

THE STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

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JUN 10 2015

APPEAL FROM
SOUTH CAROLINA WORKERS' COMPENSATION COMMISSION

SC Court of Appeals

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

APPELLANT'S REPLY BRIEF

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TABLE OF AUTHORITIES

Cases

Whitfield v. Daniel Constr. Co., 266 S.C.
37, 40-41, 83 S.E.2d 460, 462 (1954) 1

REPLY TO ARGUMENTS

The Appellant completely concurs in Respondent's statement that "every natural consequence that flows from a compensable injury is also compensable unless the consequence is the result of an independent intervening cause sufficient to break the chain of causation." Citing Whitfield v. Daniel Constr. Co., 266 S.C. 37, 40-41, 83 S.E.2d 460, 462 (1954). After stating this axiom, the Respondent then embarks on a flawed and fatally inaccurate characterization of the evidence in this case. The grandiose conclusory assertions of the Respondent conveniently ignore the foundational facts upon which the Hearing Commissioner rightly based his decision.

Appellant has truly "gone to great lengths" - as Respondent states in its Brief - to point out easily ascertainable facts and emphasize the complete opinions of Dr. Lehman the treating physician rather than pit Dr. Lehman against Dr. Schiffern and vice versa. Dr. Lehman's opinions, when not taken out of context as Respondent does, do not effectively diverge from those of Dr. Schiffern.

The Respondent has tried to create a great war of opinions between Dr. Lehman and Dr. Schiffern which is simply not reflective of the evidence. Dr. Lehman admits that he was never

able to get the native bones to abut (Dr. Lehman's Demo. P 36 L 1-31) and this problem was subsequently compounded by the decision not to use a stainless steel plate and the carrier's failure to provide the requested bone stimulator and delay in providing any bone stimulator.

The Respondent asserts incorrectly that "Claimant does not dispute the finding of the Full Commission that he was completely non-compliant with the post surgery medical instructions given him by Dr. Lehman nor does he dispute the ways in which he was non-compliant." The "800 pound gorilla" of alleged non-compliance was the incident of deer hunting which was voluntarily reported by the Claimant to Dr. Lehman's nurse and related to the doctor who had admitted in his deposition he had no details in regard to the hunting. Even if this scenario could be deemed non-compliance, there is absolutely no evidence that this "non-compliance" was the proximate cause of the breaking of the plate.

A review of all of the medical records, deposition testimony and other evidence point to multiple factors in the plate breakage, none of which can be construed in any way to constitute non-compliance by the Claimant, ie., the refusal of the carrier to provide the preferred bone stimulation device requested by Dr. Lehman, the use of a titanium plate versus a stainless steel plate, the inability by the doctor to get the native bones to abut creating a gap from the outset, claimant's large size and

the effect of routine living activities. Dr. Lehman specifically states that the bones were widely separated and a gap existed that had to be made up (Dr. Lehman's Depo. P 35 L 10-25). Also, the breakage of the plate occurred only after months of obstruction of treatment by the carrier and the uncontroverted continuation of the "gap." Before any alleged non-compliance bone simply didn't heal and the gap remained; therefore, any non-compliance was not even relevant much less the proximate cause of the failure nor an intervening cause of Claimant's condition.

Respondent engages in semantic gamesmanship in a full fledged effort to extract testimony out of context and apply a favorable spin. A vivid example of this is a purported quotation from Dr. Lehman's deposition at page 27, lines 3-10 which the doctor supposedly states that Claimant's use of his rifle and failure to use his sling caused the plate in his shoulder to break. The actual exchange involved the use of the term "could" not the term "did." This is simply illustrative of Respondent's repeated distortion of the testimony and evidence so as to comport with the Appellate Panel's ill conceived decision.

As stated in Appellant's Initial Brief, the same lack of medical evidence indicating a proximate cause of Claimant's neurological condition is similarly devoid of legitimacy. Specifically in regard to the neurological issue, the Appellate

Panel's findings were conclusory and totally without evidentiary support. The Respondent completely ignores the Neurological Institute records (Claimant's APA'S P 119-127) which refer to Claimant's neurological condition encompassing continuing memory loss at the time of his last visit on September 24, 2012.

These records indicate a referral for occupational rehabilitation given his continuing memory loss due to post concussive syndrome and also references that a closed head injury program at the Neurological Institute may be of benefit. None of this was implemented ostensibly due to the carrier's inability to subject the treating neurologist to a deposition; therefore, obviously Claimant had not been released from care by the treating neurologist.

Instead of addressing this issue, the Respondent tries to weave an assumption of non-compliance because of Dr. Goldberg's (not a neurologist but an ENT assessing tinnitus) vague and oblique reference to a history of industrial noise and past use and non use of hearing protection. This has absolutely no relevance to memory loss or any neurological condition and is illustrative of the diversionary tactics of Respondent's Brief.

SUMMARY

Respondent continues to completely ignore the incontrovertible fact that Claimant experienced a horrible, violent work related accident resulting in severe injuries necessitating long term medical treatment. During the course of this treatment, Claimant could not be expected to "live in a bubble" so as to satisfy an impossible burden of proving the negative proposition that his activities were not the cause of the circumstances in which Claimant ultimately found himself. The all encompassing principle in this case is that "but for" the work related accident Claimant would not be in these circumstances. To deny Claimant the medical care which he clearly needed as a direct and proximate result of the work related injury would serve to turn the mechanism of the workers' compensation system upside down and convert it into a system favoring the whims and fancies of the Employer/Carrier in direct contravention of the stated purposes of the Act. In this case, the carrier repeatedly played games of "keep away" and obstruction in dealing with this unconvertible legitimate workers' compensation claim. Jimmy Neff was the innocent victim of a devastating work related accident and has now been transformed into a victim of the system which was purportedly designed to protect him under these circumstances.

Claimant does not have to prove that "hunting" was not the

cause of the breaking of the plate as has been effectively required by the Appellate Panel in their reasoning in this case. To deny Claimant here would have the ultimate potential of denying all claimants everywhere.

Respectfully Submitted,



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June 10, 2015

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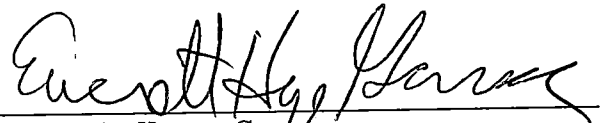
v.

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 Appellant's Reply Brief 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 June 10, 2015, addressed to their attorney of record, Nicholas L. Haigler, Esquire, Sowell, Gray, Stepp, Laffitte, P.O. Box 11449, Columbia, SC 29211.

June 10, 2015


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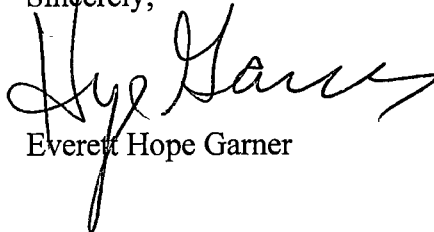
Ms. Jenny Abbott Kitchings,
Clerk of the South Carolina Court of Appeals
1015 Sumter St.
Columbia, SC 29201

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

Dear Ms. Kitchings:

Enclosed please find the original and one copy of Appellant's Reply Brief in regard to the above referenced matter. By copy of this letter with enclosure I am serving same upon defense 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