanium plate as opposed to a steel plate and referring to a delay in getting the bone stimulator approved. Also Dr. Lehman stated that he did not specifically know what caused the non-union which was due to a number of factors (Dr. Lehman's Depo. P 54).

The Appellate Panel found "we give greater weight to the medical reports and deposition testimony of Dr. Lehman as opposed to Dr. Schiffern but as cited above the opinions of Dr. Lehman are not at odds with the opinions of Dr. Schiffern. The Appellate Panel appears to have simply chosen to distort the opinions of Dr. Lehman in order to comport with their preconceived ideas for disposition of the case.

The Appellate Panel further found that the Claimant's "admitted non-compliance" with the medical instruction of Dr. Lehman is the direct intervening cause of the plate breaking and his current left clavicle condition stating that this finding is based upon the medical records and deposition testimony of Dr. Lehman whose opinion was given the most weight. The error here is that this finding is not based on the medical records and testimony of Dr. Lehman whose testimony had been completely equivocal in regard to specific causes of the problems as cited herein. Also, there is simply no evidence that any event traumatic or otherwise nor any damage occurred during this so called "non-compliance."

The Appellate Panel found moreover that Dr. Lehman testified to a reasonable degree of medical certainty more likely than not that the Claimant's non-compliance with treatment specifically deer hunting and not using his sling caused the plate in his clavicle to break resulting in his current condition. The exact

discourse in Dr. Lehman's deposition is as follows:

Q. Did you believe that non-compliance was the reason he had not healed properly?

A. I thought it was certainly a factor.

Q. Ok?

A. I couldn't rule out other issues of course that contributed which were the questionable quality of the bone stimulation device which was an off brand and unknown to me. I was also concerned about the plate which was a titanium plate. It is more bio-compatible with less chance of infection, but the strength of that plate is sometimes not as rigid. And, I suppose, could be more prone to failure as opposed to the stainless steel plate.

(Dr. Lehman's Depo. P 23 L 8 - 25 - P 24 L 1)

Dr. Lehman further testified referring to the deer hunting "well I guess the positioning in order to hold the rifle, and the recoil those are the only factors that I'm really familiar with. I'm not really a deer hunter I don't know what caliber rifle was used and how many shots were taken and so forth." In other words, he cannot state that anything happened which may have contributed to the problem. Dr. Schiffern testified to a reasonable degree of certainty that "deer hunting" was not a cause of the problem which was bound to occur anyway.

The Appellate Panel statement that Dr. Lehman testified to a reasonable degree of medical certainty that Claimant's non-compliance with treatment specifically deer hunting and not using the sling caused the plate in his clavicle to break resulting in his current condition is therefore contrary to his actual testimony. Dr. Lehman's testimony was as follows:

Q. In your opinion - and I'm asking you to state this opinion to a reasonable degree of medical certainty. In your opinion, is the condition that you found him in on October 11, 2012 as far as his left clavicle goes, is that condition or was that condition caused by his non-compliance with treatment?

A. I'm sorry. Could you repeat the question?

Q. The question is, more likely than not, was the condition of his left clavicle on October 11th caused by his non-compliance with treatment?

A. That's with the plate broken?

Q. Correct.

A. I would say that that would be a substantial factor.

Q. More likely than not?

A. Yes.

Dr. Lehman's testimony further stated:

Q. Would you consider - - - use of the rifle and the failure to use his sling as instructed by his physician, an intervening cause of his current problem? In other words, a cause in-between the accident and the problems he has now. Would you - can you give an opinion to that?

A. I guess that's a legal term. Could you explain that a little bit more?

Q. I'll try to rephrase it.

A. I want to say the right thing. But, I guess, he did have a fracture. It went on to a non-union, which the causes for that are not entirely clear. He eventually had treatment which included his surgery with a delay in the healing process. One of the contributing causes certainly being lack of use of the sling, and perhaps the deer hunting which therefore made it more likely that the plate would break.

(Dr. Lehman Depo. P 28 L 9 - P 29 L 6)

The reasonable degree of medical certainty statement is a separate assertion and does not refer to the doctor's opinion about any alleged non-compliance which is clearly equivocal.

It is patently evident that Dr. Lehman's testimony is indefinite and equivocal and is certainly not stated with a

certainty attributed to it by the Appellate Panel's findings. The Appellate Panel simply "cherry picked" and excerpted testimony completely out of context and found that this equivocal testimony constituted a definite opinion upon which they based their decision. It has been noted that the instances of deer hunting yield no indication whatsoever of any trauma or traumatic injury and any such inferences admittedly can not be drawn by the treating physician as willingly indicated in his testimony. Any such speculative inferences cannot be relied upon by the Appellate Panel which essentially decided that the only cause of the problem was the deer hunting when Dr. Lehman - concurred in by Dr. Schiffern - testified to multiple potential factors practically all beyond the control of Claimant.

Further illustrative of Dr. Lehman's opinion related to multiple factors is the following testimony:

- Q. And you referred earlier in your testimony that you knew this was going to be a difficult case. What did you mean by that?
- A. Well the bone was widely separated. The bone fragments were widely separated, suggesting there was some scar tissue or muscle interposition in the bone ends. Again, as I also mentioned, it's unusual to have a clavicle non-union. The reasons for those aren't clear, but there seems to be some biologic difficulty

in getting bones to heal in such circumstances. So, that was another factor. And there was also a gap, basically in the bone which had to be made up. Using bone graft is just not the ideal material used to get rapid fracture healing. It's much better if you can get the native bones to abut, one against the other.

(Dr. Lehman Depo. P 35 L 9 - 25)

Q. And in this case you were not able to get the native bones to abut, were you?

A. No. Not completely, no.

Q. The gap was there from the outset; is that correct?

A. Yes.

Q. There's nothing that he did by non-compliance, or anything to cause that gap to be there in the first place, was there?

A. No.

Q. That was caused by a work related injury wasn't it?

A. Yes.

(Dr. Lehman Depo. P 36 L 1 - 13)

Speculative aspects of the hunting imbroglio are illustrated in Dr. Lehman's testimony thusly.

Q. Of course when you said hunting you were basing on

how he told you or apparently told your assistant that he had been hunting. You didn't get any further details about what kind of physical activity he engaged in while hunting, whether or not he sat, climbed a tree stand or anything like that?

A. No.

Q. So, you don't know - - obviously, you don't actually know what he was doing?

A. That's correct.

Q. You said earlier, I believe, that you're not a deer hunter?

A. Correct.

Q. Do you know when deer season begins?

A. Well, I think it varies by county, but I think it usually starts around December sometime. Of course it depends on whether you're using a bow and arrow or musket and that sort of thing.

Q. All the indications so far in the questioning, in the records and so on, indicate he was using a rifle; is that correct?

A. Well, that's - - I don't really know whether he's using a rifle or not.

Q. What if I told you that the hunting season for

using a gun started on October 1st? Would you be aware of that one way or another?

A. No.

Q. October 1st would be about 10 days before the last time you saw him on October 12th when you referred to his deer hunting; is that correct?

A. Yes.

Q. So, if he went deer hunting 12 times in 10 days, I mean, obviously that would be unusual, wouldn't it? And he'd probably overexert himself?

A. Yes. Again, it just depends on whether he was just sitting in a deer stand trying to find deer or whether he was actually firing his rifle and so forth.

Q. And that would make a difference as to how much pressure he was putting on the injury and what he was actually doing. It's not the fact that he was hunting - - It's would be the physical activities that he actually engaged in. Would that be fair?

A. Yes.

Q. And you don't know what that was, do you?

A. That's correct.

(Dr. Lehman Depo. P 37 L 14 - P 39 L 11)

Testimony in regard to not using a steel plate as a factor:

- Q. If a steel plate had been used would it have broken in your opinion?
- A. That would require some conjecture, but it certainly would be stronger and would less likely break.
- Q. You also referred to a bone stimulator being a factor that you recommended in healing; is that correct?
- A. Yes.
- Q. At what point did you recommend that Mr. Neff start using a bone stimulator?
- A. As we discussed before, he'd only been using it briefly at the time of these visits. But, I do remember that I had requested the bone stimulator a significant time prior to it's actual arrival or being used. There was at least some delay in getting authorization for its use.
- Q. That delay wasn't Mr. Neff's responsibility, was it?
- A. No.
- Q. Whose responsibility was it?
- A. Well, we have to go through the adjuster usually.
- Q. Did you write a written prescription for the bone stimulator? I'm going to show you this document.

A. Yes.

Q. And that's dated August 24, 2012 is that correct?

A. Yes.

Q. Was a bone stimulator ultimately provided by the workers' compensation carrier?

A. Yes.

Q. Was it the one you wanted?

A. No.

(Dr. Lehman's Depo. P 39 L 18 - P 41 L 15)

Q. ... would that be another possibility of a contributing factor to the failure of the union?

A. Yes.

Q. And the breakage of the plate?

A. Yes.

(Dr. Lehman's Depo. P 43 L 7 - 11)

Q. Fixation plate is broken. And you say, perhaps an inadequate bone stimulator played a role is that correct?

A. Played a role, yes.

Q. And that's the first thing you mentioned, wasn't it?

A. Yes.

(Dr. Lehman's Depo. P 45 L 15 - 21)

A. I felt that it would be prudent to send him to an

upper extremity specialist ie., Dr. Schiffern who ideally would - well, potentially do a better job than I could about getting this healed without any further delay.

Q. So, you don't consider yourself an upper extremity specialist?

A. No.

(Dr. Lehman's Depo. P 46 - L 20 P 47 L 2)

Page 48 (Dr. Lehman's depo) regarding the procedure being difficult:

Q. You said that the procedure was difficult in this case due to his large size, with very little neck. As well as concerns about his underlying respiratory status. You further say perhaps a stainless steel plate would provide less potential for breakage and perhaps shortening of clavicle to get better bony apposition would be prudent. So, those are two things that had not been done up until that point; is that correct?

A. Yes sir.

Q. Was it your opinion at that point that if you could do those two things or one of them that he would have a better chance of a successful repair of the problem?

A. Yes.

Q. Do you feel that way to a reasonable degree of medical certainty?

A. Yes.

Page 54 L 6 (Dr. Lehman's depo) further indication of the speculative nature of opinions -

Q. So would it be a fair statement that you don't actually know what caused this non-union and breakage of the plate?

A. Yes that's correct. I think it very well may be caused by a number of factors.

Page 55 L 4 (Dr. Lehman's depo) Ultimate irony "I'll object" (by defense attorney), that calls for speculation as to whether he used it every day. He has no idea about that (all speculation).

Page 59 (Dr. Lehman's depo) Further widening the spectrum of potential causes of the failure:

Q. Line 7: I'm going to bring you forward to your August 2, 2012 office note under subjective transcription, again you refer to a problem with bleeding again, he still had considerable swelling and a fair amount of pain. You made the specific statement he may have turned over accidentally on his shoulder creating some new difficulties.

Would that be based on something he told you?

A. Yes. (The same manner as the hunting report).

Q. During the course of ordinary sleeping it's certainly possible and even likely that a person may roll over on an injured member is that correct?

A. Yes.

Q. And that could cause accidental injury to that member?

A. Yes.

Page 60:

Q. Would you consider a possible factor, in the ultimate non-union and breakage of the plate, the fact that he may have rolled over accidentally at some point in time or more than one time?

Again defense counsel objects - It calls for speculation. (The effect of the "hunting" also involved only speculation).

A. Yes possibly.

Q. The patient can't live in a bubble can they doctor?

A. No.

Page 70 (Dr. Lehman's depo) Further equivocation

Q. By defense attorney - Is it fair to say the most

likely reason for the issue that you saw in October was his non-compliance?

A. I can only say that it was a factor. But I can't apportion that as being the absolute most proximate - - most important factor.

Page 73 - (Dr. Lehman's depo)

Q. By defense attorney - You were asked about the not being in total compliance in this case. You cannot say that the plate would not have broken, even if there had been total compliance, can you?

A. No.

The laborious preceding discussion is globally illustrative of the complete uncertainty in regard to the reason for the breakage of the plate in this case. The only certainty in this case is that Jimmy Neff suffered a devastating work related injury in the form of a violent explosion which shattered his collar bone and inflicted severe neurological injury which has still not been addressed because of the carrier's stonewalling and recalcitrance.

II. The Appellate Panel further found that Claimant had violated clear medical restrictions pertaining to his neurological symptoms which resulted in an intervening cause sufficient to break the chain of causation between his accident on April 12, 2012 and his current neurological condition (combining and incorporating Statements of Issues on Appeal V and VI).

These are patently fallacious findings in that Claimant's discontinuation of neurological treatment was based on the treating doctor, Dr. Goldberg not complying with requests from the carrier and termination of Claimant's treatment for non medical reasons and the carrier being unable to find another treating neurologist. Again, there is no evidence that any supposed "violation of medical restrictions" played any role in causing Claimant's current neurological condition - whatever that may be since the carrier again failed to provide appropriate treatment. This is another example of carrier obstructionism which has been prevalent throughout this claim as specifically evidenced by paying Claimant the obviously wrong compensation rate and the failure and refusal to provide the bone stimulator requested by the treating physician thus engaging in a pattern of conduct designed to obstruct and delegitimize a legitimate workers' compensation claim.

Also, Claimant's testimony is replete with irrational and inappropriate comments, such as "it would probably be easier if I hadn't been blown up and had a severe concussion and my head don't (sic) work." (Hrg. Comm. Tr. P 30 L 10-12):

Q. "Just hold the document please Mr. Neff?

A. No. Get away from me." (Hrg. Tr. P 46 L 11-12).

These excerpts are the reactionary rantings of someone who has suffered a neurological injury which has not been appropriately treated.

CONCLUSION

There are numerous cases in this State that have held that the Workers' Compensation Act is remedial legislation which is entitled to a liberal construction in order to accomplish the ends and purposes for which the Act was enacted. Flemon v. Dickert-Keowee, Inc., 259 S.C. 99, S.E.2d 751 (1972); Baldwin v. Pepsi Cola Bottling Co., 234 S.C. 320, 108 S.E.2d 409 (1959); Cokeley v. Robert E. Lee, Inc., 197 S.C. 157, 14 S.E.2d 889 (1941); Ham v. Mullins Lumber Co., 193 S.C. 66, 7 S.E.2d 712 (1940).

In the present case, the findings of the Commission Appellate Panel in regard to a break in the chain of causation because of some allegation of vague non-compliance are completely and clearly erroneous in view of the reliable, probative and substantial evidence of record and constitute an abuse of discretion and error of law because the factual conclusions are without evidentiary support. Fontaine v. Peitz, 354 S.E.2d 565 (1987). The underlying foundational fact is that Claimant

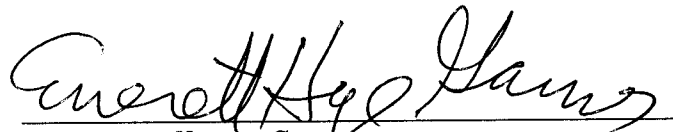
suffered a horrific work related injury and there is not a scintilla of evidence that he suffered any intervening accident, injury or occurrence which caused his ultimate condition. All we have here is speculation that some undefined episode of hunting might have been one of the multiple potential causes of this failure.

It would be different if Claimant were in a car accident or had experienced some other definitive occurrence but here the Appellate Panel clearly engaged in speculation beyond the scope of medical opinion and in direct contravention of the remedial purposes of the Act. In doing so they have created a scenario in which any Claimant who is injured in a work related accident must live in a "bubble" lest he roll over in bed or be engaged in some other routine activity which, under the reasoning by this Appellate Panel decision, would constitute an intervening accident breaking the chain of causation. In this case, the Appellate Panel has created an insurmountable burden for a Claimant to maintain the integrity of the situation and get the needed treatment occasioned by his work related injuries.

Ultimately, regardless of the medical opinions which have been thoroughly discussed herein as being numerous equivocal and speculative, the emphasis - as so determined by the Hearing Commissioner - should not be on the cause of the plate breaking but the emphasis should be on the cause of the injury itself.

Explosion → injury → surgery → non-union → Jimmy Neff is left in medical purgatory without the treatment he needs and is now denied all workers' compensation benefits for injuries which most definitely resulted from his work related injury.

Respectfully submitted,



Everett Hope Garner
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Attorney for Appellant

March 16, 2015

THE STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

APPEAL FROM
SOUTH CAROLINA WORKERS' COMPENSATION COMMISSION

APPELLATE PANEL
The Honorable Susan S. Barden, The Honorable Aisha Taylor,
and The Honorable R. Michael Campbell, II

WCC NO. 1203594
Appellate Case No. 2014-002611

James B. Neff Employee/Appellant

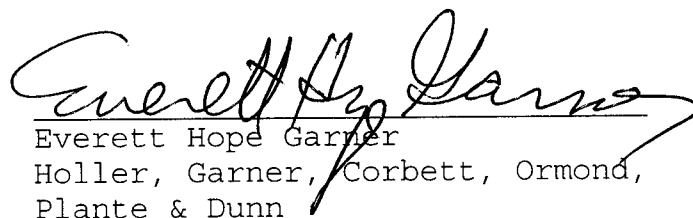
v.

Lear's Welding & Fabrication, Inc.,
Employer and Bridgefield Casualty
Insurance Company c/o Summit
Holdings, Inc., Carrier/Respondents

PROOF OF SERVICE

I certify that I have served the Initial Brief of Appellant and Designation of Matter to Be Included in the Record on Appeal on Lear's Welding & Fabrication, Inc., and Bridgefield Casualty Insurance Company by depositing a copy of it in the United States mail, postage prepaid, on March 16, 2015, addressed to their attorney of record, Nicholas L. Haigler, Esquire, Sowell, Gray, Stepp, Laffitte, P.O. Box 11449, Columbia, SC 29211.

March 16, 2015


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SC Court of Appeals

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J. Ed Holler
Everett Hope Garner
*James J. Corbett
*J. Charles Ormond, Jr.
*Anthony R. Plante
Benjamin A. Dunn, II
* Certified Mediator S.C.

Of Counsel
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*Steven D. Dennis

Reply To
Post Office Box 11006
Columbia, S.C. 29211

March 16, 2015

Ms. Jenny Abbott Kitchings,
Clerk of the South Carolina Court of Appeals
P.O. Box 11629
Columbia, SC 29211

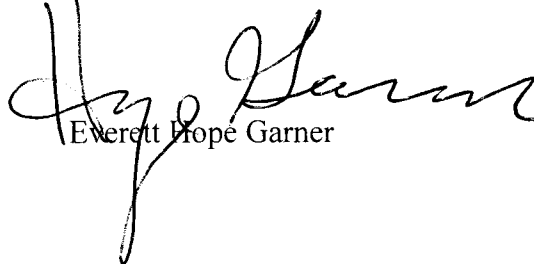
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MAR 18 2015
SC Court of Appeals

RE: James B. Neff v. Lear's Welding & Fabrication, Inc.,
Appellate Case No: 2014-002611

Dear Ms. Kitchings:

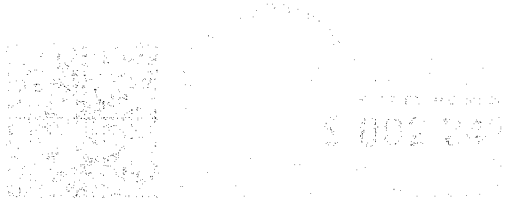
Enclosed please find the Initial Brief of Appellant and the Designation of Matter to be Included in the Record on Appeal in regard to the above referenced matter. By copy of this letter with enclosure I am serving same upon opposing counsel. If you have any questions, please do not hesitate to contact me.

Sincerely,



Everett Hope Garner

EHG/lmk
Enclosure
CC: Nicholas L. Haigler, Esquire w/enclosure



PLANTE & DUNN

1

Ms. Jenny Abbott Kitchings
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SC Court of Appeals

