

THE STATE OF SOUTH CAROLINA
In the Supreme Court

APPEAL FROM THE SOUTH CAROLINA COURT OF APPEALS

Case No. 2013-001212

Unpublished Opinion No. 2015-UP-068
Heard December 11, 2014 – Filed February 11, 2015
Petition for Rehearing Denied March 13, 2015

RECEIVED

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S.C. Supreme Court

Joseph Mickle,

Respondent,

vs.

Boyd Brothers' Transportation, Inc., Employer,
And Lumbermans' Underwriting Allinace,
Carrier

Petitioners.

**PETITIONERS' APPENDIX TO
PETITION FOR WRIT OF CERTIORARI**

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THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM THE SOUTH CAROLINA
WORKERS' COMPENSATION COMMISSION

Appellate Case No. 2013-001212

Joseph Mickle, Claimant

Appellant-Respondent,

v.

Boyd Brothers' Transportation,
Inc., Employer and
Lumbermans' Underwriting
Alliance, Carrier,

Respondents-Appellants

RECORD ON APPEAL

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APPELLATE PANEL
of the
SOUTH CAROLINA WORKERS' COMPENSATION COMMISSION

JOSEPH MICKLE, CLAIMANT-RESPONDENT

v.

BOYD BROTHERS TRANSPORTATION, INC., EMPLOYER,

and

LUMBERMANS UNDERWRITING ALLIANCE, CARRIER.

DEFENDANTS-APPELLANTS

WCC FILE NO. 1022202

Appearances:

Claimant Represented by Frank A. Barton, Esquire and the Mullis Law Firm, Columbia, South Carolina

Defendants. Will Transport, Inc. and Boyd Brothers Transportation Inc., represented by Duke McCall, Esquire, Smith Moore Leatherwood, Greenville, South Carolina

STATEMENT OF THE CASE

The parties were heard by Commissioner T. Scott Beck on November 18, 2011, in Columbia, South Carolina. On March 14, 2012, Commissioner Beck issued his Order with the following specific Findings of Fact and Conclusions of Law:

FINDINGS OF FACT

"Based upon the stipulations of the parties and the evidence presented, both in the form of submissions under the Administrative Procedures Act and the Hearing testimony, it is found as fact:

1. That the parties to this proceeding are subject to and bound by the terms and provisions of the South Carolina Workers' Compensation Act as amended;

2. That Claimant is an employee of WTI Transport, Inc.;
3. That WTI Transport, Inc. is a wholly owned subsidiary of Boyd Brothers Transportation, Inc.;
4. That WTI Transport, Inc. did not regularly employ 4 or more employees in South Carolina;
5. That Defendants initially chose to pay benefits to Claimant in Alabama for the admitted claim; however, Claimant determined to pursue benefits in South Carolina where he resides;
6. That Boyd Brothers Transportation, Inc. has coverage in South Carolina;
7. That flatbed truck driving is an important, necessary, and essential part of the business and trade of Boyd Brothers Transportation, Inc.;
8. That employees of Boyd Brothers Transportation, Inc. regularly perform the identical work activity, flatbed truck driving, that Claimant performed in his work for Boyd's wholly owned subsidiary, WTI, Transport, Inc.;
9. That where the work activity Claimant engaged in for WTI, flatbed truck driving, was part of the general trade, business, or occupation of the owner, Boyd Brothers' Transportation, Inc., the owner, is a statutory employer as contemplated in S.C. Code Section 42-1-400 (1985), and is, therefore, responsible for the payment of benefits to Claimant;
10. That Claimant's injury is to his back, with radiation affecting both legs;
11. That Claimant failed to meet his burden of proving a compensable psychological injury;
12. That the Functional Capacity Evaluation (FCE) places Claimant in the sedentary to light work capacity;
13. That Claimant's treating physicians limit Claimant to sedentary work capacity;

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14. That Claimant is required to take significant prescription medications which prohibit him from driving a truck and which would also substantially limit his ability to perform any other form of work;

15. That the authorized treating physicians have restricted Claimant from driving trucks;

16. That Claimant's work history was almost exclusively in truck driving;

17. That Claimant is sixty-six (66) years of age with a high school education;

18. That the vocational assessment conducted by Robert Brabham concludes that Claimant is unable to perform any substantial gainful work activity;

19. That Claimant is unable to perform any substantial gainful work activity and, therefore, he is permanently and totally disabled;

20. That Claimant is entitled to and Defendants shall provide lifetime causally related medical care.

21. That the proceeds of the award will be allocated and disbursed under Utica Mohawk Mills v. Orr, 227 S. C. 226, 87 S.E. 2d 589 (1955), resulting in a weekly distribution to the Claimant of \$ 147.53 per week or a monthly entitlement of \$ 639.31 per month commencing upon execution of this Order and continuing for the rest of his life (See page 15 paragraph #8).

CONCLUSIONS OF LAW

Based on the evidence submitted in this case, the testimony given, the stipulations entered into and the foregoing Findings of Fact, this Commissioner makes the following Conclusions of Law:

1. Pursuant to §42-3-180 and §42-1-400, the South Carolina Workers' Compensation Commission has jurisdiction in this proceeding.

2. Pursuant to §42-1-400, Claimant was a covered statutory employee under the Act and Boyd Brothers Transportation, Inc, is a statutory employer as contemplated in Section 42-1-400, and is, therefore, responsible for the payment of benefits to Claimant.

3. Pursuant to §42-15-60, Defendant Boyd Brothers Transportation, Inc. is responsible for payment of causally-related medical care from the date of accident and for providing lifetime medical care.

4. Pursuant to §42-15-60, Claimant has reached maximum medical improvement.

5. Pursuant to §42-9-10, Claimant is permanently and totally disabled as the result of the injuries to his back and legs.

6. Pursuant to §42-9-301, a lump sum payment is approved as being in the best interest of Claimant and not prejudicing Defendants.

7. That Defendants owe Claimant the balance of his 500 weeks, taking credit for the weeks of temporary total disability benefits paid.

8. It is ordered by the Commission that the proceeds of this Order of One Hundred and Eighty-Eight Thousand Five Hundred and Forty-Three and 38/100ths (\$ 188,543.38) Dollars shall be allocated as follows: Sixty-Two Thousand Eight Hundred and Forty-Seven and 79/100ths (\$ 62,847.79) Dollars as attorney fees [one third (1/3)]; at least Two Thousand Three Hundred Thirty-Three and 57/100ths (\$ 2,333.57) Dollars for litigation costs; resulting in a Net to the Claimant of One Hundred and Twenty-Three Thousand Three Hundred and Sixty-Two and 02/100ths (\$ 123,362.02) Dollars. This amount shall be allocated and paid to the Claimant under Section 42-9-10 and Section 42-9-20 of the 1976 Code of Laws of South Carolina as

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interpreted by the Supreme Court decision of Utica Mohawk Mills v. Orr, 227 S. C. 226, 87 S.E. 2d 589 (1955); Sciarotta v. Bowen, 837 F.2d 135 (1988); Lemire v. Secretary of Health and Human Services, 682 F. Supp 102 (D.C.N.H.1988) and Hatch v. Heckler, 626 F. Supp. 1367 (N.D. California 1986). The Claimant's life expectancy under S. C. Code Section 19-1-150 is 16.08 years (a Sixty-Six year old male). This therefore results in a weekly distribution to the Claimant of \$ 147.53 [\$ 123,362.02 divided by the life expectancy in weeks of 836.16 weeks (16.08 years times 52 weeks per year)] or a monthly entitlement of \$ 639.31 [\$ 123,362.02 divided by the life expectancy in months of 192.96 months (16.08 years times 12 months per year)] commencing upon the execution and approval of this Order and continuing for the rest of his life."

DISCUSSION

Within the statutory period for review, counsel for Defendants filed an application for review setting forth their grounds for review, copies of which were furnished to all interested parties, prior to oral argument presented by the Appellate Panel on February 20, 2013. In their briefs, which were properly filed with Commission and properly served on all interested parties, and at oral arguments before the Appellate Panel on February 20, 2013, Defendants argued that the Hearing Commissioner erred (1) in finding that Boyd Brothers Transportation, Inc. was Claimant's statutory employer and that the Commission had jurisdiction over the claim; (2) in finding that Claimant was totally and permanently disabled and entitled to benefits and lifetime medical care; and (3) in including an erroneous calculation of the amount of the lump sum award.

In his Brief of Respondent which was properly filed with the Commission and properly served on all interested parties, and at oral arguments before the Appellate Panel on February 20, 2013, Claimant asserted that, as the result of a typographical error in the Hearing Commissioner's December 12, 2011 Order Directives, the Hearing Commissioner's Order incorrectly gave the employer credit for having paid 136 weeks of temporary total disability benefits despite the fact that it was undisputed that Claimant had been paid only 32 weeks of benefits at that time. Claimant took the position that the Appellate Panel should amend the Order so as to correct the mistaken credit and adjust the calculation of benefits due.

All proffered testimony has been taken. Such, together with all documentary evidence, has been delivered by oral argument to the individual members of the Appellate Panel and have since been under study and consideration. In an appellate review, the Appellate Panel shall, pursuant to S.C. Code Ann. Section 42-17-50 (1989), review the award, weigh the evidence as presented at the initial hearing, and, if good grounds be shown therefore, make its own Findings of Fact and reach its own Conclusions of Law consistent with or inconsistent with those of the Hearing Commissioner.

After considering all of the evidence in the record and the arguments presented, the Appellate Panel, by unanimous vote, affirms the Order of the Hearing Commissioner in full. Accordingly, the following Findings of Fact and Conclusions of Law shall become, and hereby are, the law of the case:

FINDINGS OF FACT

Based upon the stipulations of the parties and the evidence presented, both in the form of submissions under the Administrative Procedures Act and the Hearing testimony, it is found as fact:

1. That the parties to this proceeding are subject to and bound by the terms and provisions of the South Carolina Workers' Compensation Act as amended;
2. That Claimant is an employee of WTI Transport, Inc.;
3. That WTI Transport, Inc. is a wholly owned subsidiary of Boyd Brothers Transportation, Inc.;
4. That WTI Transport, Inc. did not regularly employ 4 or more employees in South Carolina;
5. That Defendants initially chose to pay benefits to Claimant in Alabama for the admitted claim; however, Claimant determined to pursue benefits in South Carolina where he resides;
6. That Boyd Brothers Transportation, Inc. has coverage in South Carolina;
7. That flatbed truck driving is an important, necessary, and essential part of the business and trade of Boyd Brothers Transportation, Inc.;
8. That employees of Boyd Brothers Transportation, Inc. regularly perform the identical work activity, flatbed truck driving, that Claimant performed in his work for Boyd's wholly owned subsidiary, WTI, Transport, Inc.;
9. That where the work activity Claimant engaged in for WTI, flatbed truck driving, was part of the general trade, business, or occupation of the owner, Boyd Brothers' Transportation, Inc., the owner, is a statutory employer as contemplated in S.C. Code Section 42-1-400 (1985), and is, therefore, responsible for the payment of benefits to Claimant;

10. That Claimant's injury is to his back, with radiation affecting both legs;
11. That Claimant failed to meet his burden of proving a compensable psychological injury;
12. That the Functional Capacity Evaluation (FCE) places Claimant in the sedentary to light work capacity;
13. That Claimant's treating physicians limit Claimant to sedentary work capacity;
14. That Claimant is required to take significant prescription medications which prohibit him from driving a truck and which would also substantially limit his ability to perform any other form of work;
15. That the authorized treating physicians have restricted Claimant from driving trucks;
16. That Claimant's work history was almost exclusively in truck driving;
17. That Claimant is sixty-six (66) years of age with a high school education;
18. That the vocational assessment conducted by Robert Brabham concludes that Claimant is unable to perform any substantial gainful work activity;
19. That Claimant is unable to perform any substantial gainful work activity and, therefore, he is permanently and totally disabled;
20. That Claimant is entitled to and Defendants shall provide lifetime causally related medical care.
21. That the proceeds of the award will be allocated and disbursed under Utica Mohawk Mills v. Orr, 227 S. C. 226, 87 S.E. 2d 589 (1955), resulting in a weekly distribution to the Claimant of \$ 147.53 per week or a monthly entitlement of \$ 639.31 per month commencing upon execution of this Order and continuing for the rest of his life.

CONCLUSIONS OF LAW

Based on the evidence submitted in this case, the testimony given, the stipulations entered into and the foregoing Findings of Fact, the Commission makes the following Conclusions of Law:

1. Pursuant to §42-3-180 and §42-1-400, the South Carolina Workers' Compensation Commission has jurisdiction in this proceeding.
2. Pursuant to §42-1-400, Claimant was a covered statutory employee under the Act and Boyd Brothers Transportation, Inc. is a statutory employer as contemplated in Section 42-1-400, and is, therefore, responsible for the payment of benefits to Claimant.
3. Pursuant to §42-15-60, Defendant Boyd Brothers Transportation, Inc. is responsible for payment of causally-related medical care from the date of accident and for providing lifetime medical care.
4. Pursuant to §42-15-60, Claimant has reached maximum medical improvement.
5. Pursuant to §42-9-10, Claimant is permanently and totally disabled as the result of the injuries to his back and legs.
6. Pursuant to §42-9-301, a lump sum payment is approved as being in the best interest of Claimant and not prejudicing Defendants.
7. That Defendants owe Claimant the balance of his 500 weeks, taking credit for the weeks of temporary total disability benefits paid.

8. It is ordered by the Commission that the proceeds of this Order of One Hundred and Eighty-Eight Thousand Five Hundred and Forty-Three and 38/100ths (\$ 188,543.38) Dollars shall be allocated as follows: Sixty-Two Thousand Eight Hundred and Forty-Seven and 79/100ths (\$ 62,847.79) Dollars as attorney fees [one-third (1/3)]; at least Two Thousand Three Hundred Thirty-Three and 57/100ths (\$ 2,333.57) Dollars for litigation costs; resulting in a Net to the Claimant of One Hundred and Twenty-Three Thousand Three Hundred and Sixty-Two and 02/100ths (\$ 123,362.02) Dollars. This amount shall be allocated and paid to the Claimant under Section 42-9-10 and Section 42-9-20 of the 1976 Code of Laws of South Carolina as interpreted by the Supreme Court decision of Utica Mohawk Mills v. Orr, 227 S. C. 226, 87 S.E. 2d 589 (1955); Sciarotta v. Bowen, 837 F.2d 135 (1988); Lemire v. Secretary of Health and Human Services, 682 F. Supp 102 (D.C.N.H.1988) and Hatch v. Heckler, 626 F. Supp. 1367 (N.D. California 1986). The Claimant's life expectancy under S. C. Code Section 19-1-150 is 16.08 years (a Sixty-Six year old male). This therefore results in a weekly distribution to the Claimant of \$ 147.53 [\$ 123,362.02 divided by the life expectancy in weeks of 836.16 weeks (16.08 years times 52 weeks per year)] or a monthly entitlement of \$ 639.31 [\$ 123,362.02 divided by the life expectancy in months of 192.96 months (16.08 years times 12 months per year)] commencing upon the execution and approval of this Order and continuing for the rest of his life.

ORDER

IT IS HEREBY ORDERED that the Order of the Hearing Commissioner filed in the above-captioned matter on March 14, 2012, is hereby AFFIRMED IN FULL.

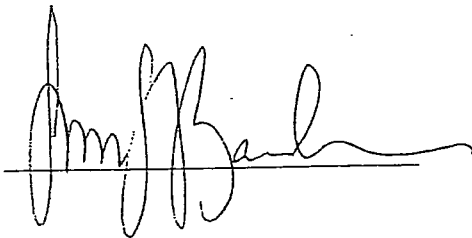
AND IT IS SO ORDERED.

South Carolina Workers' Compensation Commission

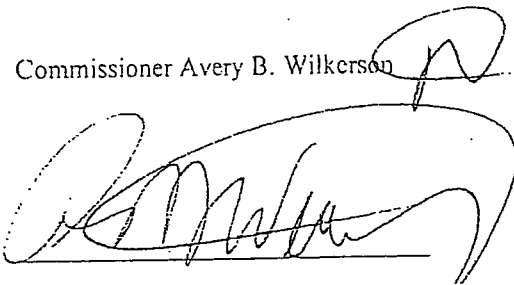
By: McLody R. James
Commissioner McLody L. James
South Carolina Workers' Compensation Commission

FULL AFFIRMATION
CONCUR:

Commissioner Susan S. Barden, Chair



Commissioner Avery B. Wilkerson



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 mail addressed to any unrepresented party.

By Valerie Deller on May 14, 2013

DECISION AND ORDER OF THE
SOUTH CAROLINA WORKERS' COMPENSATION COMMISSION
WCC FILE NO. 1022202

Joseph Mickle,

Claimant/Employee,

v.

Boyd Brothers' Transportation,
Employer

and

Lumbermens Underwriting Alliance,

Carrier/Defendants.

DECISION AND ORDER

HEARING:

November 18, 2011, in Columbia, South Carolina

APPEARANCES:

Claimant represented by J. Marvin Mullis, Jr. with
Mullis Law Firm, Columbia, South Carolina.

Defendants represented by Duke K. McCall, Jr. with Smith,
Moore, Leatherwood, LLP, Greenville, South Carolina.

DECISION AND ORDER:

By Commissioner T. Scott Beck

FILED:

March 14, 2012

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STIPULATIONS

Prior to the commencement of this hearing, the following stipulations were entered into between the parties:

1. That Claimant was an employee of WTI Transport, Inc.
2. That the July 12, 2010, accident took place in Alabama.
3. That the Defendants initially chose to pay benefits to Claimant in Alabama; however, Claimant wished to pursue benefits for permanency in the state where he resides, South Carolina.
4. That the Defendants asserted that WTI Transport, Inc. did not regularly have four or more employees in South Carolina and Claimant had no knowledge one way or the other.
5. That WTI Transport, Inc. is a wholly owned subsidiary of Boyd Brothers' Transportation, Inc.
6. That Boyd Brothers Transportation, Inc. employs more than four employees in the state of South Carolina.
7. That the date of accident is July 12, 2010.
8. That the average weekly wage is \$906.13 with a compensation rate of \$604.12.

APA SUBMISSIONS

Pursuant to notices timely filed and served, the following records were submitted into evidence pursuant to the South Carolina Administrative Procedures Act:

Claimant's Submissions:

1	Robert E. Brabham, PhD, MRC, CRC	9/9/2011	1-10
2	Dr. Steven C. Poletti Southeastern Spine	8/30/2011	11-12
3	Dr. Ivan Lamotta Midlands Orthopedics	2/24/2011-1/13/2011	13-21
4	Dr. M. David Redmond Midlands Orthopedics-	11/24/2010-10/8/2010	22-23
5	Dr. Coleman D. Fowble Midlands Orthopedics	11/24/2010-8/2/2010	24-42
6	Human Performance and Rehabilitation	10/19/2010-8/13/2010	43-71

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7	ImageCare	9/13/2010	72
8.	Doctors Care	7/13/2010	73-76
9.	Dr. Jairaj Prashad	8/23/11-7/19/2010	77-82
10.	Guides to the Evaluation of Permanent Impairment		83-99
11.	Exhibits:		
A.	Information obtained from Boyd Brothers' Transportation's website and company profile		100-101
B.	Boyd Brothers' check for Claimant's temporary disability benefits		102
C.	Worksheet to participate in Boyd Brothers' Transportation profit sharing 401(K).		103

Defendants' Submissions:

12.	Dr. Ivan E. LaMotta	2/24/2011	110-113
13.	Form 14(B), Dr. Ivan E, LaMotta with FCE		114-125
14.	List of SC Employees of WTI Transport, Inc.		128.

STATEMENT OF THE CASE

By his July 1, 2011 Form 50, Claimant sought benefits for total and permanent disability resulting from injuries to his back sustained in an admitted work accident on July 12, 2010. The accident took place in Alabama and Claimant received benefits in Alabama; however, Claimant determined to pursue benefits for permanent disability in South Carolina, the state where he lives. Defendants, Boyd Brothers' Transportation, Inc., denied coverage for the claim in South Carolina, asserting that Claimant was actually employed by WTI Transport, Inc. but that WTI had only three South Carolina employees and that WTI did not regularly employ 4 or more employees in South Carolina. Defendants asserted that, even if jurisdiction was found to be proper in South Carolina, Claimant would be entitled only to an award for partial disability to his

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back and medical treatment. Defendants denied total and permanent disability and opposed a lump sum payment.

An evidentiary hearing was held on November 18, 2011. Defendant's objection to Claimant's APA, Tab 1, pages 4-7, the report of Dr. Robert Brabham, was overruled while the objection to Tab 10, the Guides to the Evaluation of Permanent Impairment was sustained. Defendants' objection to Claimant's APA Tab 11, comprised of information obtained from the companies' profiles on the internet and benefits forms provided by Boyd Brothers' Transportation, Inc. to Claimant, submitted for the purpose of showing that WTI Transport, Inc. is Boyd Brothers' Transportation, Inc.'s subsidiary, was sustained in light of Defendants' stipulation that WTI Transport, Inc. is a wholly owned subsidiary of Boyd Brothers' Transportation, Inc.

EVIDENCE OF THE CASE

Joseph Mickle, Claimant, has lived in Columbia, South Carolina for some thirty years. Claimant is a high school graduate. Prior to starting work for WTI Transport, Inc., Claimant drove a truck for Consolidated Cargo Carrier for some twenty-five (25) years and before that he drove a flatbed truck for East Coast Transportation. Claimant indicated that all he had really ever done was drive flatbed trucks and that that work required the performance of heavy manual labor. Claimant recalled that WTI Transport, Inc. had run an ad in the paper and that he requested and faxed back an application for a job. Claimant testified that the company informed him during a phone call to his home in South Carolina that he had the job and that he could come to Alabama for orientation. Claimant agreed that he first worked as an owner/operator for WTI Transport, Inc. from July 3, 2002, until April 19, 2010 and that thereafter, he signed on as a full-time regular employee of WTI Transport, Inc.



Claimant recalled that when he first started, WTI Transport, Inc. had written on their trucks, "WTI, Subsidiary of Boyd Brothers." Claimant further presented his medical cards which all had Boyd Brothers' Transportation, Inc. printed on the cards and indicated that medical and dental coverage were provided by "Boyd Care." Claimant indicated that he had considered himself to be working for "WTI/Boyd Brothers."

At the time of his accident on July 12, 2010, Claimant had been working for WTI, Transport, Inc. since 2002. Claimant recalled that when he reported the injury in July 2010, WTI Transport, Inc. switched him and told him he had to call Boyd Brothers' Transportation, Inc. Claimant indicated that he drove a flatbed truck for WTI, Transport Inc. and that his work as a truck driver required him to do heavy manual labor tasks, including strapping down, or tarping the loads. Claimant explained that that process required the driver to chain the load down, throw and pull chains, tarp them and untarp them, and that this was heavy work. Claimant further indicated that lifting the tarps weighing from 50 to some 150 pounds was heavy work.

Claimant testified that 85% of the work of a truck driver is driving over the road and that that is a lot of hard work. He explained that just getting in the truck requires climbing, pulling, and twisting in order to sit in the driver's seat. Claimant indicated that when driving there is a lot of bumping, twisting, bending and turning as the driver uses his mirrors, shifts gears, clutches and brakes. Claimant testified that all that activity affected his back a lot. When asked how rough was the ride in a flatbed truck compared to a regular pickup truck or a car, Claimant responded, "It ain't even close." He explained, "It's very much different. The ride is just like riding in a wagon compared to a car. That's the way they ride." Claimant explained how the rough ride would affect his back, "It's just like if you're riding in your car running over a bumpy

road all the time. That's the way it would be in a truck. And when you hit a bump, that makes it even worse."

On July 12, 2010, Claimant was pulling the tarp off the top of the load while he was in Vernon Alabama when he felt a pinch of pain in his back. Claimant recalled that at first he didn't think too much about the pinch in his back but that when he got ready to leave, there was no one there to pick up the tarp so that he and his co-worker had to pick up the tarp themselves and put it on the trailer. Claimant indicated that he reinjured his back picking up the tarp but that he kept going and he finished the trip; however, the next morning, Claimant was unable to get out of bed due to pain in his back, legs, and shoulders. Claimant reported the accident; the accident was admitted and the Defendants paid Claimant temporary benefits from July 12, 2010 until February 24, 2011.

Claimant recalled that he had previously injured his back on the job in July of 2004, and that he was out of work for four to six weeks before going back to work for the same company, WTI Transport, Inc. Claimant testified that he had a little pain which resolved after a couple of months and that, after he returned to work, he missed no more work due to the 2004 injury. When asked if he totally recovered from the injury in 2004, Claimant answered, "Well, you never recover, but I can tell you that it didn't stop me from working." Claimant indicated that he had gotten back to where he was before the 2004 injury and that he had been back doing his regular work, including pulling tarps and strapping down loads, for some six or seven years before the accident on July 12, 2010.

After the accident, it took Claimant approximately three hours to make it 100 miles home to South Carolina. He testified that he kept driving real slow, with stops to rest, in order to try to make it home. Since the injury, Claimant has not been able to do physical labor. He testified

that he would love to be able to go back to work and that he would be working if he could, but that his physical condition would not allow physical labor. Claimant indicated that he had tried to see what he could do by riding along with a friend driving a Peterbilt truck in the hopes that he would be able to do it. However, Claimant reported that after riding in the Peterbilt, he did not think he was going to make it back home due to his pain. Claimant indicated that the only work he had performed over the last thirty-five (35) years was heavy flatbed truck driving, but that he can no longer drive or even ride in a flatbed truck given the condition of his back.

Claimant indicated that he had had two injections and four or five months of physical therapy, but that that did no good at all. He indicated that he tried to do some exercises whenever he could but that, now, he takes a lot of pills. Claimant indicated that he takes Hydrocodone and Oxycodone for the pain but that the drugs make him drowsy so that he could not safely drive a truck under the influence of his medications. Further, Claimant indicated that the DOT does not permit drivers to drive a truck while under the influence of the prescription medications he takes on a regular basis. Claimant indicated that he had followed the advice of his doctors and that he was no longer working as a truck driver.

Claimant indicated that his back was painful and that his leg was going numb just from sitting in the witness chair to testify at the hearing. He explained that the bottom of his feet feels like pins sticking when he walks and that his back hurts him every day. Claimant indicated that his legs are numb 90 percent of the day and that that keeps him from walking. Claimant indicated that he has to take a pill to even try to do anything. Claimant's doctor recommended that he use a cane for balance and he uses the cane every day. Claimant indicated that he would have trouble getting in and out of a truck but that even if he were able to get in, he did not believe he could drive a truck in his current condition.

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Quincy Jermaine Pollard testified that he sees Claimant about once a month and that he knows his physical condition. Mr. Pollard testified that Claimant has a lot of problems with his back and that he had noticed a change in his physical condition. Mr. Pollard indicated that Claimant is not able to do what he used to do because of his back, that he now walks with a cane, that he has slowed down and that he just cannot do the things he used to be able to do. Mr. Pollard recalled that Claimant has complained of numbness in both legs. Mr. Pollard is a professional truck driver. He testified that driving a truck affects you a lot more than people think. He testified that driving is not easy work, "You're bouncing up and down in your seat. And it takes a toll on you. And if your back is bothering you it's almost impossible to drive and bouncing up and down in a truck all day."

Sally Ann Webb has known Claimant for some twenty-four (24) years; she lives approximately five miles away from Claimant's home. Ms. Webb testified that she had observed Claimant's physical condition before and after the July 12, 2010, accident. Ms. Webb testified that, since the accident, Claimant is not getting around like he did before. She indicated that Claimant used to be an active, upbeat, outgoing person, but that he now just sits around and that he now moves very slowly. Ms. Webb indicated that she had observed that Claimant can barely rise from a seated position and that he grunts when he gets up. Ms. Webb has observed Claimant using a cane to assist with rising from a seated position and with walking. Ms. Webb recalled that before he was injured, Claimant used to do things, including helping with car and home repairs and stuff around the house, but that he cannot do that anymore.

Lucille Glanton has lived with Claimant since 2006. She testified that Claimant is not the same person that he used to be because he cannot do the things that he used to be able to do.

Ms. Glanton testified that Claimant gets agitated a lot because of his condition and that he stays medicated because of his pain.

Lynn Ingram Colley is the Human Resources Director for Boyd Brothers Transportation, Inc. and she does the adjusting for Boyd Brothers and WTI's workers' compensation claims. Ms. Colley agreed that WTI is owned by Boyd Brothers' but she maintained that they are two separate companies. However, Ms. Colley testified that although she has not looked at the internet website, she would not be shocked or surprised if, on the internet, Boyd Brothers Transportation, Inc. listed WTI Transport, Inc. as its subsidiary. Ms. Colley agreed that both Boyd Brothers Transportation and Boyd's wholly owned subsidiary, WTI Transport, Inc. are flatbed carriers with joined service areas. She read out information from the internet the total number of trucks that both companies had in their fleet of trucks, indicating, "Boyd Brothers Transportation and the WTI Division currently have 1,050 conventional trailers...1,670 48 foot flatbed trailers..."

Ms. Colley confirmed that at the time of his accident, Claimant was a company over the road driver for WTI Transport, Inc. Ms. Colley agreed that almost all the medical benefits Claimant was provided after his accident were from medical providers in South Carolina. She confirmed that, if Claimant's case was handled in Alabama, he would have to come to Alabama to have his case adjudicated. She explained that Boyd Brothers is self-insured in Alabama and that any over the road driver injuries in other states were covered. Ms. Colley agreed that, according to the medical evidence, Claimant can now do only very light work which would not include driving a truck. Ms. Colley confirmed that Claimant would not be able to drive a truck for WTI or Boyd Brothers in light of his medical restrictions.

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MEDICAL EVIDENCE

Claimant was initially referred to Doctors' Care. After Doctors' Care took x-rays, Claimant was referred to Midlands Orthopedics. On August 2, 2010, Dr. Coleman Fowble noted that Claimant had injured his back two or three weeks earlier while lifting with immediate onset of low back pain such that he was unable to get out of the truck without assistance. On August 25, 2010, Dr. Fowble noted that Claimant had pain radiating to both legs with numbness. On September 15, 2010, Dr. Fowble opined, "I think he can do sedentary type work. However, I don't think he can drive a large truck because of the vibration of this will irritate the facet joints."

On November 24, 2010, Dr. Fowble noted that Claimant had only about two days of pain relief from an epidural steroid injection before the pain returned. Dr. Fowble noted that Claimant complained of constant radiation to the right leg with intermittent radiation to the left leg. Dr. Fowble diagnosed facet arthropathy at L4-5 on the right and he indicated that Claimant had failed multiple conservative modalities, including therapy, medications, and injections. Dr. Fowble noted Claimant's lower back pain with radiation and that the brace gave Claimant a lot of help while walking but that it did not seem to help him much while sitting. Dr. Fowble noted that Claimant's pain was constant.

On February 24, 2011, Claimant was seen by Dr. Ivan LaMotta who noted his complaints of low back pain since July 12, 2010. Dr. LaMotta noted that the constant lower back pain occasionally radiated down both legs, the right worse than the left, particularly when sitting or driving. Dr. LaMotta noted that physical therapy and epidural steroid injections had been tried without any significant relief of symptoms and that Claimant's pain was rated at a 7/10 for the back and 4/10 for the legs. Dr. LaMotta noted Claimant's complaints of stiffness, severe night-time pain, difficulty walking, fatigue, muscle weakness, and joint pain. Dr. LaMotta opined that

Claimant's quality of life had been significantly affected by his pain and that the pain increased with standing, bending, twisting, sitting, walking, coughing and sneezing. Dr. LaMotta noted that Claimant's pain was increased with sitting, standing or walking and that his lumbar range of motion was severely limited. Dr. LaMotta opined that based on the functional capacity evaluation, Claimant would only be able to return to sedentary work. Dr. LaMotta indicated that Claimant was not a surgical candidate and that he had reached maximum medical improvement with a whole person impairment of 8% translating into an 11% regional impairment to the lumbar spine.

Claimant was seen by Dr. Steven Poletti for an IME. On August 30, 2011, Dr. Poletti observed, "I'm in agreement that his work restriction status would be sedentary. I would ascribe him impairment secondary to back pain and leg pain. I do think that he does have nerve compression. That is the nature of lateral recess stenosis and is the result of the facet arthropathy." Dr. Poletti assigned a ten percent permanent medical impairment for radiculopathy and an additional five percent impairment to the legs as the result of bilateral nerve root compression into his exit foramen. Dr. Poletti opined, "He has impairment to his back, he has impairment to his legs. He has a sedentary status...He does have foraminal stenosis...he could potentially consider open surgical intervention as a means of treating this. This, of course, would be a last resort. At age 65 I doubt he is going to return to truck driving in any capacity professionally." Dr. Poletti further opined that Claimant would require future pain management care as well as MRI scanning and epidural steroid injections.

Claimant was evaluated by vocational expert, Dr. Robert E. Brabham, PhD, MRC, CRC. On September 9, 2011, Dr. Brabham noted, "his limitations on sitting and standing are such that vocationally even any sedentary work, which might otherwise have been suggested, is precluded.

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Vocationally, any work requires some combination of sitting, standing and/or walking for a full 8-hour workday, without the need to rest for prolonged periods of time, something he is unable to do in his present condition. Furthermore, any such jobs would require that he be able to use his back, buttocks, hips, and bilateral lower extremities repetitively and continuously while meeting minimal productions standard...he would not be able to sustain any repetitive activity for an eight-hour basis, day after day, in his present condition..." Dr. Brabham opined, "He is unable to perform any substantial gainful work activity which exists in the South Carolina or the national economy. Directly as a result of his on-the-job injuries, the only services he could perform are so limited in quality, dependability or quantity that no reasonably stable market for them exists"

FINDINGS OF FACT

Based upon the stipulations of the parties and the evidence presented, both in the form of submissions under the Administrative Procedures Act and the Hearing testimony, it is found as fact:

1. That the parties to this proceeding are subject to and bound by the terms and provisions of the South Carolina Workers' Compensation Act as amended.
2. That Claimant is an employee of WTI Transport, Inc.;
3. That WTI Transport, Inc. is a wholly owned subsidiary of Boyd Brothers Transportation, Inc.;
4. That WTI Transport, Inc. did not regularly employ 4 or more employees in South Carolina;

5. That Defendants initially chose to pay benefits to Claimant in Alabama for the admitted claim; however, Claimant determined to pursue benefits in South Carolina where he resides;

6. That Boyd Brothers Transportation, Inc. has coverage in South Carolina;

7. That flatbed truck driving is an important, necessary, and essential part of the business and trade of Boyd Brothers Transportation, Inc.

8. That employees of Boyd Brothers Transportation, Inc. regularly perform the identical work activity, flatbed truck driving, that Claimant performed in his work for Boyd's wholly owned subsidiary, WTI, Transport, Inc.

9. That where the work activity Claimant engaged in for WTI, flatbed truck driving, was part of the general trade, business, or occupation of the owner, Boyd Brothers' Transportation, Inc., the owner, is a statutory employer as contemplated in S.C. Code Section 42-1-400 (1985), and is, therefore, responsible for the payment of benefits to Claimant;

10. That Claimant's injury is to his back, with radiation affecting both legs;

11. That Claimant failed to meet his burden of proving a compensable psychological injury;

12. That the Functional Capacity Evaluation (FCE) places Claimant in the sedentary to light work capacity;

13. That Claimant's treating physicians limit Claimant to sedentary work capacity;

14. That Claimant is required to take significant prescription medications which prohibit him from driving a truck and which would also substantially limit his ability to perform any other form of work;

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15. That the authorized treating physicians have restricted Claimant from driving trucks;

16. That Claimant's work history was almost exclusively in truck driving;

17. That Claimant is sixty-six (66) years of age with a high school education;

18. That the vocational assessment conducted by Robert Brabham concludes that Claimant is unable to perform any substantial gainful work activity;

19. That Claimant is unable to perform any substantial gainful work activity and, therefore, he is permanently and totally disabled;

20. That Claimant is entitled to and Defendants shall provide lifetime causally related medical care.

21. That the proceeds of the award will be allocated and disbursed under Utica Mohawk Mills v. Orr, 227 S. C. 226, 87 S.E. 2d 589 (1955), resulting in a weekly distribution to the Claimant of \$ 147.53 per week or a monthly entitlement of \$ 639.31 per month commencing upon execution of this Order and continuing for the rest of his life (See page 15 paragraph #8).

CONCLUSIONS OF LAW

Based on the evidence submitted in this case, the testimony given, the stipulations entered into and the foregoing Findings of Fact, this Commissioner makes the following Conclusions of Law:

1. Pursuant to §42-3-180 and §42-1-400, the South Carolina Workers' Compensation Commission has jurisdiction in this proceeding.

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2. Pursuant to §42-1-400, Claimant was a covered statutory employee under the Act and Boyd Brothers Transportation, Inc. is a statutory employer as contemplated in Section 42-1-400, and is, therefore, responsible for the payment of benefits to Claimant.

3. Pursuant to §42-15-60, Defendant Boyd Brothers Transportation, Inc. is responsible for payment of causally-related medical care from the date of accident and for providing lifetime medical care.

4. Pursuant to §42-15-60, Claimant has reached maximum medical improvement.

5. Pursuant to §42-9-10, Claimant is permanently and totally disabled as the result of the injuries to his back and legs.

6. Pursuant to §42-9-301, a lump sum payment is approved as being in the best interest of Claimant and not prejudicing Defendants.

7. That Defendants owe Claimant the balance of his 500 weeks, taking credit for the weeks of temporary total disability benefits paid.

8. It is ordered by the Commission that the proceeds of this Order of One Hundred and Eighty-Eight Thousand Five Hundred and Forty-Three and 38/100ths (\$ 188,543.38) Dollars shall be allocated as follows: Sixty-Two Thousand Eight Hundred and Forty-Seven and 79/100ths (\$ 62,847.79) Dollars as attorney fees [one third (1/3)]; at least Two Thousand Three Hundred Thirty-Three and 57/100ths (\$ 2,333.57) Dollars for litigation costs; resulting in a Net to the Claimant of One Hundred and Twenty-Three Thousand Three Hundred and Sixty-Two and 02/100ths (\$ 123,362.02) Dollars. This amount shall be allocated and paid to the Claimant under Section 42-9-10 and Section 42-9-20 of the 1976 Code of Laws of South Carolina as interpreted by the Supreme Court decision of Utica Mohawk Mills v. Orr 227 S. C. 226, 87 S.E. 2d 589 (1955); Sciarotta v. Bowen, 837 F.2d 135 (1988); Lemire v. Secretary of Health and

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Human Services, 682 F. Supp 102 (D.C.N.H.1988) and Hatch v. Heckler, 626 F. Supp. 1367 (N.D. California 1986). The Claimant's life expectancy under S. C. Code Section 19-1-150 is 16.08 years (a Sixty-Six year old male). **This therefore results in a weekly distribution to the Claimant of \$ 147.53** [\$ 123,362.02 divided by the life expectancy in weeks of 836.16 weeks (16.08 years times 52 weeks per year)] **or a monthly entitlement of \$ 639.31** [\$ 123,362.02 divided by the life expectancy in months of 192.96 months (16.08 years times 12 months per year)] **commencing upon the execution and approval of this Order and continuing for the rest of his life.**

ORDER

IT IS THEREFORE ORDERED that Claimant suffered a compensable injury by accident causing injuries to his back affecting both legs.

IT IS FURTHER ORDERED that Claimant is permanently and totally disabled as a result of his injuries to multiple body parts under §42-9-10.

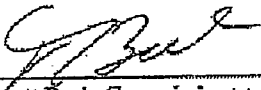
IT IS FURTHER ORDERED that Defendant shall pay to Claimant benefits for total and permanent disability as set out in Conclusion of Law no. 8.

IT IS FURTHER ORDERED that Defendant shall provide lifetime causally related medical care.

AND IT IS SO ORDERED.

SOUTH CAROLINA WORKERS'
COMPENSATION COMMISSION

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T. Scott Beck, Commissioner

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.
March 14, 2012

By: Amy Bracy, Administrative Assistant to Commissioner Beck

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BEFORE THE SOUTH CAROLINA
WORKERS' COMPENSATION COMMISSION

WCC FILE NO. 1022202

Joseph Mickle,

Claimant/Employee,

vs.

Boyd Brothers' Transportation,

Employer,

and

Lumbermen's Underwriting Alliance,

Carrier/Defendants.

CONSENT ORDER

A hearing for this matter originally went forward on November 18, 2011 in Columbia, South Carolina under the caption set forth above. Based on Stipulation #1 at the hearing (see March 14, 2012 Decision and Order), the Claimant was an employee of WTI Transport, Inc., and WTI Transport, Inc. maintained it did not regularly employ four or more employees in South Carolina. WTI Transport, Inc. and Boyd Brothers Transportation also maintained the Claimant was not a statutory employee of Boyd Brothers Transportation. The parties agree to the following:

- (1) The attorney for Lumberman's Underwriting Alliance (LUA) does hereby represent to the Commission and the attorneys for all other parties LUA did not provide coverage to WTI Transport, Inc. or Boyd Brothers Transportation for the accident which is the subject of this claim.
- (2) The parties agree LUA should be removed as carrier from the caption of this claim.

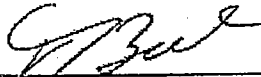
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Now, therefore, with the consent of the attorney for all other parties,

IT IS HEREBY ORDERED Lumberman's Underwriting Alliance is hereby dismissed
from this action and removed from the caption of the claim.

AND IT IS SO ORDERED.

South Carolina Workers'
Compensation Commission

By: 
T. Scott Beck, Commissioner

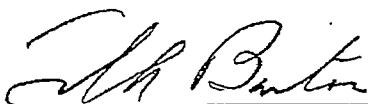
Dated: January 24, 2014
Columbia, South Carolina

WE DO HEREBY CONSENT:

SEE ATTACHED SIGNATURE/CONSENT PAGES (2 pages)

30

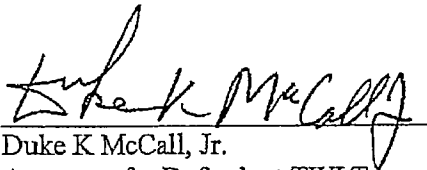
Signature/Consent Page 1/2

A handwritten signature in cursive script, appearing to read "Frank Braton", written over a horizontal line.

Frank Braton, Esquire
Attorneys for Claimant

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Signature/Consent Page 2/2



Duke K McCall, Jr.
Attorneys for Defendant TWI Transport, Inc.
and Boyd Bros. Transportation Inc.

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 Amy Bracy on January 24, 2014

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THE STATE OF SOUTH CAROLINA
In The Court of Appeals
APPEAL FROM THE SOUTH CAROLINA
WORKERS' COMPENSATION COMMISSION

W.C.C. No. 1022202

Joseph Mickle,

Claimant-Appellant,

v.

Boyd Brothers'
Transportation, Inc., WTI
Transport, Inc., Lumbermans'
Underwriting Alliance,

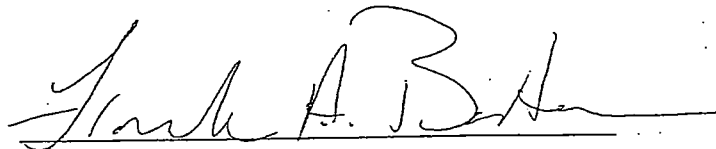
Respondents.

FILE COPY

NOTICE OF APPEAL

Joseph Mickle appeals the decision of the South Carolina Workers' Compensation Commission's Appellate Panel dated May 14, 2013. Appellant received a copy of this decision on May 14, 2013.

May 31, 2013


Frank A. Barton
Mullis Law Firm
P.O. Box 7757
Columbia, SC 29202
(803) 254-8956
Attorney for Appellant

Other Counsel of Record:
Duke K. McCall, Jr.
Smith Moore Leatherwood, LLC
Greenville, South Carolina 29602-0087
(864) 242-6440
Attorney for Respondent

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STATE OF SOUTH CAROLINA)
COUNTY OF RICHLAND)

IN THE COURT OF COMMON PLEAS

Case No: 2013-CP--_____

SCWCC File No: 1022202

Joseph Mickle)
Employee/Respondent)

v.)

NOTICE OF INTENT TO APPEAL
WITH GROUNDS STATED
NON-JURY DOCKET

WTI Transport, Inc., Boyd Brothers)
Transportation, Inc., and TSL, Ltd)
Alleged Employers,)
and)
Lumbermans Underwriting Alliance,)
Carrier,)
Of Whom)

WTI Transport, Inc. and Boyd)
Brothers Transportation, Inc.)

are Appellants)

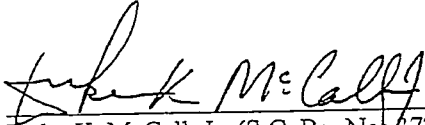
TO: Frank A. Barton, Esq, ATTORNEY FOR RESPONDENT

YOU WILL PLEASE TAKE NOTICE that the WTI Transport, Inc. and Boyd Brothers Transportation, Inc., by the undersigned attorneys, do hereby appeal from the Appellate Panel Decision and Order of the Full Commission of the South Carolina Workers' Compensation Commission filed on May 14, 2013, to the Court of Common Pleas, upon the following grounds and exceptions which are attached hereto and incorporated herein by reference to this Notice of Intent to Appeal.

GREENVILLE 1345148.1
5/20/13

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Respectfully submitted,



Duke K. McCall, Jr. (S.C. Bar No. 3720)

Smith Moore Leatherwood, LLC

P. O. Box 87

Greenville, S.C. 29602-0087

Attorneys for Appellants, *WTI Transport, Inc.*
and *Boyd Brothers Transportation, Inc.*

May 20, 2013

GREENVILLE 1345148.1
5/20/13

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GROUND FOR REVIEW

Joseph Mickle (Respondent) v. WTI Transport, Inc., TSL, Ltd, and Boyd Brothers Transportation, Inc. (of whom WTI Transport, Inc. and Boyd Boyd Brothers Transportation, Inc. are Appellants)
WCC File No: 1022202

1. It is respectfully submitted that the Appellate Panel in affirming the Hearing Commissioner committed error in adopting his Finding of Fact No. 1, it being submitted that the South Carolina Workers' Compensation Commission does not have jurisdiction of this matter, this being an Alabama workers' compensation claim.
2. It is respectfully submitted that the Appellate Panel in affirming the Hearing Commissioner committed error in adopting his Finding of Fact No. 7, it being submitted that there is no evidence or testimony, nor any substantial evidence to support this finding of fact.
3. It is respectfully submitted that the Appellate Panel in affirming the Hearing Commissioner committed error in adopting his Finding of Fact No. 8, it being submitted that there is no evidence or testimony, and certainly no substantial evidence to support this finding of fact.
4. It is respectfully submitted that the Appellate Panel in affirming the Hearing Commissioner committed error in adopting his Finding of Fact No. 9, it being submitted that there is no evidence or testimony, and certainly no substantial evidence to support this finding of fact.
5. It is respectfully submitted that the Appellate Panel in affirming the Hearing Commissioner committed error in adopting his Finding of Fact No.10, it being admitted that the Respondent sustained a back injury, but it is denied that the Respondent has, "radiation affecting both legs". There is no testimony to support his finding.
6. It is respectfully submitted that the Appellate Panel in affirming the Hearing Commissioner committed error in adopting his Finding of Fact No. 14, it being submitted that while the Respondent does take medications which may prohibit him from driving at this time, there is no evidence that the taking of medication is a permanent requirement which will last the Respondent's life time, nor that the medications permanently prevent the Respondent from performing "any other form of work".
7. It is respectfully submitted that the Appellate Panel in affirming the Hearing Commissioner committed error in adopting his Finding of Fact No. 18, it being respectfully submitted that there is no evidence that the Respondent is permanently unable to perform any substantial gainful work activity. This finding is speculative in nature.

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8. It is respectfully submitted that the Appellate Panel in affirming the Hearing Commissioner committed error in adopting his Finding of Fact No. 19, it being submitted that there is no evidence or testimony, and certainly no substantial evidence to support this finding, particularly since the attending physician has given the Respondent an impairment rating of 11% to the lumbar spine.
9. It is respectfully submitted that the Appellate Panel in affirming the Hearing Commissioner committed error in adopting his Finding of Fact No.20, it being submitted that there is no evidence or testimony, and certainly no substantial evidence to support this finding, particularly since the attending physician has given the Respondent an impairment rating of 11% to the lumbar spine.
10. It is respectfully submitted that the Appellate Panel in affirming the Hearing Commissioner committed error in adopting his Finding of Fact No.21, it being submitted that there is no evidence or testimony, and certainly no substantial evidence to support this finding, particularly since the attending physician has given the Respondent an impairment rating of 11% to the lumbar spine.
11. It is respectfully submitted that the South Carolina Workers' Compensation Commission did not have jurisdiction in this case because the Respondent's employer was WTI Transport, a company who had less than four (4) employees in this State.
12. It is respectfully submitted that the Statutory Employer doctrine does not apply regardless of the number of employees which WTI Transport has in this State.
13. It is submitted that being a subsidiary does not make the other company, Boyd Brothers Transportation, a statutory employer of the Respondent, in and of itself without more evidence that both companies were performing the trade, business or occupation of the other.
14. It is respectfully submitted that the Appellate Panel in affirming the Hearing Commissioner committed error in adopting his Conclusion of Law No. 1, it is respectfully submitted that the Hearing Commissioner did not have jurisdiction in this case because the Respondent's employer was WTI Transport, a company who had less than four (4) employees in this State.
15. It is respectfully submitted that the Appellate Panel in affirming the Hearing Commissioner committed error in adopting his Conclusion of Law No. 1, it is respectfully submitted that the Hearing Commissioner did not have jurisdiction in this case because it was improper to consider a subsidiary corporation for the purpose of determining the number of employees an "employer" had within the State to determine jurisdiction.
16. It is respectfully submitted that the Appellate Panel in affirming the Hearing Commissioner committed error in adopting his Conclusion of Law No. 2, it is

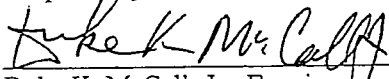
respectfully submitted that the Hearing Commissioner did not have jurisdiction in this case because the Respondent's employer was WTI Transport, a company who had less than four (4) employees in this State.

17. It is respectfully submitted that the Appellate Panel in affirming the Hearing Commissioner committed error in adopting his Conclusion of Law No. 2, it is respectfully submitted that the Hearing Commissioner did not have jurisdiction in this case because it was improper to consider a subsidiary corporation for the purpose of determining the number of employees an "employer" had within the State to determine jurisdiction.
18. It is respectfully submitted that the Appellate Panel in affirming the Hearing Commissioner committed error in adopting his Conclusion of Law No. 3, it is respectfully submitted that the Hearing Commissioner did not have jurisdiction in this case because the Claimant's employer was WTI Transport, a company who had less than four (4) employees in this State.
19. It is respectfully submitted that the Appellate Panel in affirming the Hearing Commissioner committed error in adopting his Conclusion of Law No. 3, it is respectfully submitted that the Respondent is capable of light work and is not totally disabled or entitled to life time medical care.
20. It is respectfully submitted that the Appellate Panel in affirming the Hearing Commissioner committed error in adopting his Conclusion of Law No. 4, it is respectfully submitted that while the Respondent was released by the attending physician, he is still under medical care taking medications. Further, there is no finding of fact to support this conclusion.
21. It is respectfully submitted that the Appellate Panel in affirming the Hearing Commissioner committed error in adopting his Conclusion of Law No. 5, it is respectfully submitted that while the Respondent was released by the attending physician, he is still under medical care taking medications. Further, there is no finding of fact to support this conclusion.
22. It is respectfully submitted that the Appellate Panel in affirming the Hearing Commissioner committed error in adopting his Conclusion of Law No. 6, it is respectfully submitted that while the Respondent was released by the attending physician, he is still under medical care taking medications.
23. It is respectfully submitted that the Appellate Panel in affirming the Hearing Commissioner committed error in adopting his Conclusion of Law No. 6, it is respectfully submitted that there is no finding of fact to support this conclusion, nor is there evidence to justify or support this conclusion.

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24. It is respectfully submitted that the Appellate Panel in affirming the Hearing Commissioner committed error in adopting his Conclusion of Law No. 7, it is respectfully submitted that the Respondent is capable of light work and is not totally disable or entitled to life time medical care. Further, there is no finding of fact to support this conclusion.
25. It is respectfully submitted that the Appellate Panel in affirming the Hearing Commissioner committed error in adopting his Conclusion of Law No. 8, it is respectfully submitted that while the Respondent was released by the attending physician, he is still under medical care taking medications.
26. It is respectfully submitted that the Appellate Panel in affirming the Hearing Commissioner committed error in adopting his Conclusion of Law No. 8, it is respectfully submitted that there is no finding of fact to support this conclusion, nor is there evidence to justify or support this conclusion.
27. It is respectfully submitted that the Appellate Panel in affirming the Hearing Commissioner committed error in adopting his Order, it being submitted that there is no evidence or testimony, and certainly any reasonable evidence that both legs of the Respondent are permanently affected by this accident.
28. It is respectfully submitted that the Appellate Panel in affirming the Hearing Commissioner committed error in adopting his Order, the errors being those set forth in the above grounds for review which are incorporated individually and all together in this ground with out re-stating each ground separately.

Respectfully submitted,


Duke K. McCall, Jr., Esquire
Attorney for the Appellants
WTI Transport, Inc. and Boyd Brothers
Transportation

May 20, 2013

South Carolina Workers' Compensation Commission
1333 Main Street, Suite 500 • Post Office Box 1715
Columbia, South Carolina 29202-1715
(803) 737-5723
www.wcc.sc.gov



WCC File #: _____
Carrier File #: _____
Carrier Code #: _____
Employer FEIN #: _____

Claimant's Name: Joseph Mickle SSN: _____ Employer's Name: Boyd Transportation
Address: 200 Atrium Way, Apt. 1421 Address: 3275 Highway 30
City: Columbia State: SC Zip: 29223 City: Clayton State: AL Zip: 36016
Home Phone: () - Work Phone: () - Insurance Carrier: Self Insured
Preparer's Name: J. Marvin Mullis Law Firm: Mullis Law Firm Preparer's Phone #: (803) 799-9577

Complete each information blank. To request a hearing, check Box 13b, indicate the kinds of benefits claimed by checking the box(es) at Lines 6, 7, 8, and 9, and file this form in duplicate.

A claim for workers' compensation benefits is made based on the following grounds:

Date of Injury or Illness: Jul 12, 2010

☒ Injury ☐ Illness ☐ Repetitive Trauma

1a. The claimant sustained an injury to 3 (Part(s) of Body Injured) on 7/12/10 (Month/Day/Year) in Lamar county, state of AL.
1b. Body part(s) affected are: back, right leg, left leg

Briefly describe how the accident occurred. See 1 in Addendum

2. Both the claimant and the employer were subject to the South Carolina Workers' Compensation Act at the time of injury.
3. The relationship of employer and employee existed at the time of injury.
4. At the time of the injury the claimant was performing services arising out of and in the course of employment.
5. Notice of the accidental injury was given to the Employer on 7/13/10 (Month/Day/Year) in the following manner: Reported to Tony/Dispatcher

☒ 6. Due to injury, the claimant is in need of (check one):

- ☐ (a) medical examination and treatment for: _____
☒ (b) additional medical examination and treatment for: See 1 (A) above

☒ 7. Due to injury, the claimant requests temporary total disability benefits because of lost compensable time from work and wages for the period of:
From February 24, 2011, and continuing

☒ 8. Due to the injury, the Claimant has permanent disability of the following nature and extent (check one):

- ☒ (1) General Disability: ☒ Total ☐ (2) Specific Disability: ☐ Total
☐ (3) Wage Loss ☐ Partial ☐ Partial

☐ 9. Due to the injury, the Claimant has a serious bodily disfigurement consisting of:

10a. At the time of the injury, the Claimant was paid weekly wages of \$_____, and demands accounting of days worked and wages earned as provided by law.

10b. Give names and addresses of all employers for whom the Claimant has worked since the date of the accident: None

11a. Further grounds or unusual aspects of claim: See 2 in Addendum

11b. List names and addresses of all physicians or other medical specialists who have seen or treated the Claimant as a result of the accident: Dr. Coleman Fowble, Dr. Ivan LaMotta, Doctors Care Two Notch Road, Dr. David Redman

11c. To the best of your knowledge, did you have any prior permanent disability? _____
If yes, describe: _____

12. Appropriate benefits as provided in the Act for the above grounds and other relief as the Workers' Compensation Commission may direct as just and proper.

☐ 13a. I am filing a claim. I am not requesting a hearing at this time.

☒ 13b. I am requesting a hearing. A \$25 fee is required.

14. Estimated time needed for hearing: 1 hour

I verify the contents of this form are accurate and true to the best of my knowledge.

J. Marvin Mullis Attorney
Preparer's Signature Title

crobinson@mullislawfirm.com
Email Date

Refer to R.67-204 through R.67-210 and R.67-801 through R.67-815. Questions about the use of this form may be directed to the Commission's Claims Department.

WCC Form # 50
Revised 9/07

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Employee's Notice of Claim and/or
Request for Hearing

Addendum

1. Claimant was pulling the tarp off the trailer when he felt pain/strain in his lower back; the pain worsened when he picked up the tarp.
2. Claimant is entitled to temporary total benefits, lifetime medical benefits, and any and all other benefits applicable under the Act, including but not limited to benefits for total and permanent disability. Request lump sum payment as per Section 42-9-10 and Section 42-9-20 of the 1976 Code of Laws of South Carolina as interpreted by the Supreme Court decision of Utica Mohawk Mills v Orr, 277 S.C. 226, 87 SE 2d 593; Sciarotta v. Bowen, 837 F2d 135.

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South Carolina Workers' Compensation Commission
1333 Main Street, Suite 500 • Post Office Box 1715
Columbia, South Carolina 29202-1715
(803) 737-5739



WCC File #: 1022202
Carrier File #: _____
Carrier Code #: _____
Employer FEIN #: _____

www.wcc.sc.gov **AMENDED**

Claimant's Name: Joseph Mickle SSN: _____ Employer's Name: Boyd Bros. Transportation, Inc. incorrectly named Boyd Transportation
Address: 200 Atrium Way, Apt. 1421 Address: 3275 Highway 30
City: Columbia State: SC Zip: 29223 City: Clayton State: AL Zip: 36016
Home Phone: _____ Work Phone: () _____ Insurance Carrier: Self-Insured
Date of Injury: 7/12/2010 Preparer's Name: Duke K. McCall, Jr. Law Firm: Smith Moore Leatherwood, LLP Preparer's Phone #: (864) 240-2403

Date of Injury or Illness: July 12, 2010

Complete each information blank. Specify clearly when contentions are admitted in part and denied in part. The employer/carrier in answer to the claim, respectfully shows:

1. It is **Denied** employee sustained an injury or illness on or about the date set forth in the Form 50. The reasons for denial are:
The correct name of the employer of Joseph Mickle is WTI Transport, Inc.
2. It is **Denied** the employer and employee were subject to the Workers' Compensation Act at the time in question. The reasons for denial are:

3. It is **Denied** the relationship of employer and employee existed at the time in question. The reasons for denial are:

4. It is **Denied** at the time in question the employee was performing services arising out of and in the course of employment. The reasons for denial are:

5. It is notice of injury was given the employer. The reasons for denial are:

6. It is **Denied** the employee **Needs / Is Entitled to Additional** medical care as a result of injury or illness. The reasons for denial are:

7. It is **Denied** the employee is entitled to temporary total disability for the period(s) of :

8. It is **Denied** the employee is permanently disabled. The reasons for denial are:

9. It is **Denied** the employee has serious disfigurement.

10. It is contended that an average weekly wage of \$ **Unknown** applies, according to attached Form 20 as provided by law.

11. Further contentions, grounds of defense, or unusual aspects are:
Boyd Bros. Transportation improperly named as Boyd Transportation hereby expressly denies that the Claimant was an employed or contractor or owner-operator with its company.
12. Estimated time needed for hearing: 45 minutes

I certify I have served this document pursuant to R.67-212 by delivering a copy to:

Name: J. Marvin Mullis, Jr., Mullis Law Firm

Address: PO Box 7757, Columbia, SC 29202-7757

on the 14th day of June, 2011 by ☒ first class mail ☐ personal service ☐ certified mail.
I verify the contents of this form are accurate and true to the best of my knowledge.

Duke K McCall
Preparer's Signature

Attorney for the Defendants
Title

Duke.McCall@smithmoorelaw.com
Email

June 14, 2011
Date

Refer to R.67-204 through R.67-210 and R.67-601 through R.67-615. Questions about the use of this form may be directed to the Commission's Judicial Department. Pursuant to R.67-606, a Form 20 must be filed with the Claims Department at least 30 days from the date of filing this form.

WCC Form # 51
Revised 9/07

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Employer's Answer to Request for Hearing

BEFORE THE SOUTH CAROLINA
WORKERS' COMPENSATION COMMISSION
WCC FILE NO: 1022202

Joseph Mickle,)
Employee/Claimant,)
)
v.)
TSL, Ltd. DBA: Boyd Brothers)
Transportation, Inc., WTI Transport,)
Inc.,)
Employer,)
and)
Lumberman's Underwriting Alliance;))
Boyd Brothers' Transportation, Inc.,)
Insurer,)
Defendants.)

NOTICE OF WITNESSES AND
WRITTEN REPORT(S)/ PHYSICIANS
AND/OR OTHER EVIDENCE TO BE
INTRODUCED ON BEHALF OF
CLAIMANT

TO: SOUTH CAROLINA WORKERS' COMPENSATION COMMISSION and DUKE K. MCCALL, JR.,
ESQUIRE, FOR EMPLOYER/INSURER

YOU ARE HEREBY NOTIFIED THAT THE Claimant, pursuant to the provisions of the South
Carolina Workers' Compensation Act and South Carolina Code Section 1-23-330 (1976, as amended)
herewith submit(s) the following report(s)/physician or other evidence on behalf of the Claimant, to wit:

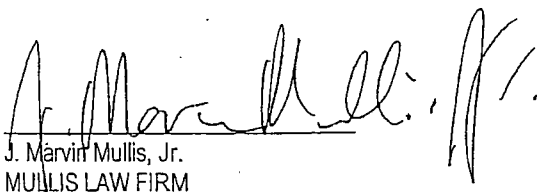
APA#	DOCTOR	PRACTICE	DATES	PAGES
1	Robert E. Brabham, PhD, MRC, CRC		9/9/2011	1-10
2	Dr. Steven C. Poletti	Southeastern Spine	8/30/2011	11-12
3	Dr. Ivan Lamotta	Midlands Orthopedics	2/24/2011-1/13/2011	13-21
4	Dr. M. David Redmond	Midlands Orthopedics	11/24/2010-10/8/2010	22-23
5	Dr. Coleman D. Fowble	Midlands Orthopedics	11/24/2010-8/2/2010	24-42
6	Human Performance and Rehabilitation		10/19/2010-8/13/2010	43-71
7	ImageCare		9/13/2010	72
8.	Doctors Care		7/13/2010	73-76

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9.	Dr. Jairaj Prashad	8/23/11-7/19/10	77-82
10.	Guides to the Evaluation of Permanent Impairment		93-99
11.	Exhibits:		
	A. Information obtained from Boyd Brothers Transportation's website and company profile		
	B. Boyd Brothers check for Claimant's temporary disability benefits,		
	C. Worksheet to participate in the Boyd Brothers Transportation profit sharing 401(K).		

YOU ARE FURTHER HEREBY NOTIFIED that you have the right to cross-examination; and, should you desire to exercise said right, you are to forthwith schedule the deposition(s) of any of the physicians or other person(s), whose reports are submitted, for the purposes of cross-examination.

YOU ARE FURTHER NOTIFIED that the originals of the documents referred herein, or photocopies received from said physician/others, are being herewith forwarded to the South Carolina Workers' Compensation Commission, for insertion in the file of the South Carolina Workers' Compensation Commission and inclusion into evidence on behalf of the Claimant.


J. Marvin Mullis, Jr.
MULLIS LAW FIRM
P.O. Box 7757
Columbia, SC 29202
(803) 799-9577

November 3, 2011

Columbia, South Carolina

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PSYCHOLOGICAL AND TRAINING SERVICES, P.A.

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LIFE CARE PLANNER

ROB BRABHAM, JR., MRC, CRC

NORA HEAPE, RN, BA

BETH BURNETT, BA, ED.

DENISE YARBOROUGH, ADMIN. ASST.

PSYCHOLOGICAL and VOCATIONAL EVALUATION

Name: Joseph (NMI) Mickle

ID Number:

Date of Birth:

Age at Evaluation:

Date of Evaluation: 09-09-2011

Date of Report: 09-09-2011

Referral and Background Information: Mr. Mickle is a 65-year-old former Truck Driver for WTI Transport, with whom he had worked for almost 9-years. He indicated that he began driving a truck at the age of 19, for a total of about 46 years. He estimated that he had driven more than 3 million miles, and never with a chargeable violation. He was referred for an independent psychological and vocational evaluation to determine vocational implications, and earnings issues, if any, related to limitations resulting from on-the-job injuries he sustained on 07-12-2010.

Mr. Mickle sustained on-the-job injuries while lifting an 8-foot tarp off of a truck loaded with lumber (2x4). He experienced pain in his back, hip and leg. He was subsequently diagnosed with disc disruption with facet arthropathy L4-5. Despite significant conservative treatment, including prescription medication, physical therapy, and steroid injections, Mr. Mickle continues to experience significant pain and radicular symptoms in his back, buttocks, hips, and bilateral lower extremities. He added that none of his physicians have recommended surgery in that none of them believe it would eliminate his pain and have suggested that he avoid surgery as long as possible.

In an effort to see if he could return to work as a Truck Driver, he "rode" in a truck with another driver on a route to see if he could sustain the rigors of truck travel, but quickly realized that his ongoing pain symptoms made that impossible. He has been unable to return to any gainful employer as a result of his on-the-job injuries in July 2010.

He was previously married for 5 years, but has been divorced since 1975. He is presently engaged. His fiancée does not work outside the home.

Mr. Mickle arrived promptly for this evaluation and was driven by his fiancée. He now drives only about 3-4 times per week, locally only (i.e., to Wal-Mart which is about 5-miles from his home), but with considerable right and left leg pain when seated in a relatively fixed position, as driving requires. He also experiences significant difficulty with the range of motion in his neck/back when checking his blind spot while in traffic.

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His general appearance, hygiene and personal grooming were good. He wore a moustache. He is 6' 0" in height, and weighs about 233 pounds, his usual weight. He always wears glasses, but acknowledged that he was having difficulty seeing very well even with his glasses. He does not require the use of a hearing aid, but noted some, possibly age-related hearing loss, including ringing in his ears. He has been prescribed a cane which he requires for stability and mobility, at times. He wriggled and changed positions throughout the evaluation, citing low back and bilateral leg pain. He was also noted to have considerable difficulty standing after having been seated during this evaluation.

Mr. Mickle was previously receiving \$604 per week in worker's compensation benefits. However, he indicated that those benefits ceased in February 2011, for reasons he is unable to explain. His only income at this time is approximately \$1,300 per month in Age-Related Social Security Benefits. That amount was, of course, reduced due to the necessity of seeking those benefits at an earlier age than he would have preferred. He continues to experience significant financial hardship related to his inability to work, and indicated that he has had to sell items such as jewelry, tools, equipment, and a truck due to his ongoing financial situation. As he noted, he made "good money" as a Truck Driver for many years and it is unreasonable to suggest that he would now deliberately forego that income for the privilege of losing money.

Sources of Information:

Medical Records from:

Southeastern Spine Institute
Midlands Orthopaedics, P.A.

Steven Poletti, M.D.
Coleman Fowble, M.D.
M. David Redmond, M.D.
Ivan LaMotta, M.D.
Martin Dommers, M.D.

ImageCare, LLC
Doctors Care

Human Performance & Rehab BL Timothy Sutton, PT

Psychological Testing and Evaluation Results:

Wechsler Adult Intelligence Scale – Fourth Edition
Wide Range Achievement Test – Revision 4
Beck Depression Inventory – II (administered orally, due to reading deficits)
Beck Anxiety Inventory (administered orally, due to reading deficits)
Clinical Interview and Behavioral Observations
Mental Status Examination

Activities of Daily Living: He lives with his fiancée in a one-story, first floor apartment. As a result of living in an apartment, they have no yard or household maintenance chores to perform, fortunately. On most days, he gets up at about 7-8 AM, but must take prescription medications to "get going", and move slowly. He indicated that he now "rolls out" of bed and is unable to stand initially upon awakening. He is able to handle his basic personal grooming and toilet needs without assistance and indicated that he was "taught" by his physician how to rise from the toilet, for example, due to ongoing pain symptoms, as well as weakness.

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He now must take showers only due to his inability to get in and out of the bathtub safely as a result of ongoing pain and decreased strength. He now must avoid socks and shoes with laces due to his inability to bend without experiencing significant pain symptoms. He indicated that even leaning over to brush his teeth results in significant pain. He requires the use of a "grabber" to reach items in his home, and has now modified the placement of many items due to his inability to reach up high or down low without experiencing an increase in his pain symptoms. He is unable to perform any chores around his home due to ongoing pain symptoms.

He shops alone only when necessary, very seldom, and then requires items be packaged for ease of carrying. He holds onto the grocery cart for stability when shopping. He continues to attempt to walk about three times per week, for about 15-minutes around his apartment complex, but indicated that he requires prescription pain medication following any exercise due to increasing back pain symptoms. He is not able to sustain much activity, despite efforts to initiate activity due to pain.

In a typical 8-hour day he indicates, and his fiancée confirmed, that he must spend about 5 hours per day sitting straight up in a chair with pillows, constantly changing positions, as a result of his physical limitations and pain. Daytime naps, due in his opinion to side-effects of prescription medication, have become a part of his daily routine. He watches television to pass the time.

In a 5-day work week he indicated that he would have to miss at least 2 days per week at any potential job due to pain problems associated with medical conditions that resulted from his on-the-job injuries. This would of course greatly exceed the number of days available for personal/sick leave in an average job in South Carolina, about 1-day per month.

He returns to bed at about 10-11 PM but gets only about 5 hours of non-restorative sleep, often interrupted by pain. He noted no prior history of sleep problems.

As a direct result of his on-the-job injuries he is now able to participate in far fewer social or leisure activities than was the case prior to his injuries. He also admits that he has inadequate patience and is easily irritated. He indicated that his relationships with friends, family and others have also changed as a result of his medical conditions. He noted he could no longer dance, bowl, or travel; all activities he enjoyed prior to his on-the-job injuries. (He added that he actually had bowling scores of 300 on several occasions.)

He noted he has difficulty concentrating and sustaining attention to complete any task. His sexual activity has also changed as a result of his medical conditions, which adds to the depression he is experiencing. The overall quality of his life has clearly been greatly diminished by his injuries.

Educational Background: He graduated from High School in Mt. Vernon, New York in 1963. He indicated that he participated on various sports teams while attending high school and was in good health throughout that time.

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As noted previously, he began driving a truck at the age of 19, following high school, and had been driving a truck for about 46 years at the time of his on-the-job injuries. He began his truck driving with a Class A license and was allowed to obtain his Commercial Driver's License (CDL) without the necessity of taking the driving portion due to his many years of driving experience. He obtained his CDL in the mid-1980's to his best recollection. He has received no further formal training and has no military experience.

Work History: Mr. Mickle has a remarkably stable work history, having performed work as a Truck Driver for the past 46 years. At the time of his on-the-job injuries, he was working as a Truck Driver for WTI Transport for whom he had worked for the almost 9-years. He earned about \$1,000-\$1,200 per week. It should be noted that he has not been medically cleared to return to work, and his employer has no alternative work to offer him within his restrictions.

Work as a Truck Driver is defined by The Dictionary of Occupational Titles as semi-skilled and Medium in physical demands. Such work is actually Heavy as performed, at times, requiring that he lift, bend, stoop, and reach on a regular basis as part of his essential job duties. He described specific tarps that were needed in driving flatbed trailers that weigh in excess of 150 pounds, confirming that the work was then "Very Heavy" at times as actually performed. He has never held an office/sedentary position, and has no office/computer skills.

He insisted that in his employment he had no personnel or performance problems. He enjoyed his co-workers, his colleagues and got along well with his supervisors. As previously noted, he had a remarkable driving record and was recognized for having driven at one point for a million miles without an accident. He actually ended up having driven more than 3 million miles without a chargeable offense.

When asked about any prior work injuries or pre-existing conditions, Mr. Mickle noted a prior back and hip injury, but quickly indicated that he missed little time from work related to both of these injuries. He was working on a full-time basis without undue difficulty at the time of his 2010 on-the-job injuries. Clearly it is the on-the-job injury in 2010, which began his medical problems which have been the primary basis for his inability to maintain gainful employment.

Medical Problems: The medical aspects of his injury are documented in other reports, and will not be addressed in great detail herein. However, several more recent medical references have vocational significance and are noted accordingly.

On 07-13-10, Doctors Care records noted, "...low back pain...Soma, Tramadol...off duty through 7/15/10...may work with restrictions as of 7/16/10...no lifting more than 10 pounds...no operation of hazardous or fast-moving machinery...ground level work only, no ladders or heights...no bending, stooping, squatting, pushing, jerking, twisting, or bouncing...no continuous standing and/or sitting...minimal walking or climbing (including stairs)...limited use of low back..." (Obviously this eliminated any possibility of returning to work as a Truck Driver.)

On 08-02-10, Dr. Coleman Fowble noted, "...injured his back about 2-3 weeks ago... lifting a lumber tarp (175-250 pounds) onto the back of a trailer...pulling it and felt a stinging in the lower back, then when he lifted to place it back on the trailer, he had immediate onset of low back pain...unable to get out of the truck without assistance...tingling in the top of his thighs...seems to be much more significantly muscular in nature...significant pain when he extends his back from a flexed position...difficulty getting out of chairs...physical therapy...Cataflam, Skelaxin..."

On 08-13-10, Timothy Sutton, PT indicated, "...back/lumbar pain...6 out of 10...appears motivated...progress towards goals is good...tolerance to treatment is good...able to perform exercises correctly with difficulty due to pain...requires continued skilled intervention...patient very tender and movements guarded..." As of 08-16-10, Timothy Sutton, PT noted, "...carrying a gallon of milk in each hand creates pain...walking 5 minutes at his complex had to call wife to come and pick him up...guarded movements, not flexing spine...difficult to get shoes off...moderate difficulty getting off of table from supine...hip flexion limited bilaterally...able to perform exercises correctly with good form, but increased pain..."

On 08-19-10, Timothy Sutton, PT noted, "...had pain last night after walking 15 minutes in his complex...pain went down right leg from his back...leg feels like it is going to sleep from groin down to foot...he walked after coming back from a 45 minute car ride..." As of 08-23-10, records indicated, "...leg was not as bad over the weekend, but he didn't do any walking...can't sit long...has to be in a recliner...standing makes right leg feel numb..." On 08-25-10, Timothy Sutton, PT noted, "...right leg feels numb after sitting, standing or walking...feels like it tries to give out on him...poor trunk strength..."

On 08-25-10, Dr. Fowble indicated, "...now has pain radiating down the right leg with numbness...has been attending physical therapy which he states only helps a little... taking Cataflam and Skelaxin, but needs something stronger for pain...possible right radicular symptoms...low back pain...he has had an obvious change in his history... continued medications..."

An MRI of the lumbar spine performed by Dr. Martin Dommers on 09-13-10 concluded, "...mild degenerative changes of the lower three lumbar discs and of the L4-5 facets... midline posterior annular tears of the distal three lumbar discs are noted..."

On 09-15-10, Dr. Fowble noted, "...unchanged...lower back pain radiating down his right leg...minor improvement since last visit...feels like he is benefitting from physical therapy...Cataflam causes him to be dizzy and nauseated...possible right radicular symptoms...low back pain...he does not seem to be responding to conservative modalities...set up for right L4-5 facet block...try him in a BOA brace...I think he can do sedentary work...*I don't think he can drive a large truck because of the vibration of this...*continue physical therapy..."

On 09-22-10, Timothy Sutton, PT indicated, "...4 out of 10 pain...back pain is worse today and down leg...leg gets more irritated with standing..." On 10-05-10, records noted, "...back hurting a lot...not able to take meds since the epidural is Friday...not able to do standing exercises today because of leg and back pain..."

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On 10-08-10, Dr. M. David Redmond performed the recommended lumbar facet injection at L4-5, right.

On 10-12-10, Timothy Sutton, PT noted, "...no change with back pain after epidural..." As of 10-19-10, records indicated, "...sharp pains in back...leg goes to sleep when up on feet..."

On 10-27-10, Dr. Fowble indicated, "...seems to be returning to his pre-injection level of pain...brace does give him a lot of help while walking...does not seem to give him much help while sitting...injection helped for a few days, but wore off and he is now in constant pain again...radiating pain down the leg seems to be only present when walking...facet arthropathy L4-5 on the right...possible right radicular symptoms...try another injection...topical anti-inflammatory patches... *remain out of work*..."

On 11-11-10, Dr. Redmond performed a second lumbar epidural steroid injection, right L4-5 and L4-5 facet injection.

On 11-24-10, Dr. Fowble noted, "...got about 2 days of good relief from the LESI...pain seems to return...constant radiation down the right leg in very intermittent radiation down the left...unchanged...facet arthropathy L4-5 on the right...low back pain...he has failed multiple conservative modalities including therapy, medications, and injections...refer to a spine subspecialist...*no change in work status*..."

On 01-13-11, Dr. Ivan LaMotta indicated, "...low back pain...symptoms present since 7/12/10...most of the pain is localized to both sides of the lower back...pain occasionally radiates down both legs, right worse than left...happens mostly while sitting and driving...present on a constant basis...numbness and tingling are present in the same distribution with pain...also complains of stiffness, severe night time pain, difficulty walking, fatigue, muscle weakness, joint pain, and blurred vision...MRI fails to reveal any compressive sequela...*not a surgical candidate*...he has already maximized and exhausted nonoperative care...Norco..."

On 02-24-11, Dr. LaMotta noted, "...low back pain...0% improvement in his condition since last appointment...I agree with the findings of the capacity evaluation and impairment rating performed on 2/2/11...based on the functional capacity evaluation, patient will be able to return to work at a sedentary duty...patient is not a surgical candidate and has met maximal medical improvement...AMA, 5th Edition...DRE lumbar category II...whole person impairment is 8%, translates to an 11% regional impairment to the lumbar-spine...sedentary duty..."

On 08-30-11, Dr. Steven Poletti noted, "...pain in his back, buttocks, and hips...goes down the posterior aspect of his legs, right greater than left...difficulty rising from a sitting position...antalgic gait...disc disruption with facet arthropathy L4-5...I'm in agreement that his work restriction status would be sedentary...impairment secondary to back pain and leg pain...he does have nerve compression...that is the nature of lateral recess stenosis and is the result of the facet arthropathy...radiculopathy would ascribe him a 10% impairment...additional 5% as impairment to his legs as a consequence of the bilateral nerve root compression into his exit foramen...he has an

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impairment to his back and legs...he does have foraminal stenosis...*at age 65 I doubt that he is going to return to truck driving in any capacity professionally...he may be a candidate for pursuing retirement...*In the future he most likely will require future pain management visits three to four times a year...he will require future medications to include Oxycodone...will require future MRI scanning and epidural injections..."

At the time of this evaluation, Mr. Mickle is still prescribed Hydrocodone and Vicodin for his medical conditions resulting from his on-the-job injuries. He also is prescribed Flomax for urinary problems and takes over-the-counter Excedrin for ongoing headaches. He mentioned several times his deliberate efforts to avoid powerful pain medications due to the side-effects, as well as concern about any possibility of addiction.

References to pain in records exist over an extended period of time. He indicated treatment has included prescription medications, epidural steroid injections, Duragesic patches, and physical therapy. When asked to describe his pain, he indicated that since his on-the-job injuries he experiences pain at a level 6 on a 10-point scale, 7-days per week. He noted daily activities, movement, reaching overhead, bending, walking, standing, and sitting exacerbate the pain. His pain is best relieved by prescription medication and resting. He is never pain free. His pain would result in unexpected absences and an inability to work, at least 2 days per week. His pain would be distracting and cause abandonment to adequately perform daily activities and work. His pain would prevent his ability to sit and/or stand for an 8-hour workday. Prescription medication side-effects would limit his effectiveness of work and performance of daily activities and work. Ongoing prescription medications legally prohibit continuation of his employment as a Truck Driver.

Mental Status Evaluation: He was well oriented to all spheres, and neither demonstrated nor reported any hallucinations or delusional thought processes. He noted no prior mental health history.

He described clinically significant symptoms sufficient to confirm the continued presence of a level of depression. His depressive symptoms include a considerable loss of interest or pleasure which is nearly always present. This includes social withdrawal even from family activities; significant reduction in previous levels of sexual interest or desire; decreased energy, tiredness and fatigue out of proportion to actual activity; impaired ability to concentrate, or make decisions; and is easily distracted with memory difficulties. These symptoms have clearly resulted in significant distress/impairment in social, occupational, and other important areas of functioning. These symptoms are not better described by any other general medical condition and he indicates that he neither consumes alcohol or any other drug, nor does he smoke. In spite of his depression, he denies any suicidal attempts or plans at this time.

In addition to his depression, he is also experiencing considerable anxiety, related to his inability to perform any job due to the limitations which have resulted from his multiple medical conditions. His anxiety is increased by the fact that he realizes he cannot do what he has done in the past.

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Psychological Test Results: He appeared to cooperate and to give optimal effort during this evaluation. Thus these results are believed to be valid indicators of his current levels of functioning.

On the Wechsler Adult Intelligence Test – Fourth Edition, he obtained a Full Scale IQ score of 78. Relative to examinees of comparable age, he is currently functioning within only the "Borderline" range of intelligence. This is somewhat lower than would have been expected of a high school graduate. However, it is also noted that he graduated from high school more than 45 years ago and has not used basic academic skills in any sustained manner in his work.

On the Wide Range Achievement Test – Revision 4, his academic scores are considerably lower than would have been expected. His Reading Standard Score of 33 is only a 2.9 grade level score, his Arithmetic Standard Score of 26 is only a 3.2 grade level score, and his Spelling Standard Score of 19 is only a 1.5 grade level score. His academic skills are not sufficient for use in work settings in which such skills would be essential.

Due to his quite low reading skills, he was unable to read the Beck Depression Inventory-II. Instead, those 21-items were covered in the evaluation orally. His responses indicate a "Moderate" level of depression is present, even though he was hesitant to acknowledge depression as it was somewhat contrary to his manly occupation as a Truck Driver for many years. We pleasantly discussed his male vanity in this regard and he did admit that he is depressed, "of course".

On the Beck Anxiety Inventory, also administered orally, his responses also confirmed the presence of a "Moderate to Severe" level of anxiety. We discussed his concern about his long-term medical prognosis with advancing age. The uncertainty of his medical future combined with his marked limitations at the age of 65, have resulted in a serious level of anxiety.

Diagnoses: After observing him during this evaluation, and from careful review of records of past behavior and levels of functioning, he is clearly manifesting signs and symptoms consistent with the requirements to establish and/or maintain several diagnoses. He is continuing to experience major pain episodes and references to pain exist in several medical records over an extended period of time. He is also anxious about his future, especially since he realizes that his past work is no longer an option for him, an anxiety-provoking thought for someone at the age of 65. Finally, his multiple losses, personal, financial, social and leisure, all have led to a level of depression. Depression and anxiety are the two most common psychiatric symptoms experienced by adults following major lifestyle changes. Therefore the following diagnoses apply, in keeping with all diagnostic requirements for each:

307.89 Pain Disorder

311 Depressive Disorder NOS

300.02 Generalized Anxiety Disorder

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These medical/mental conditions are in addition to his other physical medical problems that are well documented in his files.

Vocational Opinion and Rationale: Several factors must be considered in reaching a vocational opinion. They include his age of 65, already defined as "retirement age", a negative factor; his high school graduate educational background is positive, but is offset somewhat by his lower than expected academic skills; his stable work history of 46 years as a Truck Driver is offset by his inability, without question, to continue to perform that work on a sustained basis; due consideration must also be afforded to the pain that he experiences on a daily basis which requires that he spend 5 hours per day "sitting" in a straight chair with pillows, constantly change positions; his depression and anxiety also interfere with his ability to maintain sufficient attention and concentration, which becomes a negative factor; and, finally, his rather extreme physiological response to even minimal pain medications must be taken into consideration (even a partial dose of his prescribed medications result in extreme tiredness and sleepiness).

Taking all of these factors into consideration, it is my opinion, to a high degree of professional certainty, based on more than forty-six years of vocational rehabilitation and psychology experience, that he must be expected to permanently remain, unable to engage in full-time gainful, competitive employment as a result of his medical conditions resulting from his on-the-job injuries in July 2010.

The rationale for my opinion is essentially based on the following observations:

Credibility: He appeared credible in his description of his limitations and remaining functional capacities. As a result of the limitations on his back, buttocks, hips, and bilateral lower extremities, he cannot complete significant tasks or activities on a regular, sustained basis.

It is noted that the information provided during this interview was highly consistent with information reported in other reports. This provided additional confirmation that the responses and description of events and circumstances were candid, were not feigned or exaggerated, and do not appear to represent any symptom magnification.

It is not reasonable to suggest that someone who has worked in one profession for nearly 46 years would now, for the first time, feign, fake or exaggerate an inability to work.

Medications: He is prescribed several pain medications, and is carefully compliant with dosages and times as prescribed, and has been so since his injuries. However, he experiences the usual and predicted side-effects of medication, including feelings of fatigue and an inability to function at optimal levels while taking his medications.

Pain Factors and Attendance Implications: Even with pain medication he continues to experience significant pain at such levels as to interfere with his ability to sustain physical activity. His cognitive deficits would also cause difficulty in his ability to pay attention to job tasks and job duties for hours each week, on average.

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The inability to maintain concentration and persistence interferes with the ability to meet production expectation for even unskilled jobs.

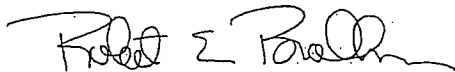
Limitations on Sitting and Standing: His limitations on sitting and standing are such that vocationally even any sedentary work, which might otherwise have been suggested, is precluded. Vocationally, any work requires some combination of sitting, standing and/or walking for a full 8-hour workday, without the need to rest for prolonged periods of time, something he is unable to do in his present condition.

Furthermore, any such jobs would require that he be able to use his back, buttocks, hips, and bilateral lower extremities repetitively and continuously while meeting minimal production standards. As evidenced during this evaluation, he would not be able to sustain any repetitive activity for an eight-hour basis, day after day, in his present condition.

Summary and Conclusions: Based on all the evidence as described above, consistent with observations during this evaluation and various reports in his file, he would be unable to effectively perform the essential duties in any gainful work activity. It is also clear that the unfortunate combination of factors and characteristics he now faces are directly related to the injuries he sustained while working.

He is unable to perform any substantial gainful work activity, which exists in the SC or the national economy. Directly as a result of his on-the-job injuries the only services he could perform are so limited in quality, dependability, or quantity that no reasonably stable market for them exists.

The opinions noted in this report are offered within a reasonable degree of professional certainty, based on more than 46 years of vocational rehabilitation and psychology experience. Thank you for the opportunity to work with you in this matter. If you have any questions, or if I could address additional issues, please do not hesitate to contact me.



Robert E. Brabham, Ph.D.
Licensed Psychologist
Master's in Rehabilitation Counseling

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SOUTHEASTERN SPINE INSTITUTE

MICKLE, JOSEPH

Patient #62461

DOB:

August 30, 2011

Mr. Mickle is seen for the purpose of independent medical evaluation.

This man has a history of a job-related injury, which occurred on 7/12/10. He was lifting a top off of a truck when he felt a pain into his back progressively going into the hip and leg. His medical records from Dr. Fowble and Dr. Lamotta accompany him. He had injections x2, which did not help. He has an MRI from 9/13/10. He is taking oxycodone and hydrocodone and has been placed at sedentary status with an 11-percent regional impairment to his lumbar spine per Dr. Lamotta. He has an MRI scan from 9/13/10, which is available. He has an MRI scan from 2001, which I ordered when I saw him for an annular tear at L5-S1. He describes his pain as being into his back, into his buttocks, into his hips. It goes down the posterior aspect of his legs right greater than left. He has no long tract signs.

His physical examination demonstrates him to have pain with extension and forward flexion. He has difficulty rising from a sitting position. He has an extension lag. He has positive straight leg raising bilaterally. He does not have specific weakness. He has brisk reflexes in the upper and lower extremities, normal range of motion in his neck. He has an antalgic gait in flexion.

I reviewed his MRI scan. This shows that he has significant facet arthropathy at the L4-5 level with posterior disc bulging and moderately severe exit foraminal stenosis at L4-5. I've compared this to the MRI scan from 2001, which showed an annular tear at L5-S1; and this shows a definitive progression or change at the L4-5 level when compared to his previous scan from my office.

Diagnosis: Disc disruption with facet arthropathy L4-5.

Comment: This man has been through appropriate nonoperative care per Dr. Lamotta. I reviewed his medical records, and he has been through treatment and has been determined to be at maximal medical improvement and been given an impairment rating with sedentary work restrictions. I'm in agreement that his work restriction status would be sedentary. I would ascribe him impairment secondary to back pain and leg pain. I do think that he does have nerve compression. That is the nature of lateral recess stenosis and is the result of the facet arthropathy. He has been felt to have radiculopathy based on his imaging studies, and this has been the rationale for injection trials. Radiculopathy would ascribe him a 10-percent impairment. I would give him an additional 5 percent specifically as impairment to his legs as a consequence of the bilateral nerve root compression into his exit foramen.

(Continued)

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SOUTHEASTERN SPINE INSTITUTE

MICKLE, JOSEPH

Patient #62461

DOB:

August 30, 2011

Page 2

He has impairment to his back; he has impairment to his legs. He has a sedentary status.

The question is whether or not anything further should be done for his back and legs.

My recommendation would be to potentially consider further investigation of his back pain if the problem was bad enough that he couldn't live with it. He could consider an updated MRI scan. He could consider potential facet-based injections and if these were successful potentially consider facet rhizotomy as a nonoperative treatment for his pain. He does have foraminal stenosis, and if his pain persisted he could consider potential discography and potential flexion/extension films; and if some measure of segmental instability were shown, some measure of foraminal stenosis, and some measure of disc disruption, then he potentially could consider open surgical intervention as a means of treating this. This, of course, would be a last resort. At age 65 I doubt that he is going to return to truck driving in any capacity professionally. He may be a candidate for pursuing retirement.

I have seen him for the purpose of independent medical evaluation. I believe that in the future he most likely will require future pain management visits three to four times a year. I believe most likely he will require future medication to include oxycodone. I believe that he will require future MRI scanning and future epidural injections. I hold these opinions most probably to a reasonable degree of medical certainty and would offer him the chance to get updated imaging and review his problem further should he desire.

I have seen this gentleman for the purpose of an independent medical evaluation and hold my opinions true, most probable, to a reasonable degree of medical certainty.

Steven C. Poletti, M.D.

SCP/dmp

T- 9/1/11

CC: Marvin Mullis, Esquire

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12

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Coleman D. Fowble, MD * Thomas D. Armsey, MD * Ivan LaMotta, MD * Bernard G. Kirol, MD

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Detailed Follow up Exam

NAME: Mickle, Joseph
DATE: 02/24/11
EMPLOYER: Boyd Brothers Transportation
REFERRING PHYSICIAN: Michael Stout, MD

ACCOUNT: 232716
DOB: AGE: :
OCCUPATION: No data for occupation

CC: low back pain **WORK COMP**

DATE OF INJURY/ONSET/SURGERY: DOI 07/12/2010 while pulling a tarp in Alabama

HPI: Pt is here to follow up on his low back pain. He had an FCE/IR performed at Columbia rehab Clinic on 02/02/2011. We are in receipt of those results today. He feels 0% improvement in his condition since his last appt.

Date of last visit: 01/13/2011

Since the last visit the pain is: () Better () Worse (X) Same () N/A

On a scale of 0-10 (10 is the worst), the patient reports the pain is: 5-6/10 in low back and 3-4/10 in legs bilaterally

The patient describes the quality of pain as:

() Sharp () Throbbing
() Dull (X) Aching
() Stabbing (X) Burning

The pain is: (X) Constant () Intermittent () N/A

The patient reports they are taking Norco 5/325mg 1 PO QHS (medication) for this condition.

The patient reports since the last visit

Treatment	Did it help?		
Anti-inflammatories	() Yes	() No	() N/A
Narcotics	(X) Yes	() No	() N/A
Brace/Cast	() Yes	() No	() N/A
Physical/Occupational Therapy	() Yes	() No	() N/A
Home Exercise Program	() Yes	() No	() N/A
Injection at last visit: short-term	() Yes	() No	() N/A
Injection at last visit: long-term	() Yes	() No	() N/A
Surgery since last visit	() Yes	() No	() N/A

Since the last visit, has there been a change in:

Patient's Medical History () Yes (X) No
Family History: () Yes (X) No
Social History: () Yes (X) No

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Report Date: April 05, 2011 Patient: Mickle, Joseph DOS: 02/24/11

ALLERGIES: No Known Allergies

MEDICATION(s): Cataflam
Norco (Dosage: 5/325 SIG: po at night Dispense: 60 Refills: 0)

REVIEW OF SYSTEMS:

General, neuro, psychiatric, respiratory, cardiovascular, GI, GU, blood and lymph, EENT, musculoskeletal, skin and endocrine are normal except for what is noted:
Systems Reviewed

PHYSICAL EXAM:

Vital Signs: HEIGHT: 6'0"
WEIGHT: 224 lbs 0 oz
BMI: 30.4

☐ Gait: normal, narrow based gait. able to ambulate on toes and heels.
Spine ROM: decreased range of motion lumbar spine
Strength: 5/5 in all myotomes
Sensation: intact sensation to light touch in all major dermatomes of upper and lower extremities
Palpation: unchanged from last examination
Improvement:
Incision:

RADIOGRAPHS:

PROCEDURE:

ASSESSMENT: 724.2-Low Back Pain

PLAN: I have reviewed the chart capacity evaluation as well as his impairment rating performed February 2, 2011. I agree with the findings.
Based on the functional capacity evaluation patient will be able to return to work at a sedentary duty. Please refer to the functional capacity evaluation for details.
The patient is not a surgical candidate and has met maximal medical improvement. According to the American medical association with asked to the evaluation of permanent impairment, fifth edition, he qualifies for a DRE lumbar category II. Therefore, his whole person impairment is 8%, which translates into an 11% regional impairment to the lumbar spine. He may follow on an as-needed basis only.

PRESCRIPTIONS: No data for Prescription

PRE-EXAMINATION:

WORK STATUS:

() Full Time () Part Time () Restrictions () Out of Work () Non-Applicable

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Report Date: April 05, 2011 Patient: Mickle, Joseph DOS: 02/24/11

 Ivan LaMotta, MD

Ivan E. LaMotta, MD

Electronically Signed
February 24, 2011 10:40 AM

59
15



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Michael R. Ugino, MD * Michael S. Green, MD * M. David Redmond, MD *
William C. James, MD * Robert D. Santrock, MD * Frederick C. Piehl, MD * Thomas P. Gross, MD
Coleman D. Fowble, MD * Thomas D. Armsey, MD * Ivan LaMotta, MD * Bernard G. Kirol, MD

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Work Status Information

NAME: Mickle, Joseph
EMPLOYER: Boyd Brothers Transportation
PHYSICIAN: Ivan E. LaMotta, MD
DATE OF ACCIDENT: 07/12/2010
WORKERS' COMP CLAIM NUMBER#
2010000019

ACCOUNT: 232716
CARRIER: Boyd Brothers transportation
DATE OF SERVICE: 02/24/11
DIAGNOSIS CODE (S): 722.52, 724.3
DIAGNOSIS DESCRIPTION:
Degeneration of Thoracic or Lumbar
Intervertebral Disc, Sciatica

WORK STATUS:

- () Regular duty as of ☐ with no restrictions
() Light duty as of ☐ with restrictions
(availability of light duty is determined by the employer, not the physician)
() Remain out of work until ☐

SECONDARY DUTY

- () Part time (whether regular duty or light duty)
() Full time (whether regular duty or light duty)

PHYSICAL LIMITATIONS:

- () None
() No walking
() No climbing
() No standing
() No prolonged standing
() No sitting
() No bending or stooping
() No twisting or stretching
Other:
() No kneeling, squatting, crawling
() Pushing or Pulling Limit (☐ lbs)
() Lifting and carrying limit (☐ lbs)
() Sedentary duties only
() No overhead work
() No work involving () L () R ☐ (extremity)
() No overhead work
() No work at heights

These restrictions are recommended to promote healing of the body part which is injured or which has had surgery. Unrestricted use is recommended when it will not adversely affect the healing process. This is not a statement as to the capacity to undertake a given task or participate in a given sport, nor is it a warranty against subsequent injury. All restrictions or the lack of such restrictions may be subject to revision or modification if conditions change. It is your responsibility to contact us for any clarification, questions or concerns.

Follow-up plan: ☐
Follow-up appointment date: ☐

Ivan LaMotta, MD

Ivan E. LaMotta, MD

60
16

MIDLANDS

Orthopaedics, P.A.

Robert M. Peele, Jr., MD * Robert M. DaSilva, MD * James A. O'Leary, MD
 Michael R. Ugino, MD * Michael S. Green, MD * M. David Redmond, MD *
 William C. James, MD * Robert D. Santrock, MD * Frederick C. Piehl, MD * Thomas P. Gross, MD
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Initial Exam

NAME: Mickle, Joseph
 DATE: 01/13/11
 EMPLOYER: Boyd Brothers Transportation
 REFERRING PHYSICIAN: Michael Stout, MD

ACCOUNT: 232716
 DOB: Age: 6
 OCCUPATION: No data for occupation

CC: low back pain **work comp**

DATE OF INJURY/ONSET/SURGERY: doi7-12-2010. He injured his back while pulling a tarp in Alabama.

HPI: []

Patient is a 65 years old male who presents today with complaints of low back pain. Symptoms have been present since 7-12-2010. Most of the pain is localized to both sides of the lower back. The pain occasionally radiates down both legs the right worse than left. This happens mostly while sitting and driving. Pain is present on a constant basis. Numbness and tingling are present in the same distribution with pain. Patient has been seen by Dr. Fowble for this in the past. The patient has tried physical therapy in the past. Epidural steroid injection have been tried on 2 occasions without any significant relief of symptoms. Treatment has also included MRI performed at Imagecare on 9-13-2010. Pain rating is 7/10 for the back and 4/10 for the legs. Pain distribution is 80% back and 20% legs. Leg pain distribution is: right leg 60% and left leg 40%. He also complains of stiffness, severe night-time pain, difficulty walking, fatigue, muscle weakness, joint pain and blurred vision. No bowel or bladder problems.

Pain is preventing patient from doing activities of daily living: () Yes (X) No
 Is the patient's quality of life significantly affected by the pain? (X) Yes () No

Patient describes the pain as:

(X) Radiating () Sharp () Throbbing (X) Ache
 () Dull (X) Burning (X) Numbness/Tingling () Stabbing
 (X) Constant () Intermittent

Patient Activity:

	Lying	Standing	Bending Forward	Bending Back	Twisting	Sitting	Walking	Coughing	exercise sneezing	exercise during	exercise after
Increase pain	(X)	(X)	(X)	()	(X)	(X)	(X)	(X)	()	()	()
reduce pain	()	()	()	()	()	()	()	()	()	()	()
no change	()	()	()	()	()	()	()	()	()	()	()

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17

Report Date: April 05, 2011 Patient: Mickle, Joseph DOS: 01/13/11

Activity Timeline:

	unable	15 Minutes	30 Minutes	45 Minutes	1 Hour	indefinitely
Sit	()	(X)	()	()	()	()
Stand	()	(X)	()	()	()	()
Walk	()	(X)	()	()	()	()

MEDICAL ILLNESSES:

Past Med Hx: 20. High Blood Pressure

Surgical History: No Surgery Reported

Family History: 07. High Blood Pressure

Social History: 06. Child em-Yes
07. Married Status-Divorced
09. Significant Other
19. Non-Smoker

Allergies: No Known Allergies

Current Meds: Cataflam

REVIEW OF SYSTEMS:

General, neuro, psychiatric, respiratory, cardiovascular, GI, GU, blood and lymph, EENT, musculoskeletal, skin and endocrine systems are normal except what is noted: Systems Reviewed

PHYSICAL EXAM:

Vital Signs HEIGHT: 6'0"
WEIGHT: 224 lbs 0 oz
BMI: 30.4

Appearance: No acute distress

Psychiatric: Mood and affect were appropriate.

Skin: Clean, dry, no lesions, no rashes.

Neuro: Alert and Oriented x3.

FOCUSED EXAM: Please refer to the initial patient questionnaire (scanned in system) for spine-specific review of systems.

CV: 2+ symmetrical x 4 extremities

Lymphatic: no cervical, supraclavicular, axillary, femoral, or popliteal adenopathy

Gait: normal, narrow based gait. able to ambulate on toes and heels.

Coordination: intact finger-nose, heel-shin motion

Ext ROM: full range of motion in all major joints in the upper and lower extremities

Spine ROM: severely decreased range of motion lumbar spine

Palpation:

Greater trochanteric NO tenderness L or R

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Report Date: April 05, 2011 Patient: Mickle, Joseph DOS: 01/13/11.

Midline NO tenderness

Paraspinal NO tenderness

PSIS NO tenderness in L or R

Sensation: intact sensation to light touch in all major dermatomes of upper and lower extremities

Muscle tone: normal

Reflexes: 2+ symmetrical UE / LE

Other:

Strength	Right	Left
Deltoid	5/5	5/5
Biceps	5/5	5/5
Triceps	5/5	5/5
Wrist Flexors	5/5	5/5
Wrist Extensors	5/5	5/5
Supinators	5/5	5/5
Pronators	5/5	5/5
EPL	5/5	5/5
Hand Grip	5/5	5/5
Intrinsics	5/5	5/5
Hip Flexors	5/5	5/5
Quadriceps	5/5	5/5
Hamstrings	5/5	5/5
Tibialis Anterior	5/5	5/5
Gastrocs	5/5	5/5
EHL	5/5	5/5

Tests	R	L
Spurling	-	-
Hoffmann	-	-
Clonus	-	-
SLR	-	-
IRR	-	-
Babinski	-	-

Radiographs: I have reviewed AP and lateral radiographs of the lumbar spine taken today. Sagittal and coronal alignment are within expected limits. There is no evidence of fracture, subluxations, listhesis or disc degeneration. No lesions were identified. These are essentially normal radiographs for the patient's age.

Today I have personally reviewed the MRI examination of the lumbar spine performed -September 13, 2010. It reveals disc bulges and degenerative changes at the level LIII-4, L4-5, L5-S1. There is facet hypertrophy at the L4-5 facet joints. Per report, no significant change since date October 18, 2004 MRI scan.

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Report Date: April 05, 2011 Patient: Mickle, Joseph DOS: 01/13/11

Procedure:

Assessment: -Back pain

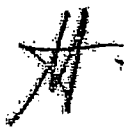
Plan: . MRI examination fails to reveal any compressive sequela. Therefore, he is not a surgical candidate. He has already maximized and exhausted nonoperative care. He will be referred for a functional capacity evaluation with impairment rating. Followup with me after the above tests.

Prescriptions: Norco (Dosage: 5/325 SIG: po at night Dispense: 60 Refills: 0 Method: Print)

Pre-Examination:

WORK STATUS:

☐ Full Time ☐ Part Time ☐ Restrictions ☐ Out of Work ☐ Non-Applicable

 Ivan LaMotta, MD

Ivan E. LaMotta, MD

Electronically signed
January 13, 2011
10:55 AM

64
21



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Michael R. Ugino, MD * Michael S. Green, MD * M. David Redmond, MD *
William C. James, MD * Robert D. Santrock, MD * Frederick C. Piehl, MD * Thomas P. Gross, MD
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1930 Blanding Street * Columbia, SC * 29201
Phone: 803.461.4740 * Fax: 803.461.4742

PROCEDURE NOTE

NAME: Joseph Mickle
DATE: 11/11/10
LOCATION: Midlands Orthopaedics Surgery Center

PROVIDER: M. David Redmond, M.D.
DOB:
MOPA ID #: 232716

AGE:

PROCEDURE: Lumbar Epidural Steroid Injection, right L4-5 and L4-5 facet injection

DIAGNOSIS: -Facet arthropathy with radicular symptoms as well

REFERRED BY: Stout, MD, Michael,
Coleman D. Fowble, MD

ALLERGIES: : No Known Allergies

CLINICAL DATA: Repeat injection. Previous injection helped for only a few days. He has a mechanical lower back pain component as well as a possible radicular component.

DESCRIPTION OF PROCEDURE IN DETAIL: The procedure was discussed and informed consent was signed. Vital signs were obtained. Pulse ox and heart rate were monitored. The patient was placed in the prone position. The L4-5 interspace was identified fluoroscopically.

Skin overlying the injection site was prepped and draped in sterile fashion. The skin and subcutaneous tissues were anesthetized using 3 cc of Lidocaine 1%. Using a paramedian approach, an 18-gauge spinal needle was inserted and 2 to 3 cc of normal saline was injected using a loss of resistance method to approximate the epidural space. Isovue contrast (1cc) was injected to confirm an epidural location. Aspiration failed to reveal blood, spinal fluid, or air. A test dose of Lidocaine 1.5% (2cc) was injected, and the patient did not report any symptoms into the lower extremities or saddle region. Celestone soluspan 6 mg (1cc) and Lidocaine 1% without Epinephrine (0.5cc) was injected into the epidural space. The spinal needle was then redirected to the right L4-5 facet joint, and after Isovue confirmation (1 cc) Celestone size and 6 mg (1 cc) of lidocaine 1% without epinephrine (0.5) cc was injected.

The patient tolerated the procedure well and was discharged after approximately 15 to 30 minutes.


M. David Redmond, MD

Electronically Signed
November 11, 2010 8:59 AM

65
22



Robert M. Peele, Jr, MD*Robert M. DaSilva, MD* James A. O Leary, MD
Michael R. Ugino, MD*Michael S. Green, MD * M. David Redmond, MD*
William C. James, MD * Robert D. Santrock, MD* Frederick C. Piehl, MD * Thomas P. Gross, MD
Coleman D. Fowble, MD*Thomas D. Armsey, MD* Ivan LaMotta, MD*Bernard G. Kirol, MD

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PROCEDURE NOTE

NAME: Joseph Mickle
DATE: 10/08/10
LOCATION: Midlands Orthopaedics Surgery Center

PROVIDER: M. David Redmond, M.D.
DOB:
MOPA ID #: 232716

AGE: :

PROCEDURE: Lumbar Facet Injection, right L4-5

DIAGNOSIS: -Facet arthropathy L4-5 on the right

REFERRED BY: Stout, MD, Michael,
Coleman D. Fowble, MD

ALLERGIES: . No Known Allergies

CLINICAL DATA: First injection. Right sided lower back pain. L4-5 facet is designated.

DESCRIPTION OF PROCEDURE IN DETAIL: The procedure was discussed and informed consent was signed. Vital signs were obtained. Pulse ox and heart rate were monitored. The patient was placed in the prone position. The L4-5 interspace was identified fluoroscopically.

Skin overlying the injection site was prepped and draped in sterile fashion. The skin and subcutaneous tissues were anesthetized using 3 cc of Lidocaine 1%. Using a paramedian approach, an 18-gauge spinal needle was inserted and 2 to 3 cc of normal saline was injected using a loss of resistance method to approximate the right L4-5 facet. Isovue contrast (1cc) was injected to confirm flow within the facet joint. Aspiration failed to reveal blood, spinal fluid, or air. A test dose of Lidocaine 1.5% (2cc) was injected, and the patient did not report any symptoms into the lower extremities or saddle region. Celestone soluspan 12 mg (2cc) and Lidocaine 1% without Epinephrine (1cc) was injected into the facet joint and surrounding tissues.

The patient tolerated the procedure well and was discharged after approximately 15 to 30 minutes.


M. David Redmond, MD

Electronically Signed
October 08, 2010 9:34 AM

66
2



Robert M. Peele, Jr, MD*Robert M. DaSilva, MD* James A. O Leary, MD
Michael R. Ugino, MD*Michael S. Green, MD * M. David Redmond, MD*
William C. James, MD * Robert D. Santrock, MD* Frederick C. Piehl, MD * Thomas P. Gross, MD
Coleman D. Fowble, MD*Thomas D. Amsey, MD*Van LaMotta, MD*Bernard G. Kirol, MD

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Detailed Follow up Exam

NAME: Mickle, Joseph
DATE: 11/24/10
EMPLOYER: Boyd Brothers Transportation
REFERRING PHYSICIAN: Michael Stout, MD

ACCOUNT: 232716
DOB: AGE:
OCCUPATION: No data for occupation

CC: LUMBAR SPINE

DATE OF INJURY/ONSET/SURGERY: 07/12/2010

HPI: Mr. Mickle again got about 2 days of good relief from the LESI. Unfortunately, the pain seems to return. He complains of constant radiation down the right leg in very intermittent radiation down the left. He has no weakness, bowel or bladder dysfunction, or other constitutional signs or symptoms. Essentially, his history is completely unchanged.

Date of last visit: 11-11-2010

Since the last visit the pain is: () Better () Worse (X) Same () N/A

On a scale of 0-10 (10 is the worst), the patient reports the pain is: 5-6

The patient describes the quality of pain as:

() Sharp () Throbbing
() Dull (X) Aching
() Stabbing (X) Burning

The pain is: (X) Constant () Intermittent () N/A

The patient reports they are taking cataplam (medication) for this condition.

The patient reports since the last visit:

Treatment	Did it help?
Anti-inflammatories	() Yes (X) No () N/A
Narcotics	() Yes () No (X) N/A
Brace/Cast	() Yes () No (X) N/A
Physical/Occupational Therapy	() Yes () No (X) N/A
Home Exercise Program	() Yes () No (X) N/A
Injection at last visit: short-term	() Yes (X) No () N/A
Injection at last visit: long-term	() Yes (X) No () N/A
Surgery since last visit	() Yes () No (X) N/A

Since the last visit, has there been a change in:

Patient's Medical History () Yes (X) No
Family History: () Yes (X) No
Social History: () Yes (X) No

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Report Date: April 05, 2011 Patient: Mickle, Joseph DOS: 11/24/10

ALLERGIES: . No Known Allergies

MEDICATION(s): Cataflam
Cataflam (Dosage: 50mg SIG: 1 po bid pc Dispense: 60 Refills: 0 Note: *MOPA)
Flector Patch (Dosage: 1.3% SIG: Apply to affected area BID Dispense: 60 Refills: 0)

REVIEW OF SYSTEMS:

General, neuro, psychiatric, respiratory, cardiovascular, GI, GU, blood and lymph, EENT, musculoskeletal, skin and endocrine are normal except for what is noted:
Systems Reviewed

PHYSICAL EXAM:

Vital Signs: HEIGHT: 6'0"
WEIGHT: 224 lbs 0 oz
BMI: 30.4

Patient is alert and oriented x 3 with a normal nonantalgic gait. Cranial nerves II-XII are intact. There is no midline palpable tenderness in the lumbar spine. There is some obvious paraspinal tenderness or spasms to palpation. Forward flexion does not create any radiating symptoms down the legs. Lateral bending is symmetric. Hip flexors, hip abductors, adductors, knee flexors, knee extensor, plantar and dorsiflexors of the ankle are all 5/5 and symmetric. SLR is positive very slightly on the right. However, it is consistently reproducible. Patellar and Achilles reflexes are intact and symmetric. There is no clonus and Babinski's are downgoing. Patient has palpable dorsalis pedis pulses bilaterally. Nail beds are pink with less than 2 second capillary refills. Rectal exam: deferred.

RADIOGRAPHS:

PROCEDURE:

ASSESSMENT: -Facet arthropathy L4-5 on the right
724.2-Low Back Pain

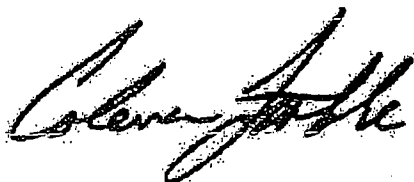
PLAN: He has failed multiple conservative modalities including therapy, medications, and injections. I will have him seen by one of the spine subspecialist for further evaluation. No change in his work status. Followup after the spine evaluation.

PRESCRIPTIONS: No data for Prescription

PRE-EXAMINATION:

WORK STATUS:

() Full Time () Part Time () Restrictions () Out of Work () Non-Applicable



Coleman D. Fowle, MD

68
25

Report Date: April 05, 2011 Patient: Mickle, Joseph DOS: 11/24/10

Electronically Signed
November 24, 2010 9:53 AM

69
24



Robert M. Peele, Jr, MD * Robert M. DaSilva, MD * James A. O Leary, MD
Michael R. Ugino, MD * Michael S. Green, MD * M. David Redmond, MD *
William C. James, MD * Robert D. Santrock, MD * Frederick C. Piehl, MD * Thomas P. Gross, MD
Coleman D. Fowble, MD * Thomas D. Armsey, MD * I van LaMotta, MD * Bernard G. Kirol, MD

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2989 Sunset Boulevard, West Columbia, SC 29169
(803) 256.4107 * www.midlandsortho.com

Detailed Follow up Exam

NAME: Mickle, Joseph
DATE: 10/27/10
EMPLOYER: Boyd Brothers Transportation
REFERRING PHYSICIAN: Michael Stout, MD

ACCOUNT: 232716
DOB:
OCCUPATION: No data for occupation

CC: Lower Back pain radiating down Right Leg

DATE OF INJURY/ONSET/SURGERY: DOI : 07/12/2010 : Post Lumbar Facet Injection, right L4-5 10/08/2010

HPI: Mr. Mickle gotten good short-term relief from the injection. Now, he seems to be returning to his pre-injection level of pain. The brace does give him a lot of help while walking. However, does not seem to give him much help while sitting. Patient states the injection helped for a few days but wore off and he is now in constant pain again. The radiating pain down the leg seems to be only present with walking. He has no true weakness, bowel or bladder dysfunction, fever, or other constitutional signs or symptoms.

Date of last visit: 09/15/2010

Since the last visit the pain is: () Better () Worse (X) Same () N/A

On a scale of 0-10 (10 is the worst), the patient reports the pain is: 7/10

The patient describes the quality of pain as:

(X) Sharp () Throbbing
() Dull () Aching
() Stabbing () Burning

The pain is: (X) Constant () Intermittent () N/A

The patient reports they are taking Cataflam (medication) for this condition.

The patient reports since the last visit:

Treatment

Anti-inflammatories
Narcotics
Brace/Cast
Physical/Occupational Therapy
Home Exercise Program
Injection at last visit: short-term
Injection at last visit: long-term
Surgery since last visit

Did it help?

() Yes	() No	(X) N/A
() Yes	() No	(X) N/A
() Yes	() No	(X) N/A
() Yes	() No	(X) N/A
() Yes	() No	(X) N/A
(X) Yes	() No	() N/A
() Yes	() No	(X) N/A
() Yes	(X) No	() N/A

Since the last visit, has there been a change in:
Patient's Medical History () Yes (X) No

70
27

Report Date: April 05, 2011 Patient: Mickle, Joseph DOS: 10/27/10

Family History: () Yes (X) No
Social History: () Yes (X) No

ALLERGIES: . No Known Allergies

MEDICATION(s): Cataflam

10/27/2010 meds updated per patient. ina

REVIEW OF SYSTEMS:

General, neuro, psychiatric, respiratory, cardiovascular, GI, GU, blood and lymph, EENT, musculoskeletal, skin and endocrine are normal except for what is noted:

. Systems Reviewed

PHYSICAL EXAM:

Vital Signs: HEIGHT: 6'0"
WEIGHT: 224 lbs 0 oz
BMI: 30.4

Patient is alert and oriented x 3 with a normal nonantalgic gait. Cranial nerves II-XII are intact. There is no midline palpable tenderness in the lumbar spine. There is some obvious paraspinal tenderness or spasms to palpation. Forward flexion does not create any radiating symptoms down the legs. Lateral bending is symmetric. Hip flexors, hip abductors, adductors, knee flexors, knee extensor, plantar and dorsiflexors of the ankle are all 5/5 and symmetric. SLR is negative bilaterally. However, he complains of radiating type leg pain down the right with prolonged weightbearing or walking. Patellar and Achilles reflexes are intact and symmetric. There is no clonus and Babinski's are downgoing. Patient has palpable dorsalis pedis pulses bilaterally. Nail beds are pink with less than 2 second capillary refills. Rectal exam: deferred.

RADIOGRAPHS:

PROCEDURE:

ASSESSMENT: -Facet arthropathy L4-5 on the right
-Possible right radicular symptoms

PLAN: I would like to try another injection as he did get good short-term relief. Also, I will give him some topical anti-inflammatory patches. Followup a few weeks after the injection. No change in his work status.

PRESCRIPTIONS: Cataflam (Dosage: 50mg SIG: 1 po bid pc. Dispense: 60 Refills: 0 Method: Print Note:
*MOPA)
Flector Patch (Dosage: 1.3% SIG: Apply to affected area BID Dispense: 60 Refills: 0
Method: Print)

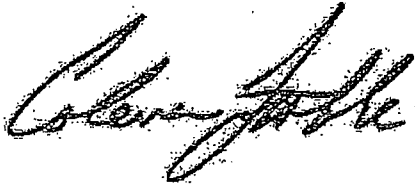
PRE-EXAMINATION:

WORK STATUS:

() Full Time () Part Time () Restrictions () Out of Work () Non-Applicable

71
28

Report Date: April 05, 2011 Patient: Mickle, Joseph DOS: 10/27/10



Coleman D. Fowble, MD

Electronically Signed
October 27, 2010 1:03 PM

72
29



Robert M. Peele, Jr, MD*Robert M. DaSilva, MD* James A. O Leary, MD
Michael R. Ugino, MD*Michael S. Green, MD* M. David Redmond, MD*
William C. James, MD* Robert D. Santrock, MD* Frederick C. Piehl, MD* Thomas P. Gross, MD
Coleman D. Fowble, MD*Thomas D. Armsey, MD*Van LaMotta, MD*Bernard G. Krol, MD

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2989 Sunset Boulevard, West Columbia, SC 29169
(803) 256.4107 * www.midlandsortho.com

Work Status Information

NAME: Mickle, Joseph
EMPLOYER: Boyd Brothers Transportation

ACCOUNT: 232716
CARRIER: BOYD BROTHERS
TRANSPORTATION
DATE OF SERVICE: 10/27/10
DIAGNOSIS CODE (S): 7242
DIAGNOSIS DESCRIPTION:: LUMBAGO

PHYSICIAN: Coleman D. Fowble, M.D.
DATE OF ACCIDENT: 07/01/2010
WORKERS' COMP CLAIM NUMBER#
2010000019

WORK STATUS:

- ☐ Regular duty as of with no restrictions
☐ Light duty as of with restrictions
(availability of light duty is determined by the employer, not the physician)
☒ Remain out of work until 11/27/2010
☐ Part time (whether regular duty or light duty)
☐ Full time (whether regular duty or light duty)

PHYSICAL LIMITATIONS:

☐ None	☐ No kneeling, squatting, crawling
☐ No walking	☐ Pushing or Pulling Limit (lbs)
☐ No climbing	☐ Lifting and carrying limit (lbs)
☐ No standing	☐ Sedentary duties only
☐ No prolonged standing	☐ No overhead work
☐ No sitting	☐ No work involving ()L ()R (extremity)
☐ No bending or stooping	☐ No overhead work
☐ No twisting or stretching	☐ No work at heights

Other:

These restrictions are recommended to promote healing of the body part which is injured or which has had surgery. Unrestricted use is recommended when it will not adversely affect the healing process. This is not a statement as to the capacity to undertake a given task or participate in a given sport, nor is it a warranty against subsequent injury. All restrictions or the lack of such restrictions may be subject to revision or modification if conditions change. It is your responsibility to contact us for any clarification, questions or concerns.

Follow-up plan:lesi tba

Follow-up appointment date: post lesi tba

Coleman D. Fowble, MD

73
30



Robert M. Peale, Jr, MD*Robert M. DaSilva, MD* James A. O Leary, MD
Michael R. Ugino, MD*Michael S. Green, MD * M. David Redmond, MD*
William C. James, MD * Robert D. Santrock, MD* Frederick C. Piehl, MD * Thomas P. Gross, MD
Coleman D. Fowble, MD*Thomas D. Armsey, MD* Ivan LaMotta, MD* Bernard G. Kirol, MD

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Detailed Follow up Exam

NAME: Mickle, Joseph
DATE: 09/15/10
EMPLOYER: Boyd Brothers Transportation
REFERRING PHYSICIAN: Michael Stout, MD

ACCOUNT: 232716
DOB:
OCCUPATION: No data for occupation

CC: Lower back pain radiating down right leg

DATE OF INJURY/ONSET/SURGERY: Date of injury: 7/12/2010

HPI: Mr. Mickle returns today for a waste of his back. He is essentially unchanged. Patient returns today for lower back pain radiating down his right leg. He does note some minor improvement since his last visit. He feels like he is benefiting from physical therapy. He states the Cataflam causes him to be dizzy and nauseated. He has had a lumbar MRI since his last visit.

Date of last visit: 8/25/2010

Since the last visit the pain is: (X) Better () Worse () Same () N/A

On a scale of 0-10 (10 is the worst), the patient reports the pain is: 6/10

The patient describes the quality of pain as:

(X) Sharp () Throbbing
() Dull () Aching
() Stabbing () Burning

The pain is: (X) Constant () Intermittent () N/A

The patient reports they are taking Skelaxin and Cataflam (medication) for this condition.

The patient reports since the last visit

Treatment

Anti-inflammatories
Narcotics
Brace/Cast
Physical/Occupational Therapy
Home Exercise Program
Injection at last visit: short-term
Injection at last visit: long-term
Surgery since last visit

-Did it help?

(X) Yes () No () N/A
() Yes () No (X) N/A
() Yes () No (X) N/A
(X) Yes () No () N/A
() Yes () No (X) N/A
() Yes () No (X) N/A
() Yes () No (X) N/A
() Yes () No (X) N/A

Since the last visit, has there been a change in:

Patient's Medical History () Yes (X) No
Family History: () Yes (X) No
Social History: () Yes (X) No

74
31

Report Date: April 05, 2011 Patient: Mickle, Joseph DOS: 09/15/10

ALLERGIES: . No Known Allergies

MEDICATION(s): Cataflam (Dosage: 50mg SIG: 1 po bid pc Dispense: 60 Refills: 0 Note: *MOPA)
Skelaxin

REVIEW OF SYSTEMS:

General, neuro, psychiatric, respiratory, cardiovascular, GI, GU, blood and lymph, EENT, musculoskeletal, skin and endocrine are normal except for what is noted:
.Systems Reviewed

PHYSICAL EXAM:

Vital Signs: HEIGHT: 6'0"
WEIGHT: 224 lbs 0 oz
BMI: 30.4

Patient is alert and oriented x 3 with a normal nonantalgic gait. Cranial nerves II-XII are intact. There is no midline palpable tenderness in the lumbar spine. There is some obvious paraspinal tenderness or spasms to palpation. Forward flexion does not create any radiating symptoms down the legs. Lateral bending is symmetric. Hip flexors, hip abductors, adductors, knee flexors, knee extensor, plantar and dorsiflexors of the ankle are all 5/5 and symmetric. SLR is negative bilaterally. However, he continues to complain of right radicular type symptoms subjectively. Patellar and Achilles reflexes are intact and symmetric. There is no clonus and Babinski's are downgoing. Patient has palpable dorsalis pedis pulses bilaterally. Nail beds are pink with less than 2 second capillary refills. Rectal exam: deferred.

RADIOGRAPHS: I reviewed the MRI and the report. He has some fairly significant facet arthritis at L4-5. This may account for his mechanical type back symptoms.

PROCEDURE:

ASSESSMENT: -Possible right radicular symptoms
724.2-Low Back Pain

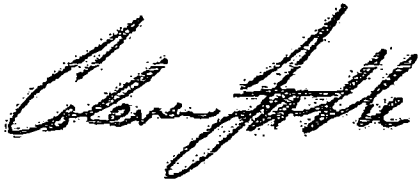
PLAN: He does not seem to be responding to conservative modalities. I will set him up for a right L4-5 facet block. Also, I will try him in a BOA brace. I think he can do sedentary type work. However, I don't think he can drive a large truck because of the vibration of this we'll your take the facet joints. Continue physical therapy. Follow up in a few weeks for clinical check.

PRESCRIPTIONS: No data for Prescription

PRE-EXAMINATION:

WORK STATUS:

() Full Time () Part Time () Restrictions () Out of Work () Non-Applicable



75
32

Report Date: April 05, 2011 Patient: Mickle, Joseph DOS: 09/15/10

Coleman D. Fowble, MD

Electronically Signed
September 15, 2010 1:34 PM

74
33



Robert M. Peele, Jr, MD * Robert M. DeSilva, MD * James A. O'Leary, MD
Michael R. Ugino, MD * Michael S. Green, MD * M. David Radmond, MD *
William C. James, MD * Robert D. Santrock, MD * Frederick C. Pfehl, MD * Thomas P. Gross, MD
Coleman D. Fowble, MD * Thomas D. Amsey, MD * I. van LaMotta, MD * Bernard G. Klotz, MD
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2989 Sunset Boulevard, West Columbia, SC 29169
(803) 256.4107 * www.midlandsortho.com

THERAPY REFERRAL / PLAN OF CARE

NAME: Joseph Mickle
Account: 232716
Date: 09/15/10

DOB:
Diagnosis: 724.2
Doctor: Coleman D. Fowble, M.D.

(X) PHYSICAL THERAPY

() OCCUPATIONAL THERAPY

Continue Therapy

1-2xweek/4weeks

***PLEASE NOTE THAT IT IS THE RESPONSIBILITY OF THE PHYSICAL
THERAPY FACILITY TO OBTAIN AUTHORIZATION FOR ANY AND ALL
PHYSICAL THERAPY APPOINTMENTS****

Coleman D. Fowble, MD

Electronically Signed
September 15, 2010 12:35 PM

77
34



Robert M. Peble, Jr, MD*Robert M. DaSilva, MD* James A. O Leary, MD
Michael R. Ugino, MD*Michael S. Green, MD * M. David Redmond, MD*
William C. James, MD * Robert D. Santrock, MD* Frederick C. Piehl, MD * Thomas P. Gross, MD
Coleman D. Fowble, MD*Thomas D. Amsey, MD* Ivan LaMotta, MD* Bernard G. Kirol, MD

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Detailed Follow up Exam

NAME: Mickie, Joseph
DATE: 08/25/10
EMPLOYER: Boyd Brothers Transportation
REFERRING PHYSICIAN: Stout, MD, Michael,

ACCOUNT: 232716
DOB:
OCCUPATION: No data for occupation

CC: Lower back pain radiating down right leg

DATE OF INJURY/ONSET/SURGERY: Date of injury: 7/12/2010

HPI: Patient in today for follow up of lower back pain. He states he now has pain radiating down the right leg with numbness. He has been attending physical therapy which he states only helps a little. He states he has been taking the Cataflam and Skelaxin but needs something stronger for pain.

Date of last visit: 7/12/2010

Since the last visit the pain is: (X)Better ()Worse ()Same ()N/A

On a scale of 0-10 (10 is the worst), the patient reports that the pain is: 7/10

The patient describes the quality of pain as: ()N/A
(X)Sharp ()Throbbing
()Dull ()Aching
()Stabbing ()Burning

The pain is: ()Constant (X)Intermittent ()N/A

The patient reports that they are taking Skelaxin and Cataflam (medication) for the condition.

The patient reports treatment since last visit:

Treatment	Did it help?	
Anti inflammatories?	()Yes	(X)No () NA
Narcotics?	()Yes	()No (X) NA
Brace/Cast	()Yes	()No (X) NA
Physical/Occupational Therapist	(X)Yes	()No () NA
Home Exercise Program	()Yes	()No (X) NA
Injection at last visit: short-term	()Yes	()No (X) NA
Injection at last visit: long-term	()Yes	()No (X) NA
Surgery since last visit	()Yes	(X)No () NA

Since the last visit, has there been a change in:

Patient's Medical History	()Yes	(X)No
Family History	()Yes	(X)No
Social History	()Yes	(X)No

ALLERGIES:

. No Known Allergies

CURRENT MEDICATIONS:

78
34

Report Date: April 05, 2011 Patient: Mickle, Joseph DOS: 08/25/10

Cataflam (Dosage: 50mg SIG: 1 po bid pc Dispense: 60 Refills: 0 Note: *MOPA)

Soma

Tramadol

REVIEW OF SYSTEMS:

General, neuro, psychiatric, respiratory, cardiovascular, GI, GU, blood and lymph, EENT, musculoskeletal, skin and endocrine are normal except for what is noted:

Systems Reviewed

PHYSICAL EXAM:

Vital Signs: HEIGHT: 6'0"
WEIGHT: 224 lbs 0 oz
BMI: 30.4

Patient is alert and oriented x 3 with a normal nonantalgic gait. Cranial nerves II-XII are intact. There is no midline palpable tenderness in the lumbar spine. There is some obvious paraspinal tenderness or spasms to palpation. Forward flexion does not create any radiating symptoms down the legs. Lateral bending is symmetric. Hip flexors, hip abductors, adductors, knee flexors, knee extensor, plantar and dorsiflexors of the ankle are all 5/5 and symmetric. SLR is negative bilaterally. However, he complains of pain with numbness and tingling down the right leg. Patellar and Achilles reflexes are intact and symmetric. There is no clonus and Babinski's are downgoing. Patient has palpable dorsalis pedis pulses bilaterally. Nail beds are pink with less than 2 second capillary refills. Rectal exam: deferred.

RADIOGRAPHS:

PROCEDURE:

ASSESSMENT: -Possible right radicular symptoms
724.2-Low Back Pain

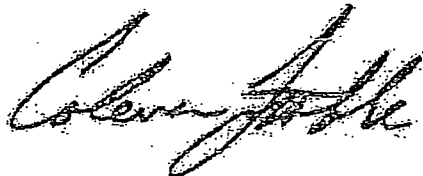
PLAN: He is had an obvious change in his history. I'll get an MRI of the lumbar spine. Refill his medications as well. Follow up after the MRI. No change in his work status.

PRESCRIPTIONS: Cataflam (Dosage: 50mg SIG: 1 po bid pc Dispense: 60 Refills: 0 Method: Print Note: *MOPA)
Skelaxin (Dosage: 800mg SIG: 1/2-1 po Tid pm muscle spasms Dispense: 50 Refills: 0 Method: Print)

PRE-EXAMINATION:

WORK STATUS:

() Full Time () Part Time () Restrictions () Out of Work () Non-Applicable



Coleman D. Fowle, MD

79
36

Report Date: April 05, 2011 Patient: Mickle, Joseph DOS: 08/25/10

Electronically Signed
September 08, 2010 8:48 AM

80
37



Robert M. Paolo, Jr., MD Robert M. O'Shea, MD James A. O'Leary, MD
 Michael R. Lyons, MD Michael S. Green, MD Al Davis Raymond, MD
 William C. James, MD Robert D. Santoro, MD Frederick C. Flinn, MD Thomas P. Orent, MD
 Coleman D. Fowble, MD Thomas D. Amosy, MD Ivan LaMotte, MD Brennan G. Kral, MD
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 (803) 256-4107 * www.midlandsoortho.com

THERAPY REFERRAL / PLAN OF CARE

NAME: Joseph Mickle
 Account: 232716
 Date: 08/25/10

DOB:
 Diagnosis: 724.2
 Doctor: Coleman D. Fowble, M.D.

(X) PHYSICAL THERAPY

() OCCUPATIONAL THERAPY

Continue Therapy

1-2xweek/4weeks

***PLEASE NOTE THAT IT IS THE RESPONSIBILITY OF THE PHYSICAL
 THERAPY FACILITY TO OBTAIN AUTHORIZATION FOR ANY AND ALL
 PHYSICAL THERAPY APPOINTMENTS***

Coleman D. Fowble, MD

Electronically Signed
 August 25, 2010 2:39 PM

81

38



Robert M. Peele, Jr, MD * Robert M. DaSilva, MD * James A. O'Leary, MD
Michael R. Ugino, MD * Michael S. Green, MD * M. David Redmond, MD *
William C. James, MD * Robert D. Santrock, MD * Frederick C. Piehl, MD * Thomas P. Gross, MD
Coleman D. Fowble, MD * Thomas D. Armsey, MD * Van LaMotta, MD * Bernard G. Kirol, MD

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Initial Exam

NAME: Mickle, Joseph
DATE: 08/02/10
EMPLOYER: Boyd Brothers Transportation
REFERRING PHYSICIAN: Michael Stout, MD

ACCOUNT: 232716
DOB:
OCCUPATION: No data for occupation

CC: Low back pain

DATE OF INJURY/ONSET/SURGERY: DOI-7/12/10

HPI: Mr. Mickle is a 64-year-old gentleman who injured his back about 2-3 weeks ago. The patient reports he was lifting a lumbar top (175-250lbs) onto the back of a trailer. He was pulling it a first and felt a stinging in the lower back, then when he lifted to place it back on the trailer he had immediate onset of low back pain. He was then unable to get out of the truck without assistance. He was then sent to Doctor's Care. He was given x-rays and pain medication. He states he has tingling in the top of his thighs. He denies any bowel or bladder dysfunction.

MEDICAL ILLNESSES:

Past Med Hx: 20. High Blood Pressure

Surgical History: No Surgery Reported

Family History: 07. High Blood Pressure

Social History: 06. Children-Yes
07. Married Status-Divorced
09. Significant Other
19. Non-Smoker

Allergies: No Known Allergies

Current Meds:
Soma
Tramadol
Vicodin

REVIEW OF SYSTEMS:

General, neuro, psychiatric, respiratory, cardiovascular, GI, GU, blood and lymph, EENT, musculoskeletal, skin and endocrine systems are normal except what is noted: Systems Reviewed

PHYSICAL EXAM:

Vital Signs PULSE: 84
RR: 14

Appearance: No acute distress
Psychiatric: Mood and affect were appropriate.

82

39

Report Date: April 05, 2011 Patient: Mickie, Joseph DOS: 08/02/10

Skin: Clean, dry, no lesions, no rashes.
Neuro: Alert and Oriented x3.

FOCUSED EXAM: FOCUSED EXAM:
Skin No laceration, abrasions, or ulcerations
Tenderness no paraspinal musculature tenderness
Gait normal gait pattern, no notable limp
lumbar flexion 90 Degrees
lumbar extension 30 degrees
lateral flexion left 30 degrees
lateral flexion right 30 degrees
lower extremity edema negative
lymph nodes no palpable lymphnodes

Motor strength	Left	Right
Quad	»5/5	»5/5
Hamstring	»5/5	»5/5
Plantar flexion	»5/5	»5/5
Dorsiflexion	»5/5	»5/5
EHL	»5/5	»5/5
SLR	»Negative	»Negative

Reflexes	Left	Right
Knee	»2+	»2+
Ankle	»2+	»2+
Babinski	»Down	»Down

Vascular exam	Left	Right
Dorsalis pedis pulse	»2+	»2+
Posterior tibial pulse	»2+	»2+

Sensory exam	Left	Right
Dorsum of foot	»Normal	»Normal
First web space	»Normal	»Normal
Plantar foot	»Normal	»Normal
Lateral heel	»Normal	»Normal

Radiographs: Kathy brought in and AP and lateral of the lumbar spine. He has some mild facet arthritis at L5-S1. On the lateral, he has very minimal degenerative disc disease. He has obvious loss of the normal lumbar lordosis.

Procedure:

Assessment: 724.2-Low Back Pain

Plan: He does not show true signs of radiculopathy. It seems to be much more significantly muscular in nature. He has significant pain when he extends his back from a flexed position. He has difficulty getting out of chairs etc. I will get him into physical therapy change some of his meds and around. Followup in 2-3 weeks.

Prescriptions: Cataflam (Dosage: 50mg SIG: 1 po bid pc Dispense: 60 Refills: 0 Method: Print Note: *MOPA)
Skelaxin (Dosage: 800mg SIG: 1/2-1 po Tid prn muscle spasms Dispense: 50 Refills: 0 Method: Print)

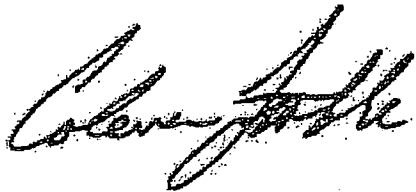
Pre-Examination:

83
46

Report Date: April 05, 2011 Patient: Mickle, Joseph DOS: 08/02/10

WORK STATUS:

☐ Full Time ☐ Part Time ☐ Restrictions ☐ Out of Work ☐ Non-Applicable



Coleman D. Fowble, MD

Electronically signed
August 02, 2010
2:33 PM

84
41

69A-1567
201-000019
7-21-10



Robert M. Perle, Jr., MD, Robert M. DeGrove, MD, James A. O'Leary, MD
Michael R. Upton, MD, Michael S. Green, MD, M. David Richmond, MD
William C. James, MD, Robert D. Sanborn, MD, Frederick C. Picht, MD, Thomas P. Giron, MD
Coleman D. Fowble, MD, Thomas C. Almon, MD, Van Lamotte, MD, Brenda G. King, MD
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2989 Sunset Boulevard, West Columbia, SC 29159
(803) 259-4107 * www.midlandsoortho.com

Vicki
334-776-
1347

THERAPY REFERRAL / PLAN OF CARE

NAME: Joseph Mickle
Account: 232716
Date: 08/02/10

DOB: :
Diagnosis:
Doctor: Coleman D. Fowble, M.D.

☒ (X) PHYSICAL THERAPY

☐ () OCCUPATIONAL THERAPY

EVALUATE AND TREAT AS ORDERED: P.T Back

FREQUENCY: BWV
DURATION: 4 weeks

---PLEASE NOTE THAT IT IS THE RESPONSIBILITY OF THE PHYSICAL
THERAPY FACILITY TO OBTAIN AUTHORIZATION FOR ANY AND ALL
PHYSICAL THERAPY APPOINTMENTS---

Coleman D. Fowble, MD

Electronically Signed
August 02, 2010 11:07 AM

85
42



HPRC

Human Performance & Rehab
BL
1910 Blanding St
Columbia, SC 292011910
Phone: (803) 253-6721
Fax: (803) 799-8177

Daily Note

Date of Visit: 10-19-10
Patient Name: Mickle, Joseph
Patient #: 0040301
Date of Birth:
Age:
Date of Onset: 07-12-10

Therapist: Timothy Sutton PT
Referring: Coleman Fowble MD
Physician:
Ref Address: 1910 Blanding St
Columbia, SC 29201
Fax #: (803) 933-6732

Medical Diagnosis:
724.2 LUMBAGO

Treatment Diagnosis:
724.2 back / lumbar Pain

SUBJECTIVE:

The patient reports today's pain a 6 out of 10. 09/15 Pain in back and legs staying about the same.
09/20 Pain in back and leg is helped with the brace.
09/22 Back pain is worse to day and down leg.
09/29 Pain in back is less when on pills, helps the leg pain too.
09/30 Epidural scheduled next Friday
10/05 Back hurting a lot, not able to take meds since the epidural is Friday.
10/12 No change with back pain after epidural.
10/15 Still no change noticed from the epidural.
10/19 Sharp pains in back. Leg goes to sleep when up on feet.

OBJECTIVE FINDINGS:

Observation	Side	Initial	Last	Current	Code	Comment
Lumbar Extension AROM		50%				
Lumbar Flexion AROM		25%				Reach to top of shins
Neuro exam		Negative				
MMT LE WNL		Yes				
TTP		Severe				across LB from L1 to sacrum
Gaurded AROM		Yes				Not reversing lordosis
Gait Deviation		No				
Oswestry Score		36				

Gaurded movements not flexing spine. Difficult to get shoes off. Moderate difficulty getting off of table from supine. Hip flexion limited bilaterally to 45deg.
08/25 poor trunk strength. Not able to do a full bridge or functional squat. Gaurds LB and does not reverse lordosis of LS with flexion or returning to extension from standing flexion.

ACTIVITY LOG:

ACTIVITIES	Comment	Status	Sets	Reps	Weight	Done today
Curl Up - VHI		Active				Yes
Theraband Unilateral pulldowns	Orange TB	Active				Yes
Theraband Unilateral Row	Wine TB	Active				Yes
Theraband Unilateral OHP	Pink TB	Active				Yes
Theraband Unilateral Punches	Wine TB	Active				Yes
Adductor Squeeze	ball	Active				Yes

Patient: Mickle, Joseph Date: 10-19-10

Theraband abduction in hooklying		Active				Yes
Quadruped LE		Active				Yes
Trunk Rotation		Active				No
Single knee to chest		Active				No
Hamstring Stretch		Active				No
Bridge		Active				No
POE		Active				No
FIG 4		Active				No

Mr. Joseph Mickle received 32 minutes skilled therapy today for back / lumbar Pain. Skilled therapeutic intervention and any evaluation time was 32 minutes and total treatment time was 32 minutes.

ASSESSMENT:

The patient appears motivated. The patient's progress towards goals is good. The patient's tolerance to treatment is good. The patient is able to perform exercises correctly with good form but increased pain. The patient is able to perform exercises correctly with verbal cues only. The patient requires continued skilled intervention. Therex progression 10/15 Did well with therex. 10/19 Epidural is wearing off.

PLAN:

Continue current treatment plan. We plan to see Joseph 2 times per week for 4 weeks for a total of 8 visits. This patient has attended 22 out of 23 visits. The patient has cancelled or no showed 1 times. Joseph will continue therapy as prescribed.

Best regards, Timothy Sutton PT

License # 2307

This document was electronically signed on 10-19-10 at 02:51p by Timothy Sutton PT.

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HP R C

Human Performance & Rehab
BL
1910 Blanding St
Columbia, SC 292011910
Phone: (803) 253-6721
Fax: (803) 799-8177

Daily Note

Date of Visit: 10-14-10
Patient Name: Mickle, Joseph
Patient #: 0040301
Date of Birth:
Age:
Date of Onset: 07-12-10

Therapist: Timothy Sutton PT
Referring: Coleman Fowble MD
Physician:
Ref Address: 1910 Blanding St
Columbia, SC 29201
Fax #: (803) 933-6732

Medical Diagnosis:
724.2 LUMBAGO

Treatment Diagnosis:
724.2 back / lumbar Pain

SUBJECTIVE:

SUBJECTIVE:
The patient reports today's pain a 5 out of 10. 09/15 Pain in back and legs staying about the same.
09/20 Pain in back and leg is helped with the brace.
09/22 Back pain is worse to day and down leg.
09/29 Pain in back is less when on pills, helps the leg pain too.
09/30 Epidural scheduled next Friday
10/05 Back hurting a lot, not able to take meds since the epidural is Friday.
10/12 No change with back pain after epidural.
10/15 Still no change noticed from the epidural.

OBJECTIVE FINDINGS:

OBJECTIVE FINDINGS:						
Observation	Signs	Findings	Assessment	Current	Goal	Comment
Lumbar Extension AROM		50%				Reach to top of shins
Lumbar Flexion AROM		25%				
Neuro exam		Negative				
MMT LE WNL		Yes				across LB from L1 to sacrum
TTP		Severe				Not reversing lordosis
Gaurded AROM		Yes				
Gait Deviation		No				
Oswestry Score		36				

Gaurded movements not flexing spine. Difficult to get shoes off. Moderate difficulty getting off of table from supine. Hip flexion limited bilaterally to 45deg.
08/25 poor trunk strength. Not able to do a full bridge or functional squat. Gaurds LB and does not reverse lordosis of LS with flexion or returning to extension from standing flexion.

ACTIVITY LOG:

Activities	Comments	Status	Sets	Reps	Weight	Done Today
Curl Up - VHI		Active				Yes
Theraband Unilateral pulldowns	Orange TB	Active				Yes
Theraband Unilateral Row	Wine TB	Active				Yes
Theraband Unilateral OHP	Pink TB	Active				Yes
Theraband Unilateral Punches	Wine TB	Active				Yes
Adductor Squeeze	ball	Active				Yes
Theraband abduction in hooklying		Active				Yes

Patient : Mickle, Joseph Date: 10-14-10.

Quadruped LE	Active				Yes
Trunk Rotation	Active				No
Single knee to chest	Active				No
Hamstring Stretch	Active				No
Bridge	Active				No
POE	Active				No
FIG 4	Active				No

Mr. Joseph Mickle received 32 minutes skilled therapy today for back / lumbar Pain. Skilled therapeutic intervention and any evaluation time was 32 minutes and total treatment time was 32 minutes.

ASSESSMENT:

The patient appears motivated. The patient's progress towards goals is good. The patient's tolerance to treatment is good. The patient is able to perform exercises correctly with good form but increased pain. The patient is able to perform exercises correctly with verbal cues only. The patient requires continued skilled intervention. Therex progression 10/15 Did well with therex.

PLAN:

Continue current treatment plan. We plan to see Joseph 2 times per week for 4 weeks for a total of 8 visits. This patient has attended 21 out of 22 visits. The patient has cancelled or no showed 1 times. Joseph will continue therapy as prescribed.

Best regards, Timothy Sutton PT

License # 2307

This document was electronically signed on 10-14-10 at 12:01p by Timothy Sutton PT.

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BL
1910 Blanding St
Columbia, SC 292011910
Phone: (803) 253-6721
Fax: (803) 799-8177

Daily Note

Date of Visit: 10-12-10
Patient Name: Mickie, Joseph
Patient #: 0040301
Date of Birth:
Age:
Date of Onset: 07-12-10

Therapist: Timothy Sutton PT
Referring: Coleman Fowble MD
Physician:
Ref Address: 1910 Blanding St
Columbia, SC 29201
Fax #: (803) 933-6732

Medical Diagnosis:
724.2 LUMBAGO

Treatment Diagnosis:
724.2 back / lumbar Pain

SUBJECTIVE:

The patient reports today's pain a 5 out of 10. 09/15 Pain in back and legs staying about the same.
09/20: Pain in back and leg is helped with the brace.
09/22: Back pain is worse to day and down leg.
09/29: Pain in back is less when on pills, helps the leg pain too.
09/30: Epidural scheduled next Friday
10/05: Back hurting a lot, not able to take meds since the epidural is Friday.
10/12: No change with back pain after epidural.

OBJECTIVE FINDINGS:

Objective Findings	Side	Initial	Last	Duration	Goal	Comment
Lumbar Extension AROM		50%				
Lumbar Flexion AROM		25%				Reach to top of shins
Neuro exam		Negative				
MMT LE WNL		Yes				
TTP		Severe				across LB from L1 to sacrum
Gaurded AROM		Yes				Not reversing lordosis
Gait Deviation		No				
Oswestry Score		36				

Gaurded movements not flexing spine. Difficult to get shoes off. Moderate difficulty getting off of table from supine. Hip flexion limited bilaterally to 45deg.
08/25 poor trunk strength. Not able to do a full bridge or functional squat. Gaurds LB and does not reverse lordosis of LS with flexion or returning to extension from standing flexion.

ACTIVITY LOG:

Activity	Comment	Status	Sets	Reps	Weight	Done Today
Curl Up - VHI		Active				Yes
Theraband pulldowns	Wine TB	Active				Yes
Adductor Squeeze	ball	Active				Yes
Trunk Rotation		Active				No
Pelvic Tilt		Active				No
Hamstring Stretch		Active				Yes
Single knee to chest		Active				Yes
Quadruped LE						

Patient : Mickle, Joseph. Date: 10-12-10

Theraband Unilateral Row	Wine TB	Active				Yes
Theraband Unilateral Punches	Wine TB	Active				Yes
Bridge		Active				No
POE		Active				No
FIG 4		Active				No
Teeterboard A/P		Active				No

Mr. Joseph Mickle received 32 minutes skilled therapy today for back / lumbar Pain. Skilled therapeutic intervention and any evaluation time was 32 minutes and total treatment time was 32 minutes.

ASSESSMENT:

The patient appears motivated. The patient's progress towards goals is good. The patient's tolerance to treatment is good. The patient is able to perform exercises correctly with good form but increased pain. The patient is able to perform exercises correctly with verbal cues only. The patient requires continued skilled intervention. Therex progression Did better with less leg pain during standing activities.
10/01 Did well in clinic with therex.
10/05 Not able to do standing exercises today because of leg and back pain.
10/12 Did well with therex less pain.

PLAN:

Continue current treatment plan. We plan to see Joseph 2 times per week for 4 weeks for a total of 8 visits. This patient has attended 20 out of 21 visits. The patient has cancelled or no showed 1 times. Joseph will continue therapy as prescribed.

Best regards, Timothy Sutton PT

License # 2307

This document was electronically signed on 10-12-10 at 12:00p by Timothy Sutton PT.

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Human Performance & Rehab
BL
1910 Blanding St
Columbia, SC 292011910
Phone: (803) 253-6721
Fax: (803) 799-8177

Daily Note

Date of Visit: 10-05-10
Patient Name: Mickle, Joseph
Patient #: 0040301
Date of Birth:
Age:
Date of Onset: 07-12-10

Therapist: Timothy Sutton PT
Referring Physician: Coleman Fowble MD
Ref Address: 1910 Blanding St
Columbia, SC 29201
Fax #: (803) 933-6732

Medical Diagnosis:
724.2 LUMBAGO

Treatment Diagnosis:
724.2 back / lumbar Pain

SUBJECTIVE:

The patient reports today's pain a 5 out of 10. 09/15 Pain in back and legs staying about the same.
09/20 Pain in back and leg is helped with the brace.
09/22 Back pain is worse to day and down leg.
09/29 Pain in back is less when on pills, helps the leg pain too.
09/30 Epidural scheduled next Friday
10/05 Back hurting a lot, not able to take meds since the epidural is Friday.

OBJECTIVE FINDINGS:

Objective Findings	Side	Initial	Last	Current	Goal	Comment
Lumbar Extension AROM		50%				
Lumbar Flexion AROM		25%				Reach to top of shins
Neuro exam		Negative				
MMT LE WNL		Yes				
TTP		Severe				across LB from L1 to sacrum
Guarded AROM		Yes				Not reversing lordosis
Gait Deviation		No				
Oswestry Score		36				

Guarded movements not flexing spine. Difficult to get shoes off. Moderate difficulty getting off of table from supine. Hip flexion limited bilaterally to 45deg.
08/25 poor trunk strength. Not able to do a full bridge or functional squat. Guards LB and does not reverse lordosis of LS with flexion or returning to extension from standing flexion.

ACTIVITY LOG:

Activities	Comment	Status	Sets	Reps	Weight	Done Today
Curl Up - VHL		Active				Yes
Quadruped LE		Active				No
Theraband Unilateral Row	Wine TB	Active				No
Theraband Unilateral Punches	Wine TB	Active				No
Theraband pulldowns	Wine TB	Active				Yes
Adductor Squeeze	ball	Active				Yes
Bridge		Active				No
Trunk Rotation		Active				Yes

Patient : Mickle, Joseph Date: 10-05-10

Mechanical Traction	90# static	Active				No
POE		Active				No
FIG 4		Active				No
Teeterboard A/P		Active				No
Pelvic Tilt		Active				Yes
Hamstring Stretch		Active				Yes
Single knee to chest		Active				Yes

Mr. Joseph Mickle received 28 minutes skilled therapy today for back / lumbar Pain. Skilled therapeutic intervention and any evaluation time was 28 minutes and total treatment time was 28 minutes.

ASSESSMENT:

The patient appears motivated. The patient's progress towards goals is good. The patient's tolerance to treatment is good.

The patient is able to perform exercises correctly with good form but increased pain.

The patient is able to perform exercises correctly with verbal cues only. The patient requires continued skilled intervention

Therex progression Did better with less leg pain during standing activities.

10/01 Did well in clinic with therex.

10/05 Not able to do standing exercises today because of leg and back pain.

PLAN:

Continue current treatment plan. We plan to see Joseph 2 times per week for 4 weeks for a total of 8 visits. This patient has attended 19 out of 19 visits. The patient has cancelled or no showed 0 times. Joseph will continue therapy as prescribed.

Best regards, Timothy Sutton PT

License # 2307

This document was electronically signed on 10-05-10 at 11:58a by Timothy Sutton PT.

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Human Performance & Rehab
BL
1910 Blanding St
Columbia, SC 292011910
Phone: (803) 253-6721
Fax: (803) 799-8177

Daily Note

Date of Visit: 09-29-10
Patient Name: Mickle, Joseph
Patient #: 0040301
Date of Birth:
Age:
Date of Onset: 07-12-10

Therapist: Timothy Sutton PT
Referring Physician: Coleman Fowble MD
Ref Address: 1910 Blanding St
Columbia, SC 29201
Fax #: (803) 933-6732

Medical Diagnosis:
724.2 LUMBAGO

Treatment Diagnosis:
724.2 back / lumbar Pain

SUBJECTIVE:

The patient reports today's pain a 5 out of 10. 09/15 Pain in back and legs staying about the same.
09/20 Pain in back and leg is helped with the brace.
09/22 Back pain is worse to day and down leg.
09/29 Pain in back is less when on pills, helps the leg pain too.

OBJECTIVE FINDINGS:

Objective Findings	Side	Findings	Current	Goal	Comments
Lumbar Extension AROM		50%			
Lumbar Flexion AROM		25%			Reach to top of shins
Neuro exam		Negative			
MMT LE WNL		Yes			
TTP		Severe			across LB from L1 to sacrum
Gaurded AROM		Yes			Not reversing lordosis
Gait Deviation		No			
Oswestry Score		36			

Gaurded movements not flexing spine. Difficult to get shoes off. Moderate difficulty getting off of table from supine. Hip flexion limited bilaterally to 45deg.

08/25 poor trunk strength. Not able to do a full bridge or functional squat. Gaurds LB and does not reverse lordosis of LS with flexion or returning to extension from standing flexion.

ACTIVITY LOG:

Activity	Comment	Status	Sets	Reps	Weight	Done today
Curl Up - VHI		Active				Yes
Quadruped LE		Active				Yes
Theraband Unilateral Row	Wine TB	Active				Yes
Theraband Unilateral Punches	Wine TB	Active				Yes
Theraband pulldowns	Wine TB	Active				Yes
Adductor Squeeze	ball	Active				Yes
Bridge		Active				Yes
Trunk Rotation		Active				Yes
Mechanical Traction	90# static	Active				No
POE		Active				No

Patient : Mickle, Joseph -Date: 09-29-10

FIG 4		Active				No
Teeterboard A/P		Active				No
Pelvic Tilt		Active				No
Hamstring Stretch		Active				No
Patient education ADL's & exercise program	body mechanics	Active				No

Mr. Joseph Mickle received 32 minutes skilled therapy today for back / lumbar Pain. Skilled therapeutic intervention and any evaluation time was 32 minutes and total treatment time was 32 minutes.

ASSESSMENT:

The patient appears motivated. The patient's progress towards goals is good. The patient's tolerance to treatment is good. The patient is able to perform exercises correctly with good form but increased pain. The patient is able to perform exercises correctly with verbal cues only. The patient requires continued skilled intervention. Therex progression did better with less leg pain during standing activities.

PLAN:

Continue current treatment plan. We plan to see Joseph 2 times per week for 4 weeks for a total of 8 visits. This patient has attended 17 out of 17 visits. The patient has cancelled or no showed 0 times. Joseph will continue therapy as prescribed.

Best regards, Timothy Sutton PT

License # 2307

This document was electronically signed on 09-29-10 at 11:38a by Timothy Sutton PT.

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Human Performance & Rehab
BL

1910 Blanding St
Columbia, SC 292011910

Phone: (803) 253-6721

Fax: (803) 799-8177

Daily Note

Date of Visit: 09-22-10
Patient Name: Mickle, Joseph
Patient #: 0040301
Date of Birth:
Age:
Date of Onset: 07-12-10

Therapist: Timothy Sutton PT
Referring Physician: Coleman Fowble MD
Ref Address: 1910 Blanding St
Columbia, SC 29201
Fax #: (803) 933-6732

Medical Diagnosis:
724.2 LUMBAGO

Treatment Diagnosis:
724.2 back / lumbar Pain

SUBJECTIVE:

The patient reports today's pain a 4 out of 10. 09/15 Pain in back and legs staying about the same.
09/20 Pain in back and leg is helped with the brace.
09/22 Back pain is worse to day and down leg.

OBJECTIVE FINDINGS:

Objective Findings	Side	Initial	Final	Current	Goal	Comment
Lumbar Extension AROM		50%				
Lumbar Flexion AROM		25%				Reach to top of shins
Neuro exam		Negative				
MMT LE WNL		Yes				
TTP		Severe				across LB from L1 to sacrum
Gaured AROM		Yes				Not reversing lordosis
Gait Deviation		No				
Oswestry Score		36				

Gaured movements not flexing spine. Difficult to get shoes off. Moderate difficulty getting off of table from supine. Hip flexion limited bilaterally to 45deg.

08/25 poor trunk strength. Not able to do a full bridge or functional squat. Gaurs LB and does not reverse lordosis of LS with flexion or returning to extension from standing flexion.

ACTIVITY LOG:

Activities	Comment	Status	Sets	Reps	Weight	Done Today
Curl Up - VHL		Active				Yes
Quadruped LE		Active				Yes
Theraband Unilateral Row	Wine TB	Active				Yes
Theraband Unilateral Punches		Active				Yes
Theraband pulldowns	Wine TB	Active				Yes
Adductor Squeeze	ball	Active				Yes
Bridge		Active				Yes
Trunk Rotation		Active				Yes
Mechanical Traction	90# static	Active				No
POE		Active				No
FIG 4		Active				No

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Patient : Mickle, Joseph. Date: 09-22-10

Teeterboard A/P		Active				No
Pelvic Tilt		Active				No
Hamstring Stretch		Active				No
Patient education ADL's & exercise program	body mechanics	Active				No

Mr. Joseph Mickle received 32 minutes skilled therapy today for back / lumbar Pain. Skilled therapeutic intervention and any evaluation time was 32 minutes and total treatment time was 32 minutes.

ASSESSMENT:

The patient appears motivated. The patient's progress towards goals is good. The patient's tolerance to treatment is good. The patient is able to perform exercises correctly with good form but increased pain. The patient is able to perform exercises correctly with verbal cues only. The patient requires continued skilled intervention. Therex progression 09/07 only got the leg numbness one time during treatment today. 09/10 Stiff after traction, then walked out fine. 09/13 traction did not seem to have any benefit. 09/15 Did well with therex. 09/20 Leg gets more irritated with standing.

PLAN:

Continue current treatment plan. We plan to see Joseph 2 times per week for 4 weeks for a total of 8 visits. This patient has attended 16 out of 16 visits. The patient has cancelled or no showed 0 times. Joseph will continue therapy as prescribed.

Best regards, Timothy Sutton PT

License #:2307

This document was electronically signed on 09-22-10 at 05:07p by Timothy Sutton PT.

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Human Performance & Rehab
BL
1910 Blanding St
Columbia, SC 292011910
Phone: (803) 253-6721
Fax: (803) 799-8177

Daily Note

Date of Visit: 09-20-10
Patient Name: Mickle, Joseph
Patient #: 0040301
Date of Birth:
Age:
Date of Onset: 07-12-10

Therapist: Timothy Sutton PT
Referring Physician: Coleman Fowble MD
Ref Address: 1910 Blanding St
Columbia, SC 29201
Fax #: (803) 933-6732

Medical Diagnosis:
724.2 LUMBAGO

Treatment Diagnosis:
724.2 back / lumbar Pain

SUBJECTIVE:

The patient reports today's pain a 4 out of 10. 09/15 Pain in back and legs staying about the same.
09/20 Pain in back and leg is helped with the brace.

OBJECTIVE FINDINGS:

Objective Findings	Side	Initial	Last	Current	Goal	Comment
Lumbar Extension AROM		50%				
Lumbar Flexion AROM		25%				Reach to top of shins
Neuro exam		Negative				
MMT LE WNL		Yes				
TTP		Severe				across LB from L1 to sacrum
Guarded AROM		Yes				Not reversing lordosis
Gait Deviation		No				
Oswestry Score		36				

Guarded movements not flexing spine. Difficult to get shoes off. Moderate difficulty getting off of table from supine. Hip flexion limited bilaterally to 45deg.
08/25-poor trunk strength. Not able to do a full bridge or functional squat. Guards LB and does not reverse lordosis of LS with flexion or returning to extension from standing flexion.

ACTIVITY LOG:

Activity	Comment	Status	Sets	Reps	Weight	Done Today
Curl Up - VHI		Active				Yes
Quadruped LE		Active				Yes
Theraband Unilateral Row	Wine TB	Active				Yes
Theraband Unilateral Punches		Active				Yes
Theraband pulldowns	Wine TB	Active				Yes
Adductor Squeeze	ball	Active				Yes
Bridge		Active				Yes
Trunk Rotation		Active				Yes
Mechanical Traction	90# static	Active				No
POE		Active				No
FIG 4		Active				No
Teeterboard A/P		Active				No

Patient : Mickle, Joseph Date: 09-20-10

Pelvic Tilt		Active				No
Hamstring Stretch		Active				No
Patient education ADL's & exercise program	body mechanics	Active				No

Mr. Joseph Mickle received 32 minutes skilled therapy today for back / lumbar Pain. Skilled therapeutic intervention and any evaluation time was 32 minutes and total treatment time was 32 minutes.

ASSESSMENT:

The patient appears motivated. The patient's progress towards goals is good. The patient's tolerance to treatment is good. The patient is able to perform exercises correctly with good form but increased pain. The patient is able to perform exercises correctly with verbal cues only. The patient requires continued skilled intervention. Therex progression 09/07 only got the leg numbness one time during treatment today.
09/10 Stiff after traction, then walked out fine.
09/13 traction did not seem to have any benefit.
09/15 Did well with therex
09/20 Leg gets more irritated with standing.

PLAN:

Continue current treatment plan. We plan to see Joseph 2 times per week for 4 weeks for a total of 8 visits. This patient has attended 15 out of 15 visits. The patient has cancelled or no showed 0 times. Joseph will continue therapy as prescribed.

Best regards,

Timothy Sutton PT

License # 2307

This document was electronically signed on 09-20-10 at 05:07p by Timothy Sutton PT.

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Human Performance & Rehab
BL
1910 Blanding St
Columbia, SC 292011910
Phone: (803) 253-6721
Fax: (803) 799-8177

Daily Note

Date of Visit: 09-13-10
Patient Name: Mickie, Joseph
Patient #: 0040301
Date of Birth:
Age:
Date of Onset: 07-12-10

Therapist: Timothy Sutton PT
Referring: Coleman Fowble MD
Physician:
Ref Address: 1910 Blanding St
Columbia, SC 29201
Fax #: (803) 933-6732

Medical Diagnosis:
724.2 LUMBAGO

Treatment Diagnosis:
724.2 back / lumbar Pain

SUBJECTIVE:

The patient reports today's pain a 5 out of 10. Pt reports that as long as he's got that medicine in him, his pain isn't too bad.
08/16 Pain not too bad as long as he is on meds. Carrying a gallon of milk in each hand creates pain. Walking 5 min at his complex had to call wife to come and pick him up.
08/19 Had pain last night after walking 15 min in his complex. Pain went down R leg from his back. Leg feels like it is going to sleep from groin down to foot. He walked after coming back from a 45 min car ride. He did well with the ride.
08/23 Leg was not as bad over the weekend but he didn't do any walking. Taking the medications help. Can't sit long, has to be in recliner. Standing makes R leg feel numb.
08/25 R leg feels numb after sitting, standing or walking. Feels like it tries to give out on him.
08/31 Getting pain/numbness in R leg down to foot with standing and walking.
09/03 Doing about the same.
09/07 Leg bothering him more than anything else.
09/10 More leg numbness yesterday and today than it has been.
09/13 Had leg numbness after the traction by the time he got to the elevator, was sore after getting off of the traction but didn't last long.

OBJECTIVE FINDINGS:

Objective Findings	Side	Initial	Final	Goal	Comment
Lumbar Extension AROM		50%			
Lumbar Flexion AROM		25%			Reach to top of shins
Neuro exam		Negative			
MMT LE WNL		Yes			
TTP		Severe			across LB from L1 to sacrum
Gaurded AROM		Yes			Not reversing lordosis
Gait Deviation		No			
Oswestry Score		36			

Gaurded movements not flexing spine. Difficult to get shoes off. Moderate difficulty getting off of table from supine. Hip flexion limited bilaterally to 45deg.

08/25 poor trunk strength. Not able to do a full bridge or functional squat. Gaurds LB and does not reverse lordosis of LS with flexion or returning to extension from standing flexion.

ACTIVITY LOG:

Activities	Comment	Status	Sets	Reps	Weight	Done Today
Curl Up - VHI		Active				Yes
Quadruped LE		Active				Yes

Patient: Mickle, Joseph Date: 09-13-10

Theraband Unilateral Row	Wine TB	Active				Yes
Adductor Squeeze	ball	Active				Yes
Mechanical Traction	90# static	Active				No
POE		Active				No
FIG 4		Active				No
Bridge		Active				Yes
Teeterboard A/P		Active				No
Theraband Unilateral Punches		Active				Yes
Pelvic Tilt		Active				No
Single Knee to Chest		Active				Yes
Hamstring Stretch		Active				No
Trunk Rotation		Active				Yes
Patient education ADL's & exercise program	body mechanics	Active				No

Mr. Joseph Mickle received 32 minutes skilled therapy today for back / lumbar Pain. Skilled therapeutic intervention and any evaluation time was 32 minutes and total treatment time was 32 minutes.

ASSESSMENT:

The patient appears motivated. The patient's progress towards goals is good. The patient's tolerance to treatment is good. The patient is able to perform exercises correctly with good form but increased pain. The patient is able to perform exercises correctly with verbal cues only. The patient requires continued skilled intervention. Therex progression 09/07 only got the leg numbness one time during treatment today. 09/10 Stiff after traction, then walked out fine. 09/13 traction did not seem to have any benefit.

PLAN:

Continue current treatment plan. We plan to see Joseph 2 times per week for 4 weeks for a total of 8 visits. This patient has attended 13 out of 13 visits. The patient has cancelled or no showed 0 times. Joseph will continue therapy as prescribed.

Best regards,

Timothy Sutton PT

License #: 2307

This document was electronically signed on 09-13-10 at 01:58p by Timothy Sutton PT.

101
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HPRC

Human Performance & Rehab
BL
1910 Blanding St
Columbia, SC 292011910
Phone: (803) 253-6721
Fax: (803) 799-8177

Daily Note

Date of Visit: 08-31-10
Patient Name: Mickie, Joseph
Patient #: 0040301
Date of Birth:
Age:
Date of Onset: 07-12-10

Therapist: Timothy Sutton PT
Referring Physician: Coleman Fowble MD
Ref Address: 1910 Blanding St
Columbia, SC 29201
Fax #: (803) 933-6732

Medical Diagnosis:
724.2 LUMBAGO

Treatment Diagnosis:
724.2 back / lumbar Pain

SUBJECTIVE:

The patient reports today's pain a 5 out of 10. Pt reports that as long as he's got that medicine in him, his pain isn't too bad. 08/16 Pain not too bad as long as he is on meds. Carrying a gallon of milk in each hand creates pain. Walking 5 min at his complex had to call wife to come and pick him up. 08/19 Had pain last night after walking 15 min in his complex. Pain went down R leg from his back. Leg feels like it is going to sleep from groin down to foot. He walked after coming back from a 45 min car ride. He did well with the ride. 08/23 Leg was not as bad over the weekend but he didn't do any walking. Taking the medications help. Can't sit long, has to be in recliner. Standing makes R leg feel numb. 08/25 R leg feels numb after sitting, standing or walking. Feels like it tries to give out on him. 08/31 Getting pain/numbness in R leg down to foot with standing and walking.

OBJECTIVE FINDINGS:

Objective Findings	Side	Initial	Current	Goal	Comment
Lumbar Extension AROM		50%	50%		
Lumbar Flexion AROM		25%	75%		Reach to top of shins
Neuro exam		Negative	Negative		
MMT LE WNL		Yes	Yes		
TTP		Severe	Moderate		across LB from L1 to sacrum
Gaurded AROM		Yes	Yes		Not reversing lordosis
Gait Deviation		No	no		
Oswestry Score		36	31		

Gaurded movements not flexing spine. Difficult to get shoes off. Moderate difficulty getting off of table from supine. Hip flexion limited bilaterally to 45deg.

08/25 poor trunk strength. Not able to do a full bridge or functional squat. Gaurds LB and does not reverse lordosis of LS with flexion or returning to extension from standing flexion.

ACTIVITY LOG:

Activities	Comment	Status	Sets	Reps	Weight	Notes
Curl Up - VHI		Active				Yes
Standing Hip Extension		Active				Yes
Theraband D2 flexion	Wine TB	Active				No
Theraband D2 extension	Wine TB	Active				Yes
Teeterboard A/P		Active				Yes

Patient: Mickle, Joseph Date: 08-31-10

Adductor Squeeze		Active				Yes
Hip Abduction	red band	Active				Yes
Bridge		Active				Yes
POE		Active				Yes
FIG 4		Active				Yes
Theraband Bilateral Punches		Active				Yes
Pelvic Tilt		Active				No
Single Knee to Chest		Active				No
Hamstring Stretch		Active				No
Trunk Rotation		Active				No
Patient education ADL's & exercise program	body mechanics	Active				No

Mr. Joseph Mickle received 36 minutes skilled therapy today for back / lumbar Pain. Skilled therapeutic intervention and any evaluation time was 36 minutes and total treatment time was 36 minutes.

ASSESSMENT:

The patient appears motivated. The patient's progress towards goals is good. The patient's tolerance to treatment is good. The patient is able to perform exercises correctly with good form but increased pain. The patient is able to perform exercises correctly with verbal cues only. The patient requires continued skilled intervention. Therex progression Pt very tender and movements guarded. Some confusion w/ HEP. Greater ease w/ exs.
 08/18 Did well with effort on new exercises.
 08/19 Did well in clinic stood 20 min during exercises without problems.
 08/23 Some complaints of R leg feeling numb while standing during therex.
 08/25 Poor trunk strength. Not able to do a full bridge, Functional squat and limitations with AROM.
 08/31 Did well with therex.

PLAN:

Continue current treatment plan. We plan to see Joseph 2 times per week for 4 weeks for a total of 8 visits. This patient has attended 9 out of 9 visits. The patient has cancelled or no showed 0 times. Joseph will continue therapy as prescribed.

Best regards,

Timothy Sutton PT

License #: 2307

This document was electronically signed on 08-31-10 at 03:02p by Timothy Sutton PT.

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HPRC

Human Performance & Rehab
BL
1910 Blanding St
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Phone: (803) 253-6721
Fax: (803) 799-8177

292716

Brief Progress Note

Date of Visit: 08-25-10
Patient Name: Mickle, Joseph
Patient #: 0040301
Date of Birth:
Age:
Date of Onset: 07-12-10

Therapist: Timothy Sutton PT
Referring Physician: Coleman Fowble MD

Medical Diagnosis:
724.2 LUMBAGO

Treatment Diagnosis:
724.2 back / lumbar Pain

SUBJECTIVE:

The patient reports today's pain a 6 out of 10. Pt reports that as long as he's got that medicine in him, his pain isn't too bad. 08/16 Pain not too bad as long as he is on meds. Carrying a gallon of milk in each hand creates pain. Walking 5 min at his complex had to call wife to come and pick him up. 08/19 Had pain last night after walking 15 min in his complex. Pain went down R leg from his back. Leg feels like it is going to sleep from groin down to foot. He walked after coming back from a 45 min car ride. He did well with the ride. 08/23 Leg was not as bad over the weekend but he didn't do any walking. Taking the medications help. Can't sit long, has to be in recliner. Standing makes R leg feel numb. 08/25 R leg feels numb after sitting, standing or walking. Feels like it tries to give out on him.

OBJECTIVE FINDINGS:

Objective Findings	Side	Initial	Last	Current	Goal	Comment
Lumbar Extension AROM		50%		50%		
Lumbar Flexion AROM		25%		75%		Reach to top of shins
Neuro exam		Negative		Negative		
MMT LE WNL		Yes		Yes		
TTP		Severe		Moderate		across LB from L1 to sacrum
Gaurded AROM		Yes		Yes		Not reversing lordosis
Gait Deviation		No		no		
Osweslry Score		36		31		

Gaurded movements not flexing spine. Difficult to get shoes off. Moderate difficulty getting off of table from supine. Hip flexion limited bilaterally to 45deg. 08/25 poor trunk strength. Not able to do a full bridge or functional squat. Gaurds LB and does not reverse lordosis of LS with flexion or returning to extension from standing flexion.

ASSESSMENT:

The patient appears motivated. The patient's progress towards goals is good. The patient's tolerance to treatment is good. The patient is able to perform exercises correctly with good form but increased pain. The patient is able to perform exercises correctly with verbal cues only. The patient requires continued skilled intervention to Therex progression Pt very tender and movements guarded. Some confusion w/ HEP. Greater ease w/ exs. 08/16 Did well with effort on new exercises. 08/19 Did well in clinic stood 20 min during exercises without problems. 08/23 Some complaints of R leg feeling numb while standing during theres. 08/25 Poor trunk strength. Not able to do a full bridge, Functional squat and limitations with AROM.

Patient : Mickle, Joseph Date: 08-25-10

PLAN:

We plan to see Joseph 2 times per week for 4 weeks for a total of 8 visits. This patient has attended 8 out of 8 visits. The patient has cancelled or no showed 0 times. Joseph will continue therapy as prescribed.

Best regards,

Timothy Sutton PT

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Oswestry Low Back Pain Scale

Please rate the severity of your pain by circling a number below:

No pain

0	1	2	3	4	5	6	7	8	9	10

Unbearable pain

Name Joseph Rickle

Date 8-25-10

Instructions: Please circle the ONE NUMBER in each section which most closely describes your problem.

Section 1 - Pain Intensity

0. The pain comes and goes and is very mild.
1. The pain is mild and does not vary much.
- ☒ 2. The pain comes and goes and is moderate.
3. The pain is moderate and does not vary much.
4. The pain comes and goes and is severe.
5. The pain is severe and does not vary much.

Section 2 - Personal Care (Washing, Dressing, etc.)

0. I would not have to change my way of washing or dressing in order to avoid pain.
1. I do not normally change my way of washing or dressing even though it causes some pain.
2. Washing and dressing increase the pain but I manage not to change my way of doing it.
- ☒ 3. Washing and dressing increase the pain and I find it necessary to change my way of doing it.
4. Because of the pain I am unable to do some washing and dressing without help.
5. Because of the pain I am unable to do any washing and dressing without help.

Section 3 - Lifting

0. I can lift heavy weights without extra pain.
1. I can lift heavy weights but it gives extra pain.
- ☒ 2. Pain prevents me lifting heavy weights off the floor.
3. Pain prevents me lifting heavy weights off the floor, but I can manage if they are conveniently positioned, e.g., on a table.
4. Pain prevents me lifting heavy weights but I can manage light to medium weights if they are conveniently positioned.
5. I can only lift very light weights at most.

Section 4 - Walking

0. I have no pain on walking.
1. I have some pain on walking but it does not increase with distance.
2. I cannot walk more than 1 mile without increasing pain.
3. I cannot walk more than 1/2 mile without increasing pain.
- ☒ 4. I cannot walk more than 1/4 mile without increasing pain.
5. I cannot walk at all without increasing pain.

Section 5 - Sitting

0. I can sit in any chair as long as I like.
1. I can sit only in my favorite chair as long as I like.
2. Pain prevents me from sitting more than 1 hour.
- ☒ 3. Pain prevents me from sitting more than 1/2 hour.
4. Pain prevents me from sitting more than 10 minutes.
5. I avoid sitting because it increases pain immediately.

Section 6 - Standing

0. I can stand as long as I want without pain.
1. I have some pain on standing but it does not increase with time.
2. I cannot stand for longer than 1 hour without increasing pain.
3. I cannot stand for longer than 1/2 hour without increasing pain.
- ☒ 4. I cannot stand for longer than 10 minutes without increasing pain.
5. I avoid standing because it increases the pain immediately.

Section 7 - Sleeping

0. I get no pain in bed.
1. I get pain in bed but it does not prevent me from sleeping well.
2. Because of pain my normal nights sleep is reduced by less than one-quarter.
3. Because of pain my normal nights sleep is reduced by less than one-half.
- ☒ 4. Because of pain my normal nights sleep is reduced by less than three-quarters.
5. Pain prevents me from sleeping at all.

Section 8 - Social Life

0. My social life is normal and gives me no pain.
1. My social life is normal but it increases the degree of pain.
2. Pain has no significant effect on my social life apart from limiting my more energetic interests, e.g., dancing, etc.
- ☒ 3. Pain has restricted my social life and I do not go out very often.
4. Pain has restricted my social life to my home.
5. I have hardly any social life because of the pain.

Section 9 - Traveling

0. I get no pain when traveling.
1. I get some pain when traveling but none of my usual forms of travel make it any worse.
2. I get extra pain while traveling but it does not compel me to seek alternate forms of travel.
3. I get extra pain while traveling which compels to seek alternative forms of travel.
- ☒ 4. Pain restricts me to short necessary journeys under 1/2 hour.
5. Pain restricts all forms of travel.

Section 10 - Changing Degree of Pain

0. My pain is rapidly getting better.
1. My pain fluctuates but is definitely getting better.
- ☒ 2. My pain seems to be getting better but improvement is slow.
3. My pain is neither getting better or worse.
4. My pain is gradually worsening.
5. My pain is rapidly worsening.

TOTAL _____

HPRC 04-16-10

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63



HPRC

Human Performance & Rehab
BL
1910 Blanding St
Columbia, SC 292011910
Phone: (803) 253-6721
Fax: (803) 799-8177

Daily Note

Date of Visit: 08-25-10
Patient Name: Mickie, Joseph
Patient #: 0040301
Date of Birth:
Age:
Date of Onset: 07-12-10

Therapist: Timothy Sutton PT
Referring Physician: Coleman Fowble MD
Ref Address: 1910 Blanding St
Columbia, SC 29201
Fax #: (803) 933-6732

Medical Diagnosis:
724.2 LUMBAGO

Treatment Diagnosis:
724.2 back / lumbar Pain

SUBJECTIVE:

The patient reports today's pain a 6 out of 10. Pt reports that as long as he's got that medicine in him, his pain isn't too bad. 08/16 Pain not too bad as long as he is on meds. Carrying a gallon of milk in each hand creates pain. Walking 5 min at his complex had to call wife to come and pick him up. 08/19 Had pain last night after walking 15 min in his complex. Pain went down R leg from his back. Leg feels like it is going to sleep from groin down to foot. He walked after coming back from a 45 min car ride. He did well with the ride. 08/23 Leg was not as bad over the weekend but he didn't do any walking. Taking the medications help. Can't sit long, has to be in recliner. Standing makes R leg feel numb. 08/25 R leg feels numb after sitting, standing or walking. Feels like it tries to give out on him.

OBJECTIVE FINDINGS:

Objective Findings	Side	Initial	Post-Exercise	Comments
Lumbar Extension AROM		50%	50%	
Lumbar Flexion AROM		25%	75%	Reach to top of shins
Neuro exam		Negative	Negative	
MMT LE WNL		Yes	Yes	
TTP		Severe	Moderate	
Gaurded AROM		Yes	Yes	across LB from L1 to sacrum
Gait Deviation		No	no	Not reversing lordosis
Oswestry Score		36	31	

Gaurded movements not flexing spine. Difficult to get shoes off. Moderate difficulty getting off of table from supine. Hip flexion limited bilaterally to 45deg.

08/25 poor trunk strength. Not able to do a full bridge or functional squat. Gaurds LB and does not reverse lordosis of LS with flexion or returning to extension from standing flexion.

ACTIVITY LOG:

Activities	Comments	Status	Sets	Reps	Weight	Notes
Curl Up - VHI		Active				Yes
Standing Hip Extension		Active				Yes
Theraband D2 flexion	Wine TB	Active				Yes
Theraband D2 extension	Wine TB	Active				Yes
Teeterboard A/P		Active				Yes
Theraband Assisted Functional Squat		Active				No

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Patient: Mickle, Joseph Date: 08-25-10

Theraband Row		Active				No
Theraband Bilateral Punches		Active				No
Adductor Squeeze		Active				Yes
Hip Abduction	red band	Active				Yes
Bridge		Active				Yes
Pelvic Tilt		Active				No
Single Knea to Chest		Active				No
Hamstring Stretch		Active				No
Trunk Rotation		Active				No
Patient education ADL's & exercise program	body mechanics	Active				No

Mr. Joseph Mickle received 32 minutes skilled therapy today for back / lumbar Pain. Skilled therapeutic intervention and any evaluation time was 32 minutes and total treatment time was 32 minutes.

ASSESSMENT:

The patient appears motivated. The patient's progress towards goals is good. The patient's tolerance to treatment is good. The patient is able to perform exercises correctly with good form but increased pain.

The patient is able to perform exercises correctly with verbal cues only. The patient requires continued skilled intervention. Therex progression Pt very tender and movements guarded. Some confusion w/ HEP. Greater ease w/ exs.

08/16 Did well with effort on new exercises.

08/19 Did well in clinic stood 20 min during exercises without problems.

08/23 Some complaints of R leg feeling numb while standing during therex.

08/25 Poor trunk strength. Not able to do a full bridge, Functional squat and limitations with AROM.

PLAN:

Continue current treatment plan. We plan to see Joseph 2 times per week for 4 weeks for a total of 8 visits. This patient has attended 8 out of 8 visits. The patient has cancelled or no showed 0 times. Joseph will continue therapy as prescribed.

Best regards,

Timothy Sutton PT

License #: 2307

This document was electronically signed on 08-25-10 at 01:42p by Timothy Sutton PT.

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65



HPRC

Human Performance & Rehab
BL
1910 Blanding St
Columbia, SC 292011910
Phone: (803) 253-6721
Fax: (803) 799-8177

Daily Note

Date of Visit: 08-23-10
Patient Name: Mickle, Joseph
Patient #: 0040301
Date of Birth:
Age:
Date of Onset: 07-12-10

Therapist: Timothy Sutton PT
Referring Physician: Coleman Fowble MD
Ref Address: 1910 Blanding St
Columbia, SC 29201
Fax #: (803) 933-6732

Medical Diagnosis:
724.2 LUMBAGO

Treatment Diagnosis:
724.2 back / lumbar Pain

SUBJECTIVE:

The patient reports today's pain a 5 out of 10. Pt reports that as long as he's got that medicine in him, his pain isn't too bad. 08/16 Pain not too bad as long as he is on meds. Carrying a gallon of milk in each hand creates pain. Walking 5 min at his complex had to call wife to come and pick him up. 08/19 Had pain last night after walking 15 min in his complex. Pain went down R leg from his back. Leg feels like it is going to sleep from groin down to foot. He walked after coming back from a 45 min car ride. He did well with the ride. 08/23 Leg was not as bad over the weekend but he didn't do any walking. Taking the medications help. Can't sit long, has to be in recliner. Standing makes R leg feel numb.

OBJECTIVE FINDINGS:

Objective Findings	Side	Initial	Current	Comment
Lumbar Extension AROM		50%		
Lumbar Flexion AROM		25%		
Neuro exam		Negative		Reach to mid thigh
MMT LE WNL		Yes		
ITP		Severe		
Gaurded AROM		Yes		across LB from L1 to sacrum
Gait Deviation		No		
Oswestry Score		36		

Gaurded movements not flexing spine. Difficult to get shoes off. Moderate difficulty getting off of table from supine. Hip flexion limited bilaterally to 45deg.

ACTIVITY LOG:

Activities	Comment	Status	Sent	Reps	Weight	Done
Curl Up - VHI		Active				Yes
Standing Hip Extension		Active				Yes
Theraband D2 flexion	Wine TB	Active				Yes
Theraband D2 extension	Wine TB	Active				Yes
Teeterboard A/P		Active				Yes
Theraband Assisted Functional Squat		Active				Yes
Theraband Row		Active				Yes
Theraband Bilateral Punches		Active				Yes

Patient : Mickle, Joseph Date: 08-23-10

Adductor Squeeze		Active				No
Hip Abduction	red band	Active				No
Pelvic Tilt		Active				No
Single Knee to Chest		Active				No
Hamstring Stretch		Active				No
Trunk Rotation		Active				No
Patient education ADL's & exercise program	body mechanics	Active				No

Mr. Joseph Mickle received 32 minutes skilled therapy today for back / lumbar Pain. Skilled therapeutic intervention and any evaluation time was 32 minutes and total treatment time was 32 minutes.

ASSESSMENT:

The patient appears motivated. The patient's progress towards goals is good. The patient's tolerance to treatment is good. The patient is able to perform exercises correctly with good form but increased pain. The patient is able to perform exercises correctly with verbal cues only. The patient requires continued skilled intervention. Therex progression Pt very tender and movements guarded. Some confusion w/ HEP. Greater ease w/ exs.

08/16 Did well with effort on new exercises.

08/19 Did well in clinic stood 20 min during exercises without problems.

08/23 Some complaints of R leg feeling numb while standing during theres.

PLAN:

Continue current treatment plan. We plan to see Joseph 2 times per week for 4 weeks for a total of 8 visits. This patient has attended 7 out of 7 visits. The patient has cancelled or no showed 0 times. Joseph will continue therapy as prescribed. Return to MD 8/26.

Best regards,

Timothy Sutton PT

License #: 2307

This document was electronically signed on 08-23-10 at 02:30p by Timothy Sutton PT.

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HPRC

Human Performance & Rehab
BL
1910 Blanding St
Columbia, SC 292011910
Phone: (803) 253-6721
Fax: (803) 799-8177

Daily Note

Date of Visit: 08-16-10
Patient Name: Mickie, Joseph
Patient #: 0040301
Date of Birth:
Age:
Date of Onset: 07-12-10

Therapist: Timothy Sutton PT
Referring Physician: Coleman Fowble MD
Ref Address: 1910 Blanding St
Columbia, SC 29201
Fax #: (803) 933-6732

Medical Diagnosis:
724.2 LUMBAGO

Treatment Diagnosis:
724.2 back / lumbar Pain

SUBJECTIVE:

The patient reports today's pain a 6 out of 10. Pt reports that as long as he's got that medicine in him, his pain isn't too bad. 08/16 Pain not too bad as long as he is on meds. Carrying a gallon of milk in each hand creates pain. Walking 5 min at his complex had to call wife to come and pick him up.

OBJECTIVE FINDINGS:

Observation	Side	Amount	Notes	Comments
Lumbar Extension AROM		50%		
Lumbar Flexion AROM		25%		
Neuro exam		Negative		Reach to mid thigh
MMT LE WNL		Yes		
ITP		Severe		
Gaured AROM		Yes		across LB from L1 to sacrum
Gait Deviation		No		
Oswestry Score		36		

Gaured movements not flexing spine. Difficult to get shoes off. Moderate difficulty getting off of table from supine. Hip flexion limited bilaterally to 45deg.

ACTIVITY LOG:

Activity	Comments	Status	Sets	Reps	Weight	Date
Curl Up - VHI		Active				
Adductor Squeeze		Active				Yes
Hip Abduction	red band	Active				Yes
Standing Hip Extension		Active				Yes
Theraband D2 flexion		Active				Yes
Theraband D2 extension		Active				Yes
Teeterboard A/P		Active				Yes
wall slides		Active				Yes
Pelvic Tilt		Active				No
Single Knee to Chest		Active				No
Hamstring Stretch		Active				No
Trunk Rotation		Active				No

Patient : Mickle, Joseph Date: 08-16-10

Patient education ADL's & exercise program	body mechanics	Active				No

Mr. Joseph Mickle received 28 minutes skilled therapy today for back / lumbar Pain. Skilled therapeutic intervention and any evaluation time was 28 minutes and total treatment time was 28 minutes.

ASSESSMENT:

The patient appears motivated. The patient's progress towards goals is good. The patient's tolerance to treatment is good. The patient is able to perform exercises correctly with good form but increased pain. The patient is able to perform exercises correctly with verbal cues only. The patient requires continued skilled intervention. Therex progression Pt very tender and movements guarded. Some confusion w/ HEP. Greater ease w/ exs. 08/16 Did well with effort on new exercises.

PLAN:

Continue current treatment plan. We plan to see Joseph 2 times per week for 4 weeks for a total of 8 visits. This patient has attended 5 out of 5 visits. The patient has cancelled or no showed 0 times. Joseph will continue therapy as prescribed. Return to MD 8/26.

Best regards,

Timothy Sutton PT

License #: 2307

This document was electronically signed on 08-16-10 at 03:21p by Timothy Sutton PT.

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HPRC

Human Performance & Rehab
BL
1910 Blanding St
Columbia, SC 292011910
Phone: (803) 253-6721
Fax: (803) 799-8177

Daily Note

Date of Visit: 08-13-10
Patient Name: Mickie, Joseph
Patient #: 0040301
Date of Birth:
Age:
Date of Onset: 07-12-10

Therapist: Kimberly Newman PTA
Referring Physician: Coleman Fowble MD
Ref Address: 1910 Blanding St
Columbia, SC 29201
Fax #: (803) 933-6732

Medical Diagnosis:
724.2 LUMBAGO

Treatment Diagnosis:
724.2 back / lumbar Pain

SUBJECTIVE:

The patient reports today's pain a 6 out of 10. Pt reports that as long as he's got that medicine in him, his pain isn't too bad.

OBJECTIVE FINDINGS:

Observations	Initial	Current	Revised	Revised	Revised
Lumbar Extension AROM	50%				
Lumbar Flexion AROM	25%				
Neuro exam	Negative				Reach to mid thigh
MMT LE WNL	Yes				
TTP	Severe				
Gaurded AROM	Yes				across LB from L1 to sacrum
Gait Deviation	No				
Oswestry Score	36				

Gaurded movements not flexing spine. Difficult to get shoes off. Moderate difficulty getting off of table from supine. Hip flexion limited bilaterally to 45deg.

ACTIVITY LOG:

Activities	Comment	Status	Set	Reps	Weight	Notes
Pelvic Tilt		Active				Yes
Single Knee to Chest		Active				Yes
Curl Up - VHI		Active				Yes
Hamstring Stretch		Active				Yes
Trunk Rotation		Active				Yes
Patient education ADL's & exercise program	body mechanics	Active				Yes
Adductor Squeeze						No
Hip Abduction	red band					Yes
Hip Extension						Yes
wall slides						Yes

Mr. Joseph Mickie received 36 minutes skilled therapy today for back / lumbar Pain. Skilled therapeutic intervention and any evaluation time was 36 minutes and total treatment time was 36 minutes.

Patient: Mickle, Joseph Date: 08-13-10

ASSESSMENT:

The patient appears motivated. The patient's progress towards goals is good. The patient's tolerance to treatment is good. The patient is able to perform exercises correctly with difficulty due to pain. The patient requires continued skilled intervention Therex progression Pt very tender and movements guarded. Some confusion w/ HEP. Greater ease w/ exs.

PLAN:

Continue current treatment plan. We plan to see Joseph 2 times per week for 4 weeks for a total of 8 visits. This patient has attended 4 out of 4 visits. The patient has cancelled or no showed 0 times. Joseph will continue therapy as prescribed. Return to MD 8/26.

Best regards,

Timothy Sutton PT

SC 2307

This document was electronically cosigned on 08-23-10 at 10:59a by Timothy Sutton PT.

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71

IMAGECARE, LLC

710 RABON ROAD
COLUMBIA, SC 29203
803-462-3680

Name: Mickie, Joseph
Patient ID: 1000031213
DOB:
Acc#: 540418
Patient Phone #: (803) 689-1569

Exam Date: 09/13/2010
Exam: MRI L-spine w/o contrast
Reason: PAIN IN LOWER BACK (724.2)
Referrer: Fowble, Coleman

MRI SCAN OF THE LUMBOSACRAL SPINE WITHOUT CONTRAST

CLINICAL HISTORY: Low back and bilateral leg pain.

Comparison is made with 10-18-04.

TECHNIQUE: Multislice sagittal and axial 4 mm thick T1 and T2-weighted images of the lumbosacral and lower thoracic spine were obtained.

FINDINGS:

The proximal two lumbar and distal two thoracic discs and spine segments are normal in appearance. Mild degenerative changes of the L3-4, L4-5, and L5-S1 discs are noted with minimal disc space narrowing and mild symmetric diffuse circumferential bulges of the disc margins. Small midline annular tears are noted at each of the three levels but without evidence of significant disc herniation or protrusion and without root sleeve effacement or spinal stenosis. Moderate hypertrophic degenerative facet and ligamentous changes are noted at the L4-5 level without associated spondylolisthesis or central or foraminal stenosis. The intradural, retroperitoneal, and paraspinal soft tissues are normal in appearance.

IMPRESSION:

MILD DEGENERATIVE CHANGES OF THE LOWER THREE LUMBAR DISCS AND OF THE L4-5 FACETS, AS ABOVE. NO DISC HERNIATIONS OR SPINAL STENOSIS ARE NOTED. MIDLINE POSTERIOR ANNULAR TEARS OF THE DISTAL THREE LUMBAR DISCS ARE NOTED. THERE HAS BEEN NO SIGNIFICANT CHANGE SINCE THE 10-18-2004 MRI SCAN.

Martin P. Dommers, M.D.
Electronic Signature
Date Finalized: 09/13/2010

DD: 09/13/2010 DT: 09/13/2010

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72



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Doctors Care Radiology Form

X-Ray Interpretation and Review

X-Ray #: 944 Office: NEPatient Name: Mickle, JosephPatient ID: 337555

DOB: _____

Date: 7/13/1Requesting Provider: George

Pregnancy Status: _____

Sex: _____

Operator's Signature: WJHistory: Back injury

Films Taken:

☐ Abdomen, 1V, 74000	☐ Finger, 3V, 73140	☒ LS-Spine, 3V, 72100	☐ Sinuses, 2V, 70210
☐ Abdomen, 3V, 74022	☐ Foot, 2V, 73620	☐ Mandible, 3V, 70100	☐ Sinuses, 3V, 70220
☐ Ankle, 3V, 73610	☐ Foot, 3V, 73630	☐ Nasal, 3V, 70160	☐ Skull, 2V, 70250
☐ C-Spine, 3V, 72040	☐ Foot-FB, 2V, 73620	☐ Neck-ST, 2V, 70360	☐ Skull, 4V, 70260
☐ C-Spine, 5V, 72050	☐ Forearm, 2V, 73090	☐ Os calcis, 2V, 73650	☐ T-Spine, 2V, 72070
☐ Chest, 1V, 71010	☐ Hand, 2V, 73120	☐ Pelvis, 1V, 72170	☐ Thumb, 3V, 73140
☐ Chest, 2V, 71020	☐ Hand, 3V, 73130	☐ Ribs, 4V, 71101	☐ Tib & Fib, 2V, 73590
☐ Clav, 2V, 73000	☐ Hip, 2V, 73510	☐ Ribs-Bilat, 4-5V, 71111	☐ Toes, 3V, 73660
☐ Coccyx, 2V, 72220	☐ Humerus, 2V, 73060	☐ Sacrum, 2V, 72220	☐ Wrist, 2V, 73100
☐ Elbow, 2V, 73070	☐ Knee, 2V, 73560	☐ Scapula, 2V, 73010	☐ Wrist w/ Nav, 3-5, 73110
☐ Elbow, 4V, 73080	☐ Knee & Sun, 3+1, 73564	☐ Shoulder AC, 2V, 73050	☐ Add View, 1V, 70001
☐ Femur, 2V, 73550	☐ Knee & Tun, 3+1, 73564	☐ Shoulder, 2V, 73030	

☐ Unlisted X-Ray Description: _____

of Views: _____

Code: _____

Doctors Care Radiology Interpretation

D7C Spine maintainedRight or Left Extremity ☐ R ☐ LLead Shielding Used ☐ Y ☐ NIs Patient Pregnant ☐ Y ☐ N

Circle # of Films Taken

1 2 3 4 5

Practitioner Signature: [Signature]

Questions for Radiologist

Do you agree with practitioner's initial impression? ☒ Yes ☐ NoDo you consider the x-ray(s) normal? ☐ Yes ☐ NoDo you see significant findings not noted by practitioner? ☐ Yes ☐ NoIf high risk, please notify office immediately by phone and fax. ☐ Yes ☐ No

Additional Comments

Radiologist Response

Radiologist Name: LexernDate of Review: 7-15-10Radiologist Signature: [Signature]

Doctors Care Office Notified (Phone/Fax/Other): _____

Doctors Care Follow Up

Report Reviewed By Doctors Care Practitioner: _____

Signature: [Signature]Date: 17Further action required? ☐ Yes ☒ NoPatient notified? ☐ Yes ☐ No

If yes to either question, follow up steps initiated (describe): _____

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Return To Work Form

☐ 850 Aiken Mall Drive, Aiken, SC 29801 (803) 648-1464
☐ 511 Beltline Blvd., Columbia, SC 29205 (803) 782-4051
☐ 1060 Highway 1, South Lugoff, SC 29078 (803) 431-9759
☐ 977 Knox Abbott Drive, Cayce, SC 29033 (803) 794-0476
☐ 7653 Gamers Ferry Road, Columbia, SC 29209 (803) 783-2661
☐ 1736 St. Matthews Road, Orangeburg, SC 29116 (803) 536-0613

☐ 4416 Forest Drive, Suite A, Columbia, SC 29206 (803) 738-9522
☐ 247 C...bia Avenue, Lexington, SC 29072 (803) 359-5533
☐ 1029...Street NE, Aiken, SC 29801 (803) 648-4112
☐ 110 Atrium Way, Columbia, SC 29223 (803) 788-1153
☐ 4214 Hardscrabble Road, Columbia, SC 29223 (803) 736-8955
☐ 100 Jimmy Love Lane, Columbia, SC 29212 (803) 772-5030
☐ 2475 Broad Street, Sumter, SC 29150 (803) 778-6555
☐ 2836 Augusta Road, W. Columbia, SC 29170 (803) 939-0545
☐ 3240 Sunset Blvd., West Columbia, SC 29169 (803) 796-4251
☐ 1520 Knox Avenue, N. Augusta, SC 29841 (803) 279-4120

Name: Joseph Mickle

Arrival Time: 12:55

Discharge Time: 2:34

Date: 7-13-10 Company Name: _____

WORK STATUS: (Check Appropriate Boxes)

☐ 1. May perform full duty activities as of _____ without accommodations.

☒ 2. Off duty due to work-related condition.

Estimated return to work date with modified duty: 7-16-10

Estimated return to work date for full duty: _____

RETURN FOR RE-EVALUATION AT THIS LOCATION ON _____ Time: _____

☒ 3. May work with the following accommodations as of: 7-16-10

☒ No lifting more than 10 lbs.

☒ No operation of hazardous or fast-moving machinery, no driving.

☒ Ground level work only, no ladders or heights.

☒ No repetitive bending, stooping, squatting, pushing, jerking, twisting, or bouncing.

☒ No continuous standing and/or sitting.

☒ Minimal walking or climbing (including stairs)

☒ Limited use of lower back

☐ No overhead lifting.

☐ No high repetitive hand activities for extended periods of time.

☐ No use of _____

☐ 4. Has reached Maximum Medical Improvement (MMI)

☐ 5. Return for re-evaluation at this office on _____ Time: _____

Additional Comments: _____

PATIENT DISCHARGE INSTRUCTIONS:

Diagnosis: Lower Back Pain (Acute HNP)

Medications:

☐ as directed

☐ as needed

Wound or Injury Care:

☐ keep dry and clean

☐ do not remove dressing

☐ elevate extremity

☐ warm soaks

☐ ice every _____

☐ apply heat every _____

☐ wear elastic support/immobilizer/keep taped

☐ home exercise instructions given

☐ follow instructions sheet given

☐ bed rest for _____

REFERRAL: If a referral is made for physical therapy, or to another physician, please complete this section:

To: ORTHO referral

Date: _____

Time: _____

For: APT scheduled be scheduled by w/c case manager

Address: _____

I understand the above instructions and what to do for my follow-up care. I have received a copy of these instructions for myself and for my employer.

Employee Signature: Joseph Mickle

Date: 7/13/2010

Provider Signature: Robert R. Rouse

Date: 7-13-10

Vickey Fripp
Workers' Compensation
Phone# 334-775-1397
Fax# 334-775-1437

BOYD BROS. TRANSPORTATION, INC.
3275 HIGHWAY 30
CLAYTON, AL 35016

Fax

To:	GARY		VICKEY FRIPP
Fax:		Pages:	INCLUDING COVER SHEET
Phone:		Date:	7/13/2010
Re:	JOSEPH MICKLE	CC:	

Thank you so much for seeing our workers' compensation claimant. Please ask the doctor to mark one of the following and fax back to me:

Released to return to work with no restrictions: _____

Released to work light duty with the following restrictions: on 7-16-10 NO LIFTING > 20 lbs
pulling, pushing, no prolonged walking or sitting

Completely off duty: For 2 days, RTW 7-16-10
7-16-10

[Signature]

Signature

7-13-10

Date

DOB: 11/14/45 SS# 250-72-4752

Thank you,

Vickey Fripp

Workers' Compensation Adjuster

Boyd Bros Transportation

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Jairaj Prashad, M.D., P.A.INTERNAL MEDICINE
SLEEP DISORDERS AND LUNG DISEASES1444 BARNWELL STREET
COLUMBIA, S.C. 29201

(803) 256-6274

PATIENT NAME:

Mickle, Joseph

DATE OF VISIT:

08/23/11

SUBJECTIVE: The patient is a 65-year-old African-American male with hypertension, BPH, and mechanical low back pain. The patient has been complaining of dizziness and ringing in the ear for about three weeks. His back continues to bother him with radiating down both legs. He denies any dysuria, hematuria, fever, chills, chest pain, and shortness of breath.

MEDICATIONS: Unchanged as of 04/28/11 plus Percocet 5/325 mg one q.i.d. p.r.n., and Cheratussin AC p.r.n. coughing plus vitamin D 10,000 units a week.

REVIEW OF SYSTEMS: The patient is unable to exercise because of back pain. He will like a cane to help his walking.

OBJECTIVE:**VITAL SIGNS:**Blood pressure 120/80, sitting and 124/80, standing;
pulse 84; temperature 97; and weight 242 pounds.**HEENT:**

Pupils round and reactive. Sclerae nonicteric. Throat clear. Left ear shows erythema in the external canal. Right shows fluid behind the tympanic membrane.

LUNGS:

Clear.

HEART:

No murmurs, gallops, or irregular beats.

ABDOMEN:

Rotund without any megaly, mass, or tenderness.

EXTREMITIES:

No cyanosis, clubbing, or pedal edema.

ASSESSMENT:

1. Hypertension.
2. Hyperlipidemia.
3. Mechanical low back pain.
4. BPH.
5. Otitis externa.

PLAN: Renew Flomax 0.4 mg one q.d. #30 with six refills, Percocet 5/325 one q.i.d. p.r.n. #120 no refill, Cheratussin AC one teaspoonful q.i.d. p.r.n. fluid ounce one refill. Appointment with Midlands Orthopedic for evaluation of worsening back pain. A straight walking cane was prescribed. The patient to return in four weeks for repeat vitamin-D level. Return in four months.

Dictated but not read, subject to dictation/transcription variance.

JAIRAJ PRASHAD, M.D.

Page 1 of 1

*Jairaj Prashad, M.D., P.A.*INTERNAL MEDICINE
SLEEP DISORDERS AND LUNG DISEASES1444 BARNWELL STREET
COLUMBIA, S.C. 29201

(803) 256-6274

PATIENT NAME: Mickle, Joseph**DATE OF VISIT:** 04/28/11

HISTORY OF PRESENT ILLNESS: The patient is a 65-year-old African American male, truck driver unable to work since July 2010 because of back pain. He is trying to get disability. He cannot sit for more than two hours at a time or lift more than 12 pounds. Pain radiates down both legs. He denies urinary or fecal incontinence. Other medical problems include hypertension and BPH. His urinary output has improved with Flomax. He denies chest pain, shortness of breath, or leg edema. Colonoscopy was done on 03/04/11 by Dr. Chockalingam, two polyps were removed, to be repeated in five years.

PAST HISTORY: Negative for surgery or hospitalization.

SOCIAL HISTORY: The patient lives with his fiancée. He is a nonsmoker and nondrinker. Denies illicit drug use. His weight over the last seven years has been the same.

CURRENT MEDICATIONS: Terazosin 5 mg q.d., Flomax 0.4 q.d., Cataflam 50 mg t.i.d. p.r.n., occasional ibuprofen 800 mg on Vicodin, and tramadol for pain.

ALLERGIES: Denied.

REVIEW OF SYSTEMS: The patient is unable to do any significant exercise because of back pain. Gets adequate sleep. No rectal bleeding. Has occasional constipation. Bloating stomach, palpitation, frequent headaches, dysuria, and fatigue.

PHYSICAL EXAMINATION:

GENERAL: Obese, well-developed male, alert and oriented x3, in no acute distress.

VITAL SIGNS: Blood pressure 140/84 sitting and 140/90 standing; pulse 88; temperature 97; weight 240 pounds; and BMI 32.

HEENT: Pupils round and reactive. Sclerae nonicteric. Throat clear. No ear or nose lesions.

NECK: Supple. Thyroid not enlarged. No adenopathy.

LUNGS: No wheezes, rales, or rhonchi.

HEART: PMI, fifth intercostal space, midclavicular line. No murmurs or gallops. Jugular venous pressure normal.

ABDOMEN: Rotund without any megaly, mass, or tenderness.

RECTAL: No mass. Stool negative for occult blood. Prostate smooth, nontender, and not enlarged.

GENITALIA: Normal male genitalia. No hernia.

EXTREMITIES: No cyanosis, clubbing, or pedal edema.

MUSCULOSKELETAL: Decreased flexion of the back. The patient has an abnormal gait because of back pain.

NEUROLOGICAL: No focal deficit.

JAIRAJ PRASHAD, M.D.

Mickle, Joseph
Page 2 of 2

LABORATORY DATA: Urinalysis normal. EKG shows left anterior hemiblock. Blood work pending.

IMPRESSION:

1. Hypertension.
2. Hyperlipidemia.
3. Fatigue.
4. Constipation.
5. Dysuria.
6. Mechanical low back pain.
7. BPH.

PLAN: Continue present medications. Encourage weight reduction. Renew terazosin; Flomax; and Cataflam, the latter at 50 mg t.i.d. p.r.n. Return in three months. Pneumovax given.

Dictated but not read, subject to dictation/transcription variance.

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JAIRAJ PRASHAD, M.D.

Jairaj Prashad, M.D., P.A.

INTERNAL MEDICINE
SLEEP DISORDERS AND LUNG DISEASES

1444 BARNWELL STREET
COLUMBIA, S.C. 29201

(803) 256-6274

PATIENT NAME: Mickle, Joseph

DATE OF VISIT: 02/14/11

SUBJECTIVE: The patient has not worked since August because of back pain. He needs refill on his medications. Did not take any terazosin since Saturday.

OBJECTIVE:

VITAL SIGNS:

Blood pressure 130/90, sitting and 134/90, standing;
pulse 76; temperature 97; and weight 240½ pounds.

LUNGS:

Clear.

HEART:

No S3.

ASSESSMENT:

1. Hypertension.
2. BPH.
3. Mechanical low back pain.

PLAN: Renew terazosin 5 mg q.d. #90 one refill, Flomax 0.4 mg q.d. #90 one refill, and tramadol 100 mg b.i.d. p.r.n. pain #60 two refills. The patient will call for an appointment for a physical examination. Appointment for colonoscopy with Dr. Chokalingham.

Dictated but not read, subject to dictation/transcription variance.

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*Jairaj Prashad, M.D., P.A.*INTERNAL MEDICINE
SLEEP DISORDERS AND LUNG DISEASES1444 BARNWELL STREET
COLUMBIA, S.C. 29201

(803) 256-6274

PATIENT NAME: Mickle, Joseph**DATE OF VISIT:** 10/14/10**SUBJECTIVE:** The patient does not want to have his blood work done today. He will decide in the future on this. He has been doing well. Does not want to use Cataflam for his back pain, will use Motrin instead.**OBJECTIVE:****VITAL SIGNS:** Blood pressure 106/70, sitting and 110/70, standing;
pulse 76; temperature 97; and weight 238 pounds.**LUNGS:** Clear.**HEART:** No S3.**ASSESSMENT:**

1. Hypertension.
2. Mechanical low back pain.

PLAN: Motrin 800 mg t.i.d. p.r.n. #100 with one refill. Return in three months. Fluvax given.

Dictated but not read, subject to dictation/transcription variance.

JAIRAJ PRASHAD, M.D.

*Jairaj Prashad, M.D., P.A.*INTERNAL MEDICINE
SLEEP DISORDERS AND LUNG DISEASES1444 BARNWELL STREET
COLUMBIA, S.C. 29201

(803) 256-6274

PATIENT NAME: Mickle, Joseph**DATE OF VISIT:** 07/19/10**SUBJECTIVE:** The patient continues to have pain in his back. He hurt his back again last week and is being treated as a workman's compensation case. Has not been working for the last week. Claims he used Cheratussin cough syrup sparingly.**OBJECTIVE:****VITAL SIGNS:** Blood pressure 120/70, sitting and 120/80, standing;
pulse 76; temperature 97; weight 233½ pounds; and
BMI 30.**LUNGS:** Clear.**HEART:** No S3.**ASSESSMENT:**

1. Hypertension.
2. Mechanical low back pain.
3. Cough.

PLAN: Vicodin 5/500 mg q.i.d. p.r.n. pain #120 with one refill, Cheratussin AC syrup one teaspoonful q.i.d. p.r.n. 4 fluidounce. No refills. Viagra 100 mg q.d. #6 with three refills. Return in three months. Blood work on return.

Dictated but not read, subject to dictation/transcription variance.

JAIRAJ PRASHAD, M.D.

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STATE OF SOUTH CAROLINA)
COUNTY OF RICHLAND)

BEFORE THE SOUTH CAROLINA
WORKERS' COMPENSATION COMMISSION

W.C.C. FILE NO. 1022202

Joseph Mickle,)
Employee,)

Claimant,)

vs.)

TSL, Ltd., d/b/a Boyd)
Brothers Transportation, Inc.,)
WTI Transport,)
Employer,)
and)

Lumberman's Underwriting)
Alliance; Boyd Brothers')
Transportation, Inc., Carrier)

Defendants.)

AMENDED
NOTICE OF WITNESSES AND
WRITTEN MEDICAL REPORTS TO
BE INTRODUCED AS DIRECT
EVIDENCE ON BEHALF OF
DEFENDANTS

TO: Honorable Thomas Scott Beck, Commissioner,
SOUTH CAROLINA WORKERS' COMPENSATION COMMISSION and
J. Marvin Mullis, Jr., Attorney for Claimant

YOU ARE HEREBY NOTIFIED THAT the Employer/Defendant pursuant to the provisions of the South Carolina Workers' Compensation Act and South Carolina Code Section 1-23-330 (1976; as amended) and Regulation 67-612, herewith submits the following medical reports as direct evidence on behalf of the Employer/Defendant, to wit:

With regard to the Notice of Witnesses and written Medical Reports to be Introduced as Direct Evidence on Behalf of the Claimant served on September 13, 2011, we hereby adopt APA No. 3 Dr. Ivan E. LaMotta, pp. 17-20; and APA No. 7, Imagecare, LLC, p. 72

APA #12	Dr. Ivan E. LaMotta	2/24/11	pp. 110-113
APA #13	Form 14-B, Dr. Ivan E. LaMotta with Functional Capacities Exam attached	2/2/11 - 9/20/11	pp. 114-125

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APA #14	List of SC Employees of WTI Transport, Inc.		p. 126

Defendants respectfully reserve the right to amend this response and submit additional reports.

YOU ARE FURTHER HEREBY NOTIFIED that you have the right of cross-examination; and, should you desire to exercise said right, you are to forthwith schedule the depositions of any of the physicians, whose reports are submitted, for the purposes of cross-examination.

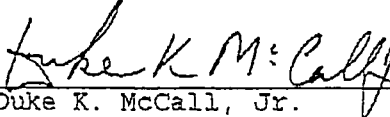
YOU ARE FURTHER NOTIFIED that the originals of the documents referred to herein, or photocopies received from said physicians/others, will be submitted at the Hearing before the South Carolina Workers' Compensation Commission, for insertion in the file of the South Carolina Workers' Compensation Commission and inclusion into evidence on behalf of the Employer/Defendant.

YOU ARE FURTHER NOTIFIED that the following witnesses may be called on behalf of the Employer/Defendant.

Lynn Ingram, HR Director, Boyd Bros.
Transportation

Defendants respectfully reserve the right to amend this response and call additional witnesses.

Respectfully submitted,



Duke K. McCall, Jr.
Attorney for Defendants

Smith Moore Leatherwood LLP
Post Office Box 87
Greenville, S.C. 29602
(864) 242-6440

November 14, 2011

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Report Date: April 05, 2011 Patient: Mickle, Joseph DGS: 02/24/11

ALLERGIES: No Known Allergies

MEDICATION(s): Cataflam
Norco (Dosage: 5/325 SIG: po at night Dispense: 60 Refills: 0)REVIEW OF SYSTEMS:

General, neuro, psychiatric, respiratory, cardiovascular, GI, GU, blood and lymph, EENT, musculoskeletal, skin and endocrine are normal except for what is noted:

Systems Reviewed

PHYSICAL EXAM:Vital Signs: HEIGHT: 6'0"
WEIGHT: 224 lbs 0 oz
BMI: 30.4

Gait: normal, narrow based gait. able to ambulate on toes and heels.
Spine ROM: decreased range of motion lumbar spine
Strength: 5/5 in all myotomes
Sensation: intact sensation to light touch in all major dermatomes of upper and lower extremities
Palpation: unchanged from last examination
Improvement:
Incision:

RADIOGRAPHS:

PROCEDURE:

ASSESSMENT: 724.2-Low Back Pain

PLAN:

I have reviewed the chart capacity evaluation as well as his impairment rating performed February 2, 2011. I agree with the findings.
Based on the functional capacity evaluation patient will be able to return to work at a sedentary duty. Please refer to the functional capacity evaluation for details.
The patient is not a surgical candidate and has met maximal medical improvement. According to the American medical association with asked to the evaluation of permanent impairment, fifth edition, he qualifies for a DRE lumbar category II. Therefore, his whole person impairment is 8%, which translates into an 11% regional impairment to the lumbar spine. He may follow on an as-needed basis only.

PRESCRIPTIONS: No data for Prescription

PRE-EXAMINATION:

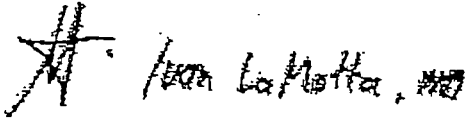
WORK STATUS:

() Full Time () Part Time () Restrictions () Out of Work () Non-Applicable

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Report Date: April 05, 2011 Patient: Micke, Joseph DCS: 02/24/11



Ivan E. LaMotta, MD

Electronically Signed
February 24, 2011 10:40 AM

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///

02/02/2011 MON 10:34 PM

02/02/2011

Feb 02, 2011

Standing tolerance
The patient's self-reported standing tolerance is as follows:

Relevant Comments
Mr. Mickle has a self-reported standing tolerance of 20 minutes. He has a self-reported standing/walking tolerance of 20 minutes. He reports his standing/walking tolerance is limited secondary to complaints of increased lumbar pain.

Feb 02, 2011

Sitting tolerance
The patient's self-reported sitting tolerance is as follows:

Relevant Comments
Mr. Mickle has a self-reported sitting tolerance of 60 minutes. He reports his sitting tolerance is limited secondary to complaints of increased lumbar pain/stiffness.

Cardiovascular Intake

Feb 02, 2011	Resting Rate (b/min)	Systolic (mm Hg)	Diastolic (mm Hg)
	68	150	80
Resting	Normal Heart Rate	Borderline Hypertension	Normal Blood Pressure

MEMPHIS TRIAL REHABILITATION CLINIC, INC.
2342 TWO NOTCH ROAD COVINGTON, MS 38934 (601) 798-5007

Mr. Joseph Mickle

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09/11/11

02/02/2011 RDP 13021 774

Single Stage Treadmill

Test Date Feb 02, 2011 1:04:00 PM

Pre-Testing Heart Disease Questions

1. Have you ever had a heart attack? ☐ Yes ☒ No
2. Have you ever had heart surgery? ☐ Yes ☒ No
3. Have you ever had an abnormal electrocardiogram? ☐ Yes ☒ No
4. Do you have heart disease? ☐ Yes ☒ No
5. Have you been told by a physician you have had angina? ☐ Yes ☒ No
6. Have you been told by a physician you have had palpitations? ☐ Yes ☒ No
7. Have you had a stroke (CVA)? ☐ Yes ☒ No
8. Is your blood pressure (BP) 160/90 or higher? ☐ Yes ☒ No
9. Are you pregnant? ☐ Yes ☒ No

Stage	Initial Heart Rate 92 BPM		Initial Blood Pressure 150 / 80		Cycle
	Speed	Heart Rate	Blood Pressure		
1. Warm-Up	1 mph	112 BPM	0/0		0%
2. Exercise	1 mph	115 BPM	0/0		5%
3. Recovery	1 mph	9 BPM	0/0		0%
Predicted Maximum V _{O2}	26 ml/kg/min				
Predicted M _{dot} V _{O2} Level	3 METS				
Functional Aerobic Capacity	Moderate work				
Classification of Aerobic Capacity	Average				

COLUMBIA REHABILITATION CLINIC, INC.
ONE TWO NINTH ROAD COLUMBIA SC 29204 (803) 796-7000

Dr. Joseph Niles



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South Carolina Workers' Compensation Commission
3 Main Street, Suite 500 • Post Office Box 1715
Columbia, South Carolina 29202-1715
(803) 737-5723
www.wcc.sc.gov



Physician's Statement

Claimant's Name: Joseph Mickle (Acct. No. _____)

Employer's Name: Royd Bros. Transportation

Physician's Name: Ivan E. LaMotta, M.D.

Insurance Carrier: _____

Office/Clinic: Midlands Orthopedics

SCWCC File No: 1022202

Attorney's Name: Duke K. McCall, Jr., Esquire

Phone: (854) 240-2403

The undersigned physician has been authorized by the Employer/Carrier to treat this Claimant for his or her injury by accident pursuant to §§42-15-60, 42-1-172 or 42-11-10.

Date of Injury or Illness: July 12, 2010

Date of first office visit: 8/2/10 Date of last visit: 2/24/11

Diagnosis or nature of injury or illness: Back pain

Body part(s) injured: Back Body part(s) affected: Back

Date of Maximum Medical Improvement: 2/24/11

Based on the AMA Guidelines, the claimant has sustained a 11% medical impairment to Lumbar spine injured body part(s) and a 0% medical impairment to other affected body part(s).

☐ The claimant is able to return to work without restriction.

☐ The claimant is able to return to work with the following restrictions:

See attached FCE

☐ The claimant is unable to return to work at his or her current employment.

As of the date I last saw this patient, it is my professional medical opinion the claimant:

☐ will not need future medical care related to his or her work related injury or illness based on a reasonable degree of medical certainty (more likely than not).

☐ will need future medical care and treatment related to his or her work related injury or illness based on a reasonable degree of medical certainty (more likely than not) and that medical care and treatment including medication is as follows:

Attesting Physician, Ivan E. LaMotta

Date 9/20/11

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02/02/2011 WED 20:21 FAX

EPOL/021



Columbia
Rehabilitation
Clinic, Inc.

DATE: FEB, 14, 1951

February 2, 2011

Attn: Dr. Ivan LaMotta
Midlands Orthopaedics
1910 Blending Street
Columbia, S.C. 29201

Ed. Joseph Micklo

Dear Dr. LaMONT,

Mr. Mickie was seen on February 2, 2011 for an impairment ruling of his lumbar spine. Mr. Mickie sustained a work injury to his lumbar spine on July 12, 2010. A MRI of the lumbar spine dated September 13, 2010 indicated mild degenerative changes of the lower three lumbar discs and of the L4-5 discs. Radiographs of the lumbar spine dated January 13, 2011 were "essentially normal for the patient's age".

Mr. Mickle reports constant lumbar pain which worsens with prolonged sitting and prolonged standing/walking. He reports difficulty with urination.

The American Medical Association's Guide to the Evaluation of Permanent Impairment, fifth edition was utilized to determine his impairment. According to Table 15-3 on page 384, Mr. Mickle qualifies for a DDE (Diagnosis Related Estimate) Lumber Category 1J. This whole person impairment rating is 6%. In order to convert a whole person impairment into a regional spine impairment, one must divide the whole person impairment by 0.75. Please refer to page 427 of the Guide. Therefore, 6% divided by 0.75 results in a 17% impairment of the lumbar spine.

Thank you for this referral. Please call me if you have any questions at (803) 799-7007.

Sincerely,

Dray Hill P.T.

1552 Two Notch Road, Columbia, SC 29204, 707-7057
1 Wallingth Blvd., Suite 204, Irmo, SC 29063, 745-0808
1177 Burnside Boulevard, West Columbia, SC 29169, 784-3440
116 Blammy Drive, Suite 202, Oconeeville, SC 29222, 735-4545
www.citishelp.com

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02/02/2011 WED 10:21 FAX

02/02/2011



Columbia
Rehabilitation
Clinic, Inc.

February 2, 2011

David A. Frost, M.D. DPT
Physician

Attn: Dr. Ivan LaMotta
Midlands Orthopaedics
1010 Harding Street
Columbia, S.C. 29201

Re: Joseph Mickie

Dear Dr. LaMotta,

Mr. Mickie was seen on February 2, 2011 for a Functional Capacity Evaluation.

Mr. Mickie is a 65 year old male who sustained a work injury to his lumbar spine on July 12, 2010. The patient reported an initial pain level of "5" on a "0-10" pain scale in which "0" represents no pain and "10" represents maximal emergency level pain. The highest reported pain level during today's evaluation was "7" and this occurred with attempted squatting.

The results of the Functional Capacity Evaluation performed on this date indicate that he can meet the demands of sedentary to limited light work. He tolerates occasional walking, bending, twisting, and reaching. He does not tolerate occasional stairclimbing, kneeling, squatting, or crawling. He can lift from 10 to 15 pounds at various heights on an occasional basis. He can carry 15 pounds with 2 hands. He can carry 10 pounds in the right hand and 10 pounds in the left hand. He can push 20 pounds loaded in a sled and can pull 0 pounds loaded in a sled. He has a self-reported sitting and standing tolerance of 90 and 20 minutes respectively. He has a self-reported standing/walking tolerance of 20 minutes. He was observed to sit for a maximal time of 37 minutes and stand for a maximal time of 10 minutes. He was observed to stand/walk for a maximal time of 30 minutes.

The patient's lumbar range of motion is limited. Please refer to the enclosed forms for range of motion measurements.

The results of the treadmill test place Mr. Mickie in the average Classification of Aerobic Capacity. Mr. Mickie's Functional Aerobic Capacity qualifies him for medium work.

Mr. Mickie put forth a consistent effort during the evaluation. He qualifies for sedentary to limited light work. He does not tolerate occasional squatting, stairclimbing, kneeling, or crawling. Mr. Mickie reported he was "50% better" prior to January 27, 2011 when he had an exacerbation of lumbar pain from "bending over and spilling out toothpaste".

Thank you for this referral. If you have any questions, please call me at (803) 792-7007

Sincerely,

David A. Frost, M.D. DPT

2562 Two Notch Road, Columbia, SC 29204, 792-7007
1 Wellington Blvd., Suite 204, Irmo, SC 29063, 792-0000
1177 Sunset Boulevard, West Columbia, SC 29168, 794-3440
115 Embassy Drive, Suite 202, Columbia, SC 29223, 792-4646
www.columbiaclinic.com

134
116

02/02/2011 12:00 PM FAX

0113/011



PREPARED FOR:
Arini Dr. Ivan LaMarta
Midlands Orthopaedics
1910 Blending Street
Columbia, S.C. 29201

FUNCTIONAL ABILITIES EVALUATION



Client Information

Client Name
Address

Injury Date
Diagnosed By:
SSN:

Employment Information

Occupation
Employer
Address

Insurance Information

Company
Address

Date of Birth
Gender
Height
Weight

Work Status

Claim #

Start & Finish Dates
Evaluator

Areas of Complaint



General Location	Specific Location	Plane	Side	Pain Type	Pain Scale
Lower Back (Lumbosacral)			Central	Stinging/Sharp/Throbbing	6 - High Moderate

Tracy Hill, PT
Physical Therapist

COLUMBIA REHABILITATION CLINIC, INC.
1115 TYPICAL ROAD COLUMBIA, SC 29201 (803) 799-7007

All services are provided under the supervision of a licensed physical therapist. Data developed by the program is the property of Columbia Rehabilitation Clinic, Inc.



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02/02/2011 12:22 FAX

0000/111

Strength **Lower Extremity Manual Muscle Test**
Manual Muscle Testing of the lower extremities was performed and the results are as follows:
Hip Flexion: 4/5 Knee Extension: 5/5
Extensor Hallucis Longus: 4/5 Evolverator: 4/5

Feb 02, 2011 12:05:57 PM
Dorsiflexion: 4/5

Range of Motion **Lumbar Range of Motion**

Feb 02, 2011 12:13:13 PM

	True Lumbar Flexion	True Lumbar Extension	Left Laternal Flexion	Right Laternal Flexion	Left Straight Leg Raise	Right Straight Leg Raise
Normal:	60	25	25	25	80	80
Test 1:	23	11	14	14	23	22
Test 2:	21	10	14	14	23	22
Test 3:	21	14	30	12	23	22
Average	21.7	11.7	17.5	13.5	24.0	23.5
Maximum	23.0	14.0	20.0	14.0	24.0	24.0
AMA Valid	YES	YES	YES	YES	YES	YES
% of Normal	53%	47%	60%	54%	30%	29%



Evolverator Comments:
Increased lumbar pain especially "when straightening up from the bent position"
Reference Information:
American Medical Association Guide to the Evaluation of Permanent Impairment, 5th Edition

Feb 02, 2011 12:44:10 PM

Work Simulation

Dynamic Bending

The patient was asked to bend forward at the waist 25 repetitions. The results are as follows:
dynamic bending: 25 repetitions

PRIOR TO POST
HR 113

Evolverator Comments:

Mr. Mickle was able to bend forward at the waist 25 repetitions. He reported increased lumbar pain after 15 repetitions especially when straightening up but he opted to complete the test.

COLUMBIA REHABILITATION CLINIC, INC.
2362 TWO NOTCH ROAD COLUMBIA MD 21034 (410) 799-7897

Mr. Joseph P. Miller

136

118

12/02/2011 12:11:22 PM

0005/011

Work Simulation Dynamic Rotation

Feb 02, 2011 12:01:00 PM

The patient was asked to rotate at the waist 25 repetitions. The results are as follows:
Dynamic rotation 25 repetitions

FILE NR 114 POST
NR 115

Evaluator Comments

Mr. Mickle was able to rotate at the waist 25 repetitions.

Work Simulation Squatting

Feb 02, 2011 12:34:12 PM

The patient was asked to assume a squatting position for 2 minutes. The results of squatting are as follows:
squatting: unable

FILE NR 107 POST
NR 120

Evaluator Comments

Mr. Mickle was unable to squat. He attempted by holding onto pillars but was able to squat minimally secondary to complaints of increased lumbar pain.

Work Simulation Kneeling

Feb 02, 2011 12:36:06 PM

The patient was asked to assume a kneeling position for 2 minutes. The results are as follows:
kneeling: 29 seconds

FILE NR 107 POST
NR 118

Evaluator Comments

Mr. Mickle was able to kneel for 29 seconds. He had difficulty maintaining this position secondary to complaints of increased lumbar pain. Testing was terminated at the request of the patient secondary to complaints of increased lumbar pain.

Work Simulation Dynamic Crawling

Feb 02, 2011 12:58:02 PM

The patient was asked to crawl for 2 minutes. The results are as follows:
dynamic crawling: 1 minute 29 seconds

FILE NR 107 POST
NR 122

Evaluator Comments

Mr. Mickle was able to crawl for 1 minute 29 seconds with difficulty not getting in and out of this position. Testing was terminated at the request of the patient secondary to complaints of increased lumbar pain.

COLUMBIA REHABILITATION CLINIC, INC.
200 TRU NORTH ROAD COLUMBIA SC 29204 (843) 726-7000

Mr. Joseph Mickle

111
P.4

137

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0005/011

02/02/2011 WED 12:23 PM

Work Simulation Dynamic Reaching

Feb 02, 2011 1:15:08 PM

The patient was asked to transfer 1 lb weights from shoulder level to above head level for 5 minutes. The results are as follows:
Dynamic reaching: 5 minutes

MAX LK 107 POINT
RL 113

Evaluator Comments

Mr. Mickie was able to reach for 5 minutes. He reported increased lumbar pain but he opted to complete the test.

Work Simulation Stair Climbing

Feb 02, 2011 1:25:03 PM

The patient was asked to ascend/descend a series of 4 stairs for a total of 10 cycles. The results are as follows:

Time (min:sec)	Initial Heart Rate (bpm)	Final Heart Rate (bpm)	Stairs Ascended	Stairs Descended
2:38	105	118	20	20

Evaluator Comments

Mr. Mickie was able to ascend/descend a series of 4 stairs for a total of 5 cycles. He used a step to step gait pattern and required handrails. Testing was terminated at the request of the patient secondary to complaints of increased lumbar pain.

Work Simulation 12 Inch to Waist Lift

Feb 02, 2011 1:32:02 PM

The patient was asked to lift from 12 inches off of the floor to waist height. The results are as follows:
12 inch to waist: 15 pounds Physical demands report: limited right

MAX LK 116

Evaluator Comments

Mr. Mickie was able to lift 15 pounds. He did not want to attempt additional weight secondary to complaints of increased lumbar pain. The lowest level lift he could complete was 8 inches from floor level and he could lift 10 pounds with difficulty noted. He did not want to attempt additional weight secondary to complaints of increased lumbar pain.

Work Simulation Waist to Shoulder Lift

Feb 02, 2011 1:45:01 PM

The patient was asked to lift from waist height to shoulder height. The results are as follows:
Waist to shoulder: 15 pounds Physical demands report: limited right

MAX LK 118

Evaluator Comments

Mr. Mickie was able to lift 15 pounds. He did not want to attempt additional weight secondary to complaints of increased lumbar pain.

COMMUNITA REHABILITATION CLINIC, INC.
2362 TWO NOTCH ROAD GOLDENVALE, NY 12086 (518) 794-7007

Mr. Joseph Mickie

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02/07/2011

02/02/2011 03:05 134 LJ JLS

Work Simulation Shoulder to overhead lift

Feb 02, 2011 1:45:46 PM

The patient was asked to lift from shoulder height to overhead height. The results are as follows:

Shoulder to overhead: 12 pounds Physical demand level: limited light

MAX HR 116

Evaluator Comments

Mr. Mickle was able to lift 12 pounds with difficulty noted. He did not want to attempt additional weight secondary to complaints of increased lumbar pain.

Work Simulation Dynamic 2-handed carry

Feb 02, 2011 2:04:59 PM

The patient was asked to carry a box, using both hands, a distance of 30 feet. The results are as follows:

Dynamic 2-handed carry: 15 pounds Physical demand level: limited light

MAX HR 110

Evaluator Comments

Mr. Mickle was able to carry 15 pounds. His speed/rate of gait was noted to decrease and he did not want to attempt additional weight secondary to complaints of increased lumbar pain.

Work Simulation Dynamic 1-handed carry

Feb 02, 2011 2:16:24 PM

The patient was asked to carry a bucket, using 1 hand, a distance of 30 feet. The results are as follows:

Left-handed carry: 10 pounds Right-handed carry: 10 pounds

MAX HR 117

Evaluator Comments

Mr. Mickle was able to carry 10 pounds in his left hand and 10 pounds in his right hand. His speed/rate of gait was noted to decrease and he did not want to attempt additional weight secondary to complaints of increased lumbar pain.

Work Simulation Dynamic Push/Pull

Feb 02, 2011 2:28:01 PM

The patient was asked to push and pull a sled a distance of 30 feet. The results are as follows:

Push: 16.0 lbs Pull: 14.2 lbs

MAX HR 113

Evaluator Comments

Mr. Mickle was able to push 20 pounds and pull 0 pounds loaded to a sled with some difficulty noted. He did not want to attempt additional weight secondary to complaints of increased lumbar pain.

COLUMBIA REHABILITATION CLINIC, LLC
236 TWO NOTCH ROAD COLUMBIA, SC 29204 (803) 705-7807

Mr. Joseph Mickle

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02/08/2011

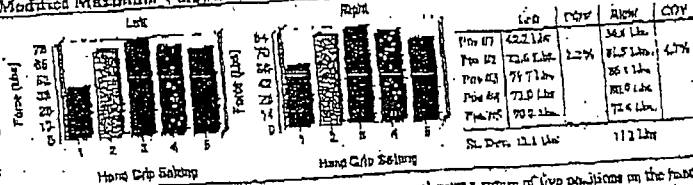
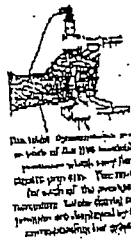
02/12/2011 KEO 15123 PAI

Hand Grip Strength

The JAMAR hand dynamometer was used in order to quantify grip strength and determine whether Mr. Joseph Mickle wanted consistent effort during grip strength testing. Mr. Joseph Mickle was tested using the modified maximum voluntary effort hand grip protocol. Mr. Joseph Mickle is right hand dominant. Normative data is based on the assumption that right and left hand dominant subjects, analyzed separately show little functional difference between their mean scores.^{1, 2}

Feb 02, 2011 12:21 PM

Modified Maximum Voluntary Effort (MMVE)



	Left	Right	Mean	COV
Pos 01	42.2 lbs	42.2 lbs	42.2 lbs	0.0%
Pos 02	72.6 lbs	72.6 lbs	72.6 lbs	0.0%
Pos 03	74.7 lbs	74.7 lbs	74.7 lbs	0.0%
Pos 04	71.9 lbs	71.9 lbs	71.9 lbs	0.0%
Pos 05	70.2 lbs	70.2 lbs	70.2 lbs	0.0%
St. Dev.	12.1 lbs	12.1 lbs	12.1 lbs	

Using the Modified Maximum Voluntary Effort (MMVE) protocol over a range of five positions on the hand dynamometer, it is expected that the strength graphs obtained results in a bell-shaped curve which even in a disabled population or if the client's hand is injured, with the coefficients of variation at position 2 within the acceptable 15% or less limit.

The graph obtained for Mr. Joseph Mickle did demonstrate a bell shaped curve which may be an indicator of consistent effort and the coefficients of variation of the underlying data may be an indicator of consistent effort.

1. Bowers IL. 1973. The voluntary voluntary hand movement of grip. J Occup Med 16:393-394.
2. Mickle JR, Mickle JR. 1990. Voluntary control of submaximal grip strength. Am J Phys Med Rehabil 19:96-101.
3. Mickle JR, Mickle JR. 1990. Grip strength is a divided concept: reliability and normative data. J Rehabil Q 13(1):3-12.
4. Mickle JR, Mickle JR, Linder R, Mickle JR. 1993. Location of submaximal action by use of the right and left hand. J Hand Surg 14A(4):742-743.

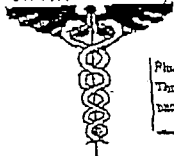
COLUMBIA REHABILITATION CLINIC, INC.
3102 TWO MILE CREEK ROAD COLUMBIA SC 29204 (803) 749-7801

Mr. Joseph Mickle

140

02/02/2011 WED 15:28 FAX

0009/111

The Waddell Signs

Please note

The following tests are recommended to test for sincerity of effort in the case of lower back injuries. Please check whether the test is positive or negative.

Nov 14, 2011

1. Tenderness - Should be localized to a vertebra or paravertebral structures.

Superficial Tenderness - provide light pinch to the skin over the lower back region. If there is widespread tenderness, this is considered non-physiological and is an indication of symptom magnification.

☐ Negative☐ Positive

Deep-Anatomic Tenderness - Perform deep palpation to the lumbar paravertebral. If there is tenderness which is widespread and not localized to any specific structure, then this is considered magnification of symptoms.

☐ Negative☐ Positive**2. Simulation Tests - Give the patient the impression that a particular movement is being performed when it actually is not.**

Axial Loading - To perform this test apply a light downward pressure on the top of the patient's head while they are in the standing position. If increased lower back pain is reported then this is an indication of exaggeration of symptoms.

☐ Negative☐ Positive

Simulated Rotation - With the patient in the stand position and feet together, rotate the pelvis and shoulders independently by applying pressure at the level of the lower forearm. If the patient reports increased pain then this is considered symptom magnification.

☐ Negative☐ Positive**3. Distraction Tests - Reporting of a positive finding in a way that the patient does not recognize or suspect.**

Distraction Test - Perform a straight leg raise with the patient in the supine position. When the BLR shows marked improvement while performed on distraction (i.e. patient's stomach) this is considered positive.

☐ Negative☐ Positive**4. Regional Disturbances - Deviations from accepted neuroanatomy.**

Regional Disturbances - There are several atypical locations or sensory loss involving widespread regions such as the entire leg or a quarter or half of the body.

☐ Negative☐ Positive**5. Overreaction - Disproportionate verbalization, facial expression, muscular reaction and/or motor or sensory response.**

Overreaction - A disproportionate response such as verbalization, facial expression, and/or crying can be indicative of symptom magnification.

☐ Negative☐ Positive

If three or more of the categories are positive then the findings are clinically significant for non-organic low back pain.

Scoring: Clinically insignificant.

COLUMBIA REHABILITATION CLINIC, INC.
300 TWO NOTCH ROAD COLUMBIA SC 29204 (803) 759-7007

Mr. Joseph M. White

141

02/02/2011 15:24 FAX

02/02/2011

Feb 02, 2011

Standing tolerance
The patient's self-reported standing tolerance is as follows:

Evaluator Comments
Mr. Mickle has a self-reported standing tolerance of 20 minutes. He has a self-reported standing/walking tolerance of 20 minutes. He reports his standing/walking tolerance is limited secondary to complaints of increased lower back pain.

Feb 02, 2011

Sitting tolerance
The patient's self-reported sitting tolerance is as follows:

Evaluator Comments
Mr. Mickle has a self-reported sitting tolerance of 30 minutes. He reports his sitting tolerance is limited secondary to complaints of increased lower back pain.

Cardiovascular Intake

Feb 02, 2011	Resting Rate (b/min)	Systolic (mm Hg)	Diastolic (mm Hg)
	62	150	80
Result	Normal Heart Rate	Diastolic Hypertension	Normal Blood Pressure

CHESAPEAKE REHABILITATION CLINIC, INC.
200 TWO NORTH ROAD COLUMBIA, SC 29204 (843) 798-7007

Dr. Joseph Attardo

142

02/02/2012

02/02/2012 02:06 PM

Single Stage Treadmill

Pre-Testing Heart Disease Questionnaire

Test Date Feb 02, 2011 10:40 PM

1. Have you ever had a heart attack? ☐ Yes ☒ No
2. Have you ever had heart surgery? ☐ Yes ☒ No
3. Have you ever had an abnormal electrocardiogram? ☐ Yes ☒ No
4. Do you have heart disease? ☐ Yes ☒ No
5. Have you been told by a physician you have had angina? ☐ Yes ☒ No
6. Have you been told by a physician you have had palpitations? ☐ Yes ☒ No
7. Have you had a stroke (CVA)? ☐ Yes ☒ No
8. Is your blood pressure (BP) low/high? ☐ Yes ☒ No
9. Are you pregnant? ☐ Yes ☒ No

Initial Heart Rate 150 / 80
per BPM

Stage	Speed	Heart Rate	Blood Pressure	Grade
1. Warm-Up	1mph	112 BPM	0/0	0%
2. Exercise	1mph	115 BPM	0/0	5%
3. Recovery	1mph	9 BPM	0/0	0%
Predicted Maximum VCO ₂	26 ml/kg/min			
Predicted Max Min Level	3 METS			
Functional Aerobic Capacity	Moderate work			
Classification of Aerobic Capacity	Average			

THE JIMMYE RESEARCH INSTITUTION CLINICAL, INC.
202 TWO NORTH ROAD COLUMBIA, SC 29204 (803) 746-7007

Dr. George Kellie

10

143

<u>Employee Name</u>	<u>Address</u>	<u>Phone Number</u>	<u>Date of Hire</u>	<u>Date of Termination</u>
Willie Gunter, Jr.	3708 Baywater Dr. Columbia, SC 29209	803-238-0827	10/15/2010	12/31/2010
Joseph Mickle	200 Hatrill Way Unit 1401 Columbia, SC 29223	803-699-1569	4/19/2010	
Sean Smith	316 Mt. Beulah Rd. Windsor, SC 29856	803-335-6875	4/30/2009	
Michael Story	PO Box 4194 West Columbia, SC 29171	706-339-9089	1/6/2011	

144

STATE OF SOUTH CAROLINA
WORKERS' COMPENSATION COMMISSION
CASE NUMBER 1022202

JOSEPH MICKLE,

CLAIMANT,

VS.

WTI/BOYD BROTHERS TRANSPORTATION,

EMPLOYER,

LUMBERMANS UNDERWRITING,

CARRIER/DEFENDANTS.

COPY

SINGLE COMMISSION HEARING

BEFORE

COMMISSIONER T. SCOTT BECK

Friday, November 188, 2011

11:23 AM - 1:08 PM

South Carolina Workers' Compensation Commission
1333 Main Street, Columbia, South Carolina

Reported by

Sara L. Quattlebaum, Court Reporter

148 Lake Harbor Drive, Lexington, SC 29072

(803) 447-0272

Sara L. Quattlebaum
(803) 447-0272

APPEARANCES:

FOR THE CLAIMANT:

J. MARVIN MULLIS
MULLIS LAW FIRM
POST OFFICE BOX 7757
COLUMBIA, SOUTH CAROLINA 29202
803-799-9577

FOR THE DEFENDANT:

DUKE MCCALL, JR.
SMITH MOORE LEATHERWOOD, LLP
POST OFFICE BOX 87
GREENVILLE, SOUTH CAROLINA 29602
864-242-6440

REPORTED BY:

SARA L. QUATTLEBAUM
INDEPENDENT COURT REPORTER
148 LAKE HARBOR DRIVE
LEXINGTON, SOUTH CAROLINA 29072
(803) 447-0272

1 THE COURT: Today's date is November 18,
2 2011. This is Workers' Compensation File No. 1022202.
3 The Claimant in this matter is Joseph Mickle represented
4 today by Attorney Marvin Mullis, Jr. The Employer is WTI
5 Transport, Inc. The Carrier is Lumbermans Underwriting
6 Alliance.

7 Mr. McCall, you represent Boyd Brothers
8 Transportation; is that correct?

9 MR. MCCALL: I represent Boyd Brothers
10 Transportation and WTI Transport.

11 THE COURT: All right. And the Carrier is
12 Lumbermans Underwriting Alliance.

13 The date of accident is July 12, 2010. The
14 parties have agreed to an average weekly wage of \$906.13
15 and a compensation rate of \$604.12.

16 We are here today on Claimant's Form 50. I
17 received APAs from both the Claimant and the Defendant in
18 this matter as well as a legal brief on behalf of the
19 Claimant and some case law, specifically Hawk versus
20 Bayshore Concrete Products/South Carolina, Inc.

21 I have allowed the record to remain open
22 until November 29, 2011 at close of business for the
23 Defendants to provide their legal brief response to both
24 the Commission and Mr. Mullis in this matter.

25 Are there any objections to APAs,

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1 jurisdiction, venue or any other items? Mr. Mullis?

2 MR. MULLIS: No, sir.

3 THE COURT: Mr. McCall?

4 MR. MCCALL: Yes, sir.

5 The Claimant submitted under APA No. 10 the
6 AMA guideline. I think that is jurisdiction. I don't
7 think resubmitting that under the APA is appropriate. I
8 would object to that.

9 Second, there are web pages off of the
10 Internet on WTI under APA No. 11. We object to that.

11 And in Dr. Branham's report beginning at Page
12 4 running through the top half of Page 7, there is simply
13 a recitation or reciting of the medical reports of various
14 physicians, which we submit is not appropriate. The
15 medicals speak for themselves. They are submitted
16 separately under the APAs.

17 THE COURT: Where is that at?

18 MR. MCCALL: Page -- starting at Page -- the
19 bottom half of Page 4 of the APAs running through the top
20 half of Page 7. I think it's fine for the doctor to say
21 look at the medical, and these are the reports you look
22 at. But I think it's inappropriate for the doctor to
23 quote from those reports because the APAs -- the medical
24 reports are already in evidence in the case. And that
25 gives undue emphasis upon the medical because the medical

1 is a key issue in this case.

2 THE COURT: Do you dispute the accuracy of
3 those statements?

4 MR. MCCALL: I don't know if I reviewed them
5 from that standpoint, but Dr. Branham is not an MD. He is
6 a Ph D, he is a rehab counselor. And I will submit again
7 that he can reference those reports but not quote from
8 them.

9 THE COURT: Okay. Mr. Mullis?

10 MR. MULLIS: We think that clearly he can
11 quote from the doctor's reports he's relying on.

12 THE COURT: How about APA 10 of the AMA
13 Guides? Is it appropriate as an APA?

14 MR. MULLIS: Yes, sir.

15 THE COURT: Why, sir?

16 MR. MULLIS: Because it's an authoritative
17 document.

18 THE COURT: Okay. What about 11?

19 MR. MULLIS: That came off the Internet. And
20 it's the company, Boyd Brothers, stating what companies
21 they control, mainly under equipment. And somewhere they
22 quote ~~WPP as a subsidiary~~ I'm looking for it.

23 THE COURT: ~~That's been stipulated to, as I~~
24 ~~understood, earlier.~~

25 MR. MULLIS: Yes, sir.

1 THE COURT: Okay. So what is the
2 significance of the objection if you stipulate to the
3 purpose of the document that's in there?

4 MR. MCCALL: Well, with that stipulation, APA
5 No. 11 shouldn't be here -- it shouldn't be there. It
6 should be taken out.

7 MR. MULLIS: It's already in. It doesn't
8 hurt anything. It's clearly admissible. It may be the
9 same as something else, but that doesn't exclude it. In
10 fact, that gives even more grounds for it to be in.

11 MR. MCCALL: Well, until there is some
12 foundation laid for it, since it's not a medical report,
13 I'm going to object to it.

14 MR. MULLIS: It's a statement by the
15 Defendant, which is clearly admissible.

16 MR. MCCALL: I do not agree to that. They
17 are also connected with APA No. 11, it looks like a group
18 benefit form that is blank. And Pages 102 through 109,
19 which is clearly not statements by the Employer, WTI in
20 this case.

21 MR. MULLIS: There are statements by Boyd to
22 the Claimant. It's simply showing that Boyd also
23 controlled the retirement plan for the people that worked
24 with WTI. That's in here.

25 THE COURT: Okay. Ten and 11 are out. I'll

1 leave them in a pile as proffered. The report of Brabham
2 is in. The cites are part of his report. I'm going to
3 leave them there. Obviously, as I review that report I
4 will be reconciling those with the actual doctor's
5 reports.

6 Any other objections?

7 MR. MCCALL: None from the Defendants.

8 MR. MULLIS: No, sir.

9 THE COURT: All right. Without further
10 objection the Commission File becomes a part of the record
11 with the exception of self-serving declarations and
12 unstipulated medical reports.

13 During a prehearing conference in this matter
14 the positions of both parties was discussed. There are a
15 number of items that I believe the parties are in
16 agreement with. I am going to list those. First is the
17 Claimant was an employee of WTI Transport, Inc.

18 And gentlemen, if I say anything you disagree
19 with, stop me.

20 Secondly, that the accident occurred in
21 Alabama.

22 Third, the Claimant was receiving benefits in
23 Alabama.

24 Four, the Claimant wishes to pursue
25 permanency in South Carolina.

1 Five, that the Defendants assert that WTI
2 does not have four or more employees in South Carolina.
3 And the Claimant's position on that matter is that he had
4 no knowledge one way or the other.

5 Six, ~~that WTI is a wholly owned subsidiary of~~
6 ~~Boyd Brothers.~~

7 And seven, that Boyd Brothers employs more
8 than four employees in the State of South Carolina.

9 Any disagreement on those items?

10 MR. MCCALL: Your Honor, I don't agree or
11 disagree, but I do want to make one point at this point.
12 On the four or more employees, I would submit it is
13 encumbered upon the Claimant to establish jurisdiction,
14 not upon the Defendants and that the Claimant must prove
15 that WTI has four or more employees in this state.

16 THE COURT: Don't they do that by your email
17 response back? There was a motion filed earlier in the
18 month.

19 MR. MCCALL: In my -- in my --

20 THE COURT: You responded back how many
21 employees they had.

22 MR. MCCALL: And my response is No. 14 of the
23 APA -- of the Defendants' APA. And I submit that the
24 Claimant must establish jurisdiction in this case before
25 he can proceed beyond the other issues.

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1 THE COURT: I understand what you just said,
2 Mr. McCall. But you have a letter in the file in which
3 you say, I am advised that Boyd Brothers has 43 employees
4 that live in South Carolina.

5 MR. MCCALL: Yes, sir. But my --

6 THE COURT: Does that resolve this issue?

7 MR. MCCALL: No, sir; because I submit that
8 the first stipulation was the Claimant is employed by WTI
9 Transport and that jurisdiction must be established before
10 WTI Transport in South Carolina before the Claimant can
11 proceed on other issues that he has raised in this Form
12 50.

13 THE COURT: I understand that. And we are
14 getting to that part of it. But my point is, in the
15 prehearing conference we had originally stipulated that
16 Boyd Brothers employed 43 people in South Carolina. And
17 you indicated, I would rather have that say four or more.

18 MR. MCCALL: Right. That is correct. And I
19 think -- and I'm not departing from that stipulation. But
20 I also took the position that jurisdiction --

21 THE COURT: I'm getting to that. I'm getting
22 to that. I'm dealing with the stipulations right now.

23 MR. MCCALL: All right, sir.

24 THE COURT: So we all agree with those
25 stipulations I've indicated thus far?

1 MR. MCCALL: ~~YES, SIR.~~

2 THE COURT: All right. Now, where we start
3 to part company is the Defendant argues that the Claimant
4 must get over the threshold of four employees for WTI
5 first before you can go to the upstream contractor. The
6 Claimant asserts that the statutory employer doctrine
7 applies regardless of the number of employees WTI has in
8 the state.

9 The Claimant is seeking an award of
10 permanent and total disability, asking for lifetime
11 causally-related medical care, asking for the payment of
12 a lump sum and that Utica language be included within the
13 body of the order.

14 The Defendant asserts that if I find that
15 jurisdiction is proper in South Carolina, the Claimant
16 would only be entitled to an order of permanent and
17 partial disability to the back, future medical care in
18 accordance with the authorized treating physician
19 recommendations. They would oppose lump sum payment and
20 assert that the Claimant is not permanently and totally
21 disabled.

22 MR. MCCALL: Correct.

23 THE COURT: Mr. Mullis, any position with
24 regard to the Claimant's standpoint that I have not
25 mentioned thus far?

1 MR. MULLIS: No, sir.

2 THE COURT: With the Defendants; Mr. McCall?

3 MR. MCCALL: No, sir; other than what I said
4 earlier.

5 THE COURT: Which was?

6 MR. MCCALL: Which is that the Claimant must
7 establish jurisdiction through WTI because we submit that
8 you can't consider the statutory employer on the
9 jurisdiction issue. You've got to decide that on the
10 issue of the direct employer.

11 THE COURT: Yes, sir. Yes, sir. All right.
12 Anything further, gentlemen?

13 MR. MULLIS: Yes. You said that he was
14 receiving.

15 THE COURT: Was receiving Alabama benefits.

16 MR. MULLIS: But you said was receiving,
17 which could be taken that he was --

18 THE COURT: No, I didn't say is. I said
19 was.

20 MR. MULLIS: Was, okay. That's fine.

21 THE COURT: Past tense; yes, sir.

22 MR. MULLIS: That's fine.

23 THE COURT: Okay. Now, your name again was?

24 MS. WEBB: Sally Webb.

25 THE COURT: Sally Webb?

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1 MS. WEBB: Yes, sir.

2 THE COURT: Is that S-A-L-L-Y or E-Y?

3 MS. WEBB: Y.

4 THE COURT: W-E-B-B?

5 MS. WEBB: Yes, sir.

6 THE COURT: All right. Ms. Webb, would you
7 raise your right hand, please.

8 SALLY WEBB,
9 Having been first duly sworn, testified as follows:

10 THE COURT: Please state your full name for
11 me.

12 THE WITNESS: Sally Ann Webb.

13 THE COURT: All right. Mr. Mullis?

14 DIRECT EXAMINATION

15 BY MR. MULLIS:

16 Q. Ms. Webb, where do you live?

17 A. I live at 2801 Carousel Circle, Columbia,

18 SC.

19 Q. And how long have you lived there?

20 A. I've been there for about two years now.

21 Q. For the record, I have to also ask your age?

22 A. I'm 52.

23 Q. And did you live in Columbia before?

24 A. Yes, sir.

25 Q. How long have you known Mr. Mickle?

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1 A. For about 24 years.

2 Q. Have you had a chance to observe him in the
3 last year or so?

4 A. Yes, sir; I have.

5 Q. Did you have a chance to observe him before
6 his accident on July 12 of 2010?

7 A.. Yes, sir.

8 Q. Would you tell us what you have observed
9 about his physical condition?

10 A. Well, he's not getting around like how he
11 used to. He used to be an upbeat person and outgoing.
12 But when I go there now he's just sitting in the house
13 looking at TV. That's all he do.

14 Q. Have you noticed anything about his
15 attitude, him being down in the dumps?

16 A. His spirit is not how it used to be. Like I
17 say, he used to be an upbeat outgoing person. But he's
18 not like how he used to be.

19 Q. Okay. And have you seen him move?

20 A. He moves very slowly.

21 Q. Anything else about his movements?

22 A. He can barely get up and he's grunting when
23 he gets up.

24 Q. Does he use a cane?

25 A. Yes, sir.

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1 Q. You have seen him use a cane?

2 A. Yes, sir; I have.

3 THE COURT: Mr. McCall?

4 MR. MCCALL: Your Honor, I should have
5 directed that to you. Your Honor, I object to Counsel
6 leading.

7 THE COURT: Would you rephrase the question,
8 Mr. Mullis?

9 MR. MULLIS: Yes, sir.

10 BY MR. MULLIS:

11 Q. We've got to go backwards a little bit.
12 Describe how he walks and what you see when he walks.

13 A. He gets up very slowly. He barely gets up.
14 He does use his cane when he gets up.

15 Q. Okay. Did you know his condition before his
16 accident of July 12, 2010?

17 A. Yes, sir.

18 Q. And would you tell the Commissioner what it
19 was?

20 A. He was very outgoing. He used to do things.
21 He used to help us with stuff around our house and stuff,
22 but he can't do that anymore; he's not able. He used to
23 fix on our cars if he could, but he can't do that
24 anymore.

25 MR. MULLIS: We have no further questions.

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1 THE COURT: Mr. McCall?

2 CROSS EXAMINATION

3 BY MR. MCCALL:

4 Q. Excuse me, Ms. Webb, are you kin by blood or
5 marriage to Mr. Mickle?

6 A. No, sir. I met them 24 years ago through a
7 mutual friend. Well, he was my son's father, his best
8 friend. And I met him 24 years ago through them. But we
9 are no longer together.

10 Q. Are you all neighbors?

11 A. No, sir.

12 Q. How far do you live from where they live?

13 A. Probably about five miles. I think that's
14 probably about five or six miles, if I'm not mistaken.

15 Q. And how frequently do you see him?

16 A. I see him just about three times a week.

17 Q. Three times a week?

18 A. Yes, sir.

19 Q. Are you familiar, then, with his accident in
20 2004?

21 A. No, sir. I wasn't here then. I had just
22 came back, and I wasn't here.

23 Q. You just --

24 MR. MULLIS: I would request you let her
25 finish answering the question.

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1 THE WITNESS: I was living in North
2 Carolina, and I just came back.

3 BY MR. MCCALL:

4 Q. How long were you living in North Carolina?

5 A. I was in Fayetteville, North Carolina.

6 Q. In Fayetteville.

7 A. Yes, sir.

8 Q. How long were you in North Carolina?

9 A. For about four years.

10 Q. Four years?

11 A. Yes, sir.

12 Q. So you have known Mr. Mickle for 24 years,

13 but for four of those 24 years you have lived in North
14 Carolina?

15 A. Yes, sir.

16 Q. And you came back in 2010 or 2011?

17 A. I came back here -- I just came back here in
18 2004.

19 Q. You came back in 2004?

20 A. Yes, sir. I moved there in '99.

21 Q. Okay. So you've been living in Columbia
22 continuously from 2004 to the present time?

23 A. Yes, sir.

24 Q. What takes you over to the Mickle's house?

25 A. Like I say, we all became friends in 1987

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1 when I met them. We all became friends. And me and his
2 friend, his girlfriend, we were more closer than -- well,
3 we are best of friends.

4 Q. Okay. Thank you.

5 MR. MCCALL: That's all I have.

6 THE COURT: Mr. Mullis, anything further?

7 MR. MULLIS: We have no further questions.

8 THE COURT: You may step down, ma'am. Thank
9 you very much.

10 THE WITNESS: Thank you.

11 MR. MULLIS: Ma'am, you can stay in here at
12 the hearing; we can get you excused. What is your
13 pleasure?

14 THE WITNESS: I've got to go pick up my
15 grand baby.

16 MR. MULLIS: Then we request she be excused.

17 THE COURT: Mr. McCall?

18 MR. MCCALL: No objection.

19 THE COURT: You are excused, ma'am. Thank
20 you very much.

21 THE WITNESS: Thank you.

22 THE COURT: Mr. Mullis, your next witness,
23 sir.

24 MR. MULLIS: We would like to call Mr. Joe
25 Mickle.

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1 THE COURT: Mr. Mickle?

2 JOSEPH MICKLE,

3 Having been first duly sworn, testified as follows:

4 THE COURT: Please state your full name for
5 the record.

6 THE WITNESS: Joseph Mickle.

7 THE COURT: All right. Mr. Mickle, you
8 have a low voice. I'm going to ask you to try and keep
9 that voice up a little bit. All these recording devices
10 and all these ears around here have to hear everything
11 you say, okay?

12 THE WITNESS: Okay.

13 THE COURT: Thank you, sir. Mr. Mullis?

14 MR. MULLIS: Yes, sir.

15 DIRECT EXAMINATION

16 BY MR. MULLIS:

17 Q. Mr. Mickle, where do you live?

18 A. 200 Atrium Way, Columbia, South Carolina.

19 Q. And how long have you lived there?

20 A. About 11 years.

21 Q. How long have you lived in Columbia?

22 A. Since two thousand and -- about 30 years.

23 Q. Okay. Let me get a little work history on
24 you. When this accident occurred, who were you working
25 for?

- 1 A. WTI/Boyd.
- 2 Q. And how long had you been working for them?
- 3 A. Since 2002.
- 4 Q. Who did you work for before then?
- 5 A. A company called Consolidated Cargo Carrier.
- 6 Q. Okay. When you worked for Boyd and WTI what
7 were you doing?
- 8 A. Driving, truck driving.
- 9 Q. Driving a truck?
- 10 A. Correct.
- 11 Q. As a truck driver, did you have to do heavy
12 manual things in connection with driving the truck?
- 13 A. Yes, sir.
- 14 Q. What things did you have to do?
- 15 A. We had to tarp load; we had to strap them
16 down.
- 17 Q. We're going to have to go a little slow
18 because none of us have driven very many trucks. You did
19 what?
- 20 A. We had to strap the loads down; chain them
21 down. We had to tarp them and untarp them --
- 22 Q. Did that require --
- 23 A. -- throwing chains and pulling chains and
24 stuff like that.
- 25 Q. Okay. Was that heavy work?

1 A. Yes, sir.

2 Q. And what else did you have to do as heavy
3 work?

4 A. Well, we had to lift the tarps and do things
5 like that.

6 Q. How much would these tarps weigh?

7 A. They could average anywhere from 50 to 125
8 to approximately 150 pounds at the most.

9 Q. Do you have one tarp that covers the whole
10 load?

11 A. Well, it takes two. It depends on the load.

12 Q. Okay. Before working for Boyd and WTI, who
13 did you work for?

14 A. Consolidated Cargo.

15 Q. And how long did you work for them?

16 A. Approximately 25 years.

17 Q. And what did you do for them?

18 A. I drove.

19 Q. Drove what?

20 A. Truck.

21 Q. And did that truck driving job require you
22 to do heavy work?

23 A. Yes, sir.

24 Q. What heavy work did you do for that job?

25 A. Strapping down loads and some tarping.

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- 1 Q. Why did you leave that truck driving job?
- 2 A. Because they did downsizing.
- 3 Q. And then you went to work for Boyd and WTI?
- 4 A. Correct.
- 5 Q. What did you do before that?
- 6 A. Before driving for Consolidated?
- 7 Q. Yes, sir.
- 8 A. I have to think back. That was a long time
- 9 ago.
- 10 Q. It was 35 years ago, yes.
- 11 A. Let me think. Oh, I drove for a company
- 12 here in Columbia called East Coast Transportation.
- 13 Q. And what kind of truck did you drive?
- 14 A. Flatbed truck.
- 15 Q. The same type situation?
- 16 A. Well, we didn't have to do any lifting. All
- 17 we had to do then is just strapping.
- 18 Q. And does the strapping require that you
- 19 exert yourself?
- 20 A. Yes, sir.
- 21 Q. Was that heavy manual labor?
- 22 A. Chains and bindings, yes.
- 23 Q. And the chains you used were big heavy
- 24 chains?
- 25 A. Yeah.

- 1 Q. The tarp was how much?
- 2 A. We didn't have to do any tarping with that
- 3 company.
- 4 Q. Oh, you didn't tarp the load?
- 5 A. No. That was structured steel.
- 6 Q. Okay. What did you do before that?
- 7 A. I worked in New York. I was doing small.
- 8 household furniture, like chairs and stuff like what we
- 9 are sitting in here; delivering chairs and stuff like
- 10 that.
- 11 Q. Okay. And how long did you do that?
- 12 A. Three or four years.
- 13 Q. You had to load and unload the chairs?
- 14 A. We didn't have to load; we just had to
- 15 unload.
- 16 Q. You had to unload.
- 17 A. Uh-huh.
- 18 Q. What did you do before that?
- 19 A. That's all I really ever done was drove
- 20 truck.
- 21 Q. Okay. Where did you go to high school?
- 22 A. Mt. Vernon, New York.
- 23 Q. Did you graduate from high school?
- 24 A. Yes, sir.
- 25 Q. How did you end up down here?

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1 A. I married -- well, my parents were
2 originally from here. So I went to New York, and I got
3 married. I decided I would try to make a better life
4 here. I couldn't buy a house up there, so I bought one
5 here.

6 Q. Tell me about your accident. When were you
7 hurt?

8 A. In Vernon, Alabama. I was pulling a tarp
9 off a trailer, off the top of a load.

10 Q. And what happened?

11 A. Well, at first I felt a pinch in my back.
12 So I really didn't look at that too much. And then when
13 I got ready to leave, we had untarped the load. And
14 there was no one there to pick the tarp up, so we had to
15 do it ourselves and put it on the trailer. And then it
16 rehurt it again. I didn't think too much about it. It
17 would hurt, but I would just keep going.

18 And I went on to Alabama to get a load of
19 some pipe. And on my way out of Alabama I stopped and
20 got an aspirin or something like that. I thought maybe
21 that would help it. And I came on to -- I'm trying to
22 think of the name of the city -- Cleveland, South
23 Carolina to unload. And I went to bed that night. The
24 next morning I couldn't get out of the bed.

25 Q. Where were you hurting?

1 A. I was hurting all over at that time.
2 Q. Specifically where were you hurting?
3 A. My back and my legs and my shoulders;
4 everything was hurting.
5 Q. Did you report this to the Employer?
6 A. Yes, sir.
7 Q. They paid you some weekly benefits?
8 A. Yes, sir.
9 Q. About how long did they pay you for?
10 A. They paid from July 12 until February 24, if
11 I'm not mistaken.
12 Q. Now, have you ever hurt your back before on
13 the job?
14 A. Yes, sir.
15 Q. When did you hurt your back before on the
16 job?
17 A. I don't know the exact date, but I know it
18 was July -- excuse me, 2004.
19 Q. Okay. And how did you hurt your back then?
20 A. I was moving a tarp up in Rock Hill, South
21 Carolina.
22 Q. Okay. Did you report it to the Employer?
23 A. Yes, sir.
24 Q. Did they provide you with medical care?
25 A. Yes, sir.

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1 Q. How long were you out of work?

2 A. I think it was four to six weeks.

3 Q. Did you go back to work for the same
4 company?

5 A. Yes, sir.

6 Q. Have you been working for them ever since?

7 A. Yes, sir.

8 Q. Did you miss any work because of that
9 accident?

10 A. No, sir.

11 Q. Was it giving you any substantial problems
12 after about two months?

13 A. Do you mean from the 2004 accident?

14 Q. Yes, sir.

15 A. I had a little pain, but it wasn't enough to
16 keep me out of work.

17 Q. So you continued to work. Did you lift
18 tarps?

19 A. Not at first. It took me seven or eight
20 weeks because I wouldn't take the load that they offered
21 me with the tarps. I pulled non-tarp loads for awhile.

22 Q. Okay. But did you eventually get over it?

23 A. Yes, sir.

24 Q. To the best of your knowledge, did you
25 totally recover from that accident?

1 A. Well, you never recover, but I can tell you
2 that it didn't stop me from working.

3 Q. I'm sorry?

4 A. I said I never recovered, but I never
5 stopped from working.

6 Q. So you just kept on working?

7 A. Yes, sir.

8 Q. And you didn't miss any work?

9 A. No.

10 Q. Did you get back to where you were as far as
11 tarps and strapping things down and all that?

12 A. Before I got hurt?

13 Q. Yes, sir.

14 A. Well, I could do it with no problem.

15 Q. So you were back to your regular work for
16 what, six or seven years?

17 A. Yes, sir.

18 Q. And you say you didn't miss work?

19 A. No.

20 Q. How did you end up going to work for WTI?

21 A. Well, they run an ad in the paper. And I
22 saw it and put in an application with them.

23 Q. And then what happened?

24 A. Well, they said that I could come to Alabama
25 and I had the job once I got there.

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1 Q. Okay. Did they call you on the phone?

2 A. Yes, sir.

3 Q. Where did they talk to you?

4 A. I was at home, here in Columbia.

5 Q. Did they tell you you had the job?

6 A. Yes, sir.

7 Q. Did they tell you you had the job while you
8 were in South Carolina?

9 A. As long as I met the DOT requirements.

10 Q. Okay. Did they tell you you had the job in
11 South Carolina as long as you passed the DOT?

12 A. Yes, sir.

13 Q. So when you went down there you felt like
14 you had the job?

15 MR. MCCALL: Objection.

16 THE COURT: I'll allow it. Please proceed.

17 MR. MULLIS: Sir?

18 THE COURT: I'm going to allow it.

19 THE WITNESS: Yes. Yes, sir.

20 BY MR. MULLIS:

21 Q. This was when?

22 A. Do you mean when they first hired me?

23 Q. Yes, sir.

24 A. I think it was in June of '02. When I
25 finished my DOT test it was July 4. That's when I left

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1 with the truck.

2 Q. Okay. And you've worked for them ever
3 since?

4 A. Yes, sir.

5 Q. Now, when you were hurt back on July 12 of
6 '10 what doctors did you go to?

7 A. Well, they first sent me to Doctors Care.

8 Q. That was where?

9 A. In Columbia.

10 Q. Okay. So you came home?

11 A. Yeah, they asked me -- they thought I could
12 make it home, and I told them I would try. So it took me
13 approximately three hours to come 100 miles. I just kept
14 driving real slow to try to make it home. I would stop
15 and rest and then come on in.

16 Q. That was right after the accident?

17 A. Correct.

18 Q. You went to Doctors Care. And then what
19 happened?

20 A. They gave me an x-ray and a prescription to
21 take. And then they recommended me to go to Midlands
22 Orthopedics.

23 Q. Okay. Did you go to Midlands?

24 A. Yes, sir.

25 Q. Who treated you there?

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1 A. I think the first doctor was Dr. Coleman
2 Fowble or something like that.

3 Q. Okay. And who did you end up being treated
4 by?

5 A. Well, they sent me from him to Dr. LaMotta.
6 Dr. Ivan LaMotta, I think is his name.

7 Q. Okay. Now, since you were hurt on July 12,
8 2010, have you been able to do physical labor?

9 A. No, sir.

10 Q. Tell the Commissioner how you feel about
11 working.

12 A. Well, I would love to go to work. If I
13 could go to work now I would. But my physical condition
14 right now wouldn't allow that. I tried approximately six
15 months ago, and I rode with a guy just to see could I do
16 it. And I didn't think I was going to make it back home.

17 Q. Who was this guy you rode with?

18 A. It was a friend of mine called Sylvester
19 Taylor.

20 Q. What kind of truck did you ride in?

21 A. It was a Peterbilt.

22 Q. And you were hoping you could get back to
23 truck driving of some kind?

24 A. It was my intention to hope I could do it.

25 Q. And could you do it?

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1 A. I don't think I could do that now.

2 Q. Would you do it if you could?

3 A. Yes, sir.

4 Q. What kind of medical treatment have you
5 gotten from the doctors at Midlands?

6 A. Well, they gave me physical therapy. And I
7 had two injections. And I did physical therapy probably
8 four or five months. And then they gave me the
9 injections twice. And that didn't do any good at all.

10 Q. Anything else?

11 A. I do a lot of -- I try to do some exercises
12 whenever I can. And I take -- I'm on a lot of pills now.

13 Q. You're what?

14 A. I take a lot of pills now.

15 Q. Tell the Commissioner what pills you're on.

16 A. Hydrocodone and Oxycodone.

17 Q. How do those affect you?

18 A. Well, they make me drowsy and sleepy.

19 Q. Would you feel safe driving a truck on those
20 pills?

21 A. No, sir.

22 Q. Did they give you advice about going back to
23 heavy manual labor?

24 A. No, they just told me to be --

25 MR. MCCALL: Objection as to what they told

1 him. I object to that.

2 THE COURT: Sustained, hearsay.

3 MR. MULLIS: We don't think it matters, but
4 we think, just for the record, that is something to put
5 into evidence, a medical record. Then the person can
6 comment on that, particularly when it affects what he's
7 going to do on his job.

8 THE COURT: If the question is asked
9 properly, you probably can.

10 MR. MULLIS: Well, let me try two or three
11 different ways and maybe I can figure it out.

12 BY MR. MULLIS:

13 Q. Did they give you advise on whether you
14 should go back to work or not?

15 A. Well, they told me --

16 MR. MCCALL: Objection.

17 THE COURT: Sustained.

18 BY MR. MULLIS:

19 Q. No, you can't say what they told you. I
20 think that's what he's objecting to.

21 THE COURT: He is.

22 BY MR. MULLIS:

23 Q. You've got to listen to what I'm asking you.
24 And you need to answer what I'm asking you.

25 A. Okay.

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1 Q. Did they give you advise on whether you
2 could go back to work or not?

3 A. No, sir.

4 Q. They didn't tell you whether you could go
5 back to heavy work or not?

6 A. Well, it's in the paperwork that it said
7 sedentary work, but --

8 MR. MCCALL: Objection.

9 THE COURT: I'm going to sustain it. The
10 medical records will speak for themselves.

11 BY MR. MULLIS:

12 Q. At any rate, did you follow their
13 recommendations?

14 A. Correct.

15 Q. And you are still following what they said?

16 A. Correct.

17 Q. Did you -- for the last 35 years have you
18 done any other kind of work other than heavy truck
19 driving?

20 A. That's it.

21 Q. Did you want to continue to work?

22 A. If I could I would.

23 Q. I believe your paycheck comes from WTI; is
24 that correct?

25 A. Yes, sir.

1 Q. And in working for WTI what was your
2 understanding of the relationship between WTI and Boyd
3 Brothers?

4 MR. MCCALL: Objection, Your Honor, that
5 would be speculation, conjecture and surmise.

6 MR. MULLIS: No, I'm going to have him --
7 well --

8 THE COURT: Either he knows or he doesn't
9 know. I'm going to allow you to ask the question again.

10 MR. MULLIS: Okay. What I want to ask him
11 is --

12 BY MR. MULLIS:

13 Q. Have you seen anything in writing connecting
14 Boyd Brothers with WTI?

15 THE COURT: I'll allow you to answer the
16 question.

17 BY MR. MULLIS:

18 Q. Like what do they put on their trucks?

19 A. Well, when I first started with them it was
20 WTI, Subsidiary of Boyd Brothers.

21 Q. Okay. And that was written on the trucks?

22 A. Yes, sir.

23 THE COURT: I think that might be stipulated
24 to, as well.

25 MR. MULLIS: Right.

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1 BY MR. MULLIS:

2 Q. Now, I believe that you have some little
3 cards?

4 A. My medical cards, yeah.

5 Q. Okay. Sir?

6 A. I said my medical cards.

7 Q. Okay. Get out all the cards you have that
8 have Boyd Brothers written on them.

9 (Witness complies)

10 A. I've got to get up to get them. I had a
11 smaller card, but I think you have that other card, if
12 I'm not mistaken. These are the medical cards here.

13 Q. Okay. You've got about four other cards.
14 What are they?

15 A. Well, this here is my prescription card.

16 Q. Okay. Slow down. Who is that from?

17 A. Boyd Care.

18 Q. And what is that for?

19 A. It's for my prescription medicine and stuff
20 like that if I need it.

21 Q. Okay. Did you have that before the accident
22 or after?

23 A. Before.

24 Q. Okay.

25 A. And this is the same one. This is your

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1 thing when you go to the doctor. All these things are
2 the same thing.

3 Q. Okay. Whose name is on that card?

4 A. Boyd Care.

5 Q. And what does that allow you to get?

6 A. My prescription medicine and stuff like that
7 if I need to go to the doctor.

8 Q. Okay. And who was the card given to you by?

9 A. On this paper here it's got Boyd Care.

10 Q. It's got what?

11 A. Boyd Care.

12 Q. Okay. And is it from Boyd Brothers?

13 A. Correct.

14 Q. Okay. What is the next card you have?

15 A. They are basically the same thing. This one
16 here says Blue Cross/Blue Shield, dental -- health and
17 dental, Boyd Care.

18 Q. Okay. And you have dental coverage, too?

19 A. Yes, sir.

20 Q. And that came from what company?

21 A. Boyd Care.

22 Q. Was that Boyd Brothers?

23 A. Right.

24 Q. Okay. And what is the next one?

25 A. Well, these here are the older ones that I

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1 had in the job that they replaced with these.

2 Q. Okay. Well, let's talk about them. We're
3 going to put them in evidence, too.

4 A. These say the same thing as these right
5 here.

6 Q. Okay. Who did you consider yourself working
7 for?

8 A. WTI/Boyd Brothers.

9 MR. MULLIS: We have no further questions.

10 THE COURT: Mr. Mullis, before you sit down,
11 I want to get one thing clarified because you may have
12 some additional questions that may affect cross
13 examination from Mr. McCall. The back and both the legs
14 are listed; this nervous condition, emotion and distress.
15 Are you pleading psyche?

16 MR. MULLIS: The psychologist says he is
17 depressed. Other than that we have no other
18 documentation. But let me go into the other --

19 THE COURT: Was there any causation
20 established in the reports?

21 MR. MULLIS: Right.

22 THE COURT: So are you asking for the psyche
23 to be found compensable, as well?

24 MR. MULLIS: Yes, sir.

25 BY MR. MULLIS:

1 Q. Now, we need to also tell the Commissioner
2 what problems you're having physically.

3 A. Well, it bothers me sitting here right now.
4 My back bothers me. My leg feels like it's going numb.

5 Q. That could be anything from severe pain to
6 an itch. So tell the Commissioner --

7 A. Well, my back and my legs. My leg feels
8 like it's getting numb now.

9 Q. Did the numbness in the legs start from this
10 accident?

11 A. Correct.

12 Q. You've had the numbness ever since?

13 A. Correct.

14 Q. And you've told the doctors about it?

15 A. Yes sir.

16 Q. And you've seen the reports?

17 A. Yes, sir.

18 MR. MCCALL: Object to Counsel leading.

19 THE COURT: Rephrase your question,

20 Mr. Mullis.

21 BY MR. MULLIS:

22 Q. Have you seen the reports?

23 A. Yes, sir.

24 Q. Tell us what problems you're having in your
25 legs.

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1 A. Well, at the bottom of my feet it feels like
2 pins are sticking in it sometimes when I walk. And my
3 back bothers me every day.

4 Q. Okay. When you say "bothers" --

5 A. It hurts every day.

6 Q. And what else about your legs?

7 A. Well, they be numb 90 percent of the day.

8 Q. And when they're numb does that affect your
9 ability to use them?

10 A. Yes, sir.

11 Q. How?

12 A. Well, I have to try to walk, and it keeps me
13 from walking. And then I have to take a pill to even try
14 to do anything.

15 Q. Okay. And you're still taking both of those
16 medications we talked about?

17 A. Well, they stopped me from taking one. They
18 said one conflicted with the other one.

19 MR. MCCALL: I object to what they said.

20 THE COURT: Sustained.

21 MR. MULLIS: We will withdraw that.

22 BY MR. MULLIS:

23 Q. I notice you have a cane.

24 A. Yes, sir.

25 Q. How did you get the cane?

1 A. Well, the doctor recommended me to use it
2 for balance.

3 Q. And do you use it?

4 A. Every day.

5 Q. Physically, do you think you are able to
6 even get in a truck?

7 A. I might could get in it, but I probably -- I
8 know I couldn't drive it.

9 Q. Why do you think you could get in it with
10 the condition you're in?

11 A. I got in it just to see could I do it.

12 Q. Okay. That was six months ago?

13 A. Yes.

14 Q. Did you have problems getting in it then?

15 A. Getting in and getting out of it.

16 MR. MULLIS: We have no further questions.

17 THE COURT: Mr. McCall, what is the
18 Defendant's position regarding the psyche? We didn't
19 cover that --

20 MR. MCCALL: We deny it as being causally
21 related.

22 THE COURT: Mr. McCall?

23 CROSS EXAMINATION

24 BY MR. MCCALL:

25 Q. Mr. Mickle, did you apply to go to work for

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1 WTI Transport -- when was it you applied to go?

2 A. 2002.

3 Q. And why did you apply for it, for work
4 there?

5 A. Yes, sir.

6 Q. Why did you apply? What caused you to
7 apply?

8 A. I was looking for employment.

9 Q. All right. And what prompted you to request
10 employment?

11 A. Because the job that I had had downsized.

12 Q. What did you see, if anything, that caused
13 you to seek employment at WTI Transport, Inc?

14 A. They was running an ad in the paper, and I
15 saw it.

16 Q. And what did you do when you saw that ad?

17 A. I called and asked for an application. They
18 faxed it to me. I faxed it back to them.

19 Q. All right. And then did you go to WTI
20 Transport?

21 A. They called me and told me I could come down
22 and do an orientation.

23 Q. All right, sir. Now, Boyd Brothers, when
24 you went there you applied for work as an owner/operator?

25 A. Correct.

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1 Q. And you operated and you worked as an
2 owner/operator for WTI Transport, Inc. from July 3, 2002
3 until April 19, 2010?

4 A. Yes, sir.

5 Q. And then in April of 2010 you signed on as a
6 full-time employee for WTI Transport?

7 A. Yes.

8 Q. Regular employee?

9 A. Yeah.

10 Q. Okay. So in 2004 when you pulled your back,
11 you were basically self-employed as an owner/operator,
12 right?

13 A. Yes, sir.

14 Q. Okay. Now, when you reported in July of
15 last year that you was removing the tarp you told them
16 that that happened in the morning, about 7:30 in the
17 morning, right, when you pulled the tarp off?

18 A. About 7:30 or 8:00, yeah.

19 Q. Okay. And did WTI Transport accept your
20 claim and pay you benefits under the Alabama Workers'
21 Compensation Act?

22 A. Well, they switched me to Boyd Brothers.
23 They told me I had to call Boyd Brothers.

24 Q. Okay. Did you receive benefits under the
25 Alabama Workers' Compensation Act?

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1 A. Yes, sir.

2 Q. And you received those benefits until
3 Dr. LaMotta put you at maximum medical improvement?

4 A. Yes, as far as I know. Yes.

5 Q. All right, sir. And Dr. LaMotta basically
6 discharged you from his care as reaching maximum medical
7 improvement; is that correct?

8 A. Yes.

9 Q. Then your attorney sent you over to
10 Dr. Poletti. Do you remember Dr. Poletti, the
11 neurosurgeon?

12 A. That was much later.

13 Q. Yeah. And you went to see Dr. Poletti, and
14 he examined your back. And he also discharged you, as
15 well; did he not?

16 A. I don't understand what you mean,
17 discharged.

18 Q. You have not been back to see Dr. Poletti
19 since that one time?

20 A. Yes.

21 Q. Okay. He didn't do any surgery on you?

22 A. Well, he said that --

23 Q. Not what he said. I didn't ask you that.

24 A. No, he didn't do any surgery.

25 Q. Okay.

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1 THE WITNESS: Do you mind if I stand up?

2 THE COURT: I don't mind at all, sir.

3 Please stand up.

4 BY MR. MCCALL:

5 Q. In 2004 did the doctor inform you that you
6 had degenerative arthritis in your back?

7 A. I don't know nothing about --

8 MR. MULLIS: Hold it. I object. If he
9 can't testify to what the doctor said, he can't answer
10 that question. He's asking him for hearsay.

11 THE COURT: I will sustain that objection
12 unless you can rephrase the question.

13 BY MR. MCCALL:

14 Q. Under the 2004 MRI scan that you had, did
15 you have a chance to see that and did it reflect that you
16 had degenerative arthritis in your back?

17 A. Did I see it in 2004?

18 MR. MULLIS: Objection, he is asking for a
19 medical conclusion on behalf of my client.

20 THE COURT: I'm going to allow him to answer
21 the question. If he saw it, he saw it.

22 THE WITNESS: Well, I didn't see the one in
23 2004.

24 THE COURT: All right.

25 BY MR. MCCALL:

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1 Q. You have a high school education; did I
2 understand that?

3 A. Yes, sir.

4 Q. And you were in New York?

5 A. Yes, sir.

6 Q. Did you get a diploma?

7 A. Yes, sir.

8 Q. And have you attempted to do any other --
9 have you attempted to do any work since Dr. LaMotta
10 discharged you?

11 A. Nothing but driving that truck, like I said
12 earlier.

13 Q. All right. And the driving you were doing,
14 basically when you were an owner/operator and then an
15 employee of WTI Transport, Inc. you were driving flatbed
16 --

17 A. Yes, sir.

18 Q. -- trailers or pulling flatbed trailers?

19 A. Pulling flatbeds, yeah.

20 Q. And that is basically all you've done for
21 the last 35 or 40 years, pull flatbeds?

22 A. Yeah, that's it.

23 Q. Right. And when you were delivering chairs
24 you were driving a box van at that time?

25 A. Yeah.

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1 Q. Okay. Sometimes you chained them down,
2 sometimes you didn't, but you had to strap them down all
3 the time, right?

4 A. Do you mean the -- in which ones? Which
5 loads are you talking about, the flatbed stuff?

6 Q. Yes, sir.

7 A. Yeah, you had to do that every time you
8 pulled a load.

9 Q. Okay. But for the amount of time that the
10 trip takes strapping it down or taking the straps off is
11 just a very small part of the time of the trip itself?
12 The major part of the time is spent behind the wheel
13 driving the truck?

14 A. I would say 85 percent of it, yes.

15 Q. All right. And that isn't hard manual
16 labor; is it?

17 A. It's not manual labor, but it's a lot of
18 hard work.

19 Q. Driving truck?

20 A. Yes, sir.

21 Q. Okay. Most of your driving has been
22 basically over the road?

23 A. Yes, sir.

24 Q. That would be in multiple states?

25 A. Yes, sir..

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1 Q. You have to comply with the DOT regs?

2 A. Correct.

3 Q. And if you are an over-the-road driver, the
4 DOT doesn't let you take certain medications; does it?

5 A. That's right.

6 Q. And one of those medications is Oxycodone;
7 do you know that?

8 A. Yes, sir.

9 Q. So you know that as long as you take
10 Oxycodone you can't drive under a CDL license; is that
11 correct?

12 A. Yes, sir.

13 Q. Other than truck driving have you tried,
14 since Dr. LaMotta released you to do any kind of work of
15 any nature?

16 A. No, sir.

17 Q. Is that answer no?

18 A. No. That's no.

19 Q. All right, sir. Now, you have mentioned a
20 couple of cards, medical cards that you have. Do you
21 know whose plan that is and what the arrangements of that
22 medical plan is?

23 A. (No Response.)

24 Q. Other than what the card says, do you know
25 anything about the plan itself?

1 A. Well, they are medical cards. That's the
2 only thing that I know.

3 Q. All right, sir. When you drove for WTI,
4 either as an owner/operator or as an employee, you drove
5 exclusively for WTI? Do you know what I mean by
6 exclusively?

7 A. No, explain.

8 Q. You drove only for WTI; didn't you? You
9 didn't drive for anybody else?

10 A. That's correct.

11 Q. And you were dispatched by WTI to different
12 locations?

13 A. As far as I know, yes.

14 Q. Your dispatch -- you dealt with one
15 dispatcher all the time; didn't you?

16 A. No.

17 Q. Primarily?

18 A. They switched us off, yes.

19 Q. Okay. And they would tell you where to go?

20 A. Yes.

21 Q. Give you the manifest and tell you when you
22 needed to be there, correct?

23 A. That's correct.

24 Q. Were you ever dispatched by anyone other
25 than WTI during the period of time you worked for them?

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1 A. When they switched me from one dispatcher to
2 another, I really don't know who I was talking to.

3 Q. Okay. The name WTI wasn't always WTI; was
4 it, Mr. Mickle?

5 A. I beg your pardon?

6 Q. The name WTI wasn't always WTI; was it?

7 A. It was Welborn Transportation, subsidiary of
8 Boyd.

9 Q. All right. When you went to work it was
10 Welborn Transport, correct?

11 A. Yes, sir.

12 Q. It was Welborn Transport?

13 A. Yes, sir.

14 Q. Okay.

15 A. Can I re-answer that question?

16 Q. Yes, sir. You can correct any answer you
17 give.

18 A. When you say it was exclusive of Welborn
19 Transportation; that's the question you asked?

20 Q. I asked if you drove for anybody else other
21 than WTI Transport.

22 A. No, you said when I first went to work for
23 them.

24 Q. Oh, yes; was it Welborn Transport?

25 A. No, it was Welborn Transportation,

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1 subsidiary of Boyd when I first went there.

2 Q. When did it change its name?

3 A. That I can't answer. I don't know.

4 Q. Do you know the relationship -- other than
5 using the word subsidiary, do you know the relationship
6 between WTI Transport and Boyd Brothers?

7 A. I can't answer that.

8 Q. Okay.

9 MR. MCCALL: May I have a minute?

10 THE COURT: Yes, sir.

11 MR. MCCALL: That's all I have.

12 THE COURT: Thank you. Mr. Mullis?

13 REDIRECT EXAMINATION

14 BY MR. MULLIS:

15 Q. Just in case some of us haven't ridden in an
16 18-wheeler, tell the Commissioner how riding in an
17 18-wheeler affects you physically and affects your back.

18 A. Well, for one, when you're climbing, you've
19 got to pull, twist, sit. There's a lot of bumping and
20 twisting and bending, looking at your -- trying to look
21 in your mirror and stuff like that. It's a lot of
22 physical work. Shifting gears, you've got to use your
23 clutch all the time, braking; all that affects you. And
24 it bothers your back a lot.

25 Q. How rough of a ride are 18-wheelers compared

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1 to a regular pickup truck or a car?

2 A. It ain't even close.

3 Q. Well, you're going to have to describe it to
4 us. See, I don't know whether the Commissioner has ever
5 ridden in an 18-wheeler.

6 THE COURT: I have not.

7 THE WITNESS: It's very different. It's
8 very much different. The ride is just like riding in a
9 wagon compared to a car. That's the way they ride. And
10 they are getting better, but it ain't there yet. And
11 it's very rough.

12 BY MR. MULLIS:

13 Q. So tell him how rough it is.

14 A. It's just like if you're riding in your car
15 running over a bumpy road all the time. That's the way
16 it would be in a truck. And when you hit a bump, that
17 makes it even worse.

18 Q. We put into your claim emotional distress.

19 MR. MCCALL: Your Honor, I object. I
20 haven't gone into that at all.

21 THE COURT: That is outside the scope of
22 redirect.

23 MR. MULLIS: Sir?

24 THE COURT: It is outside the scope of
25 redirect.

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1 MR. MULLIS: I think all the damages are
2 under redirect since he went in to any part of it.

3 THE COURT: I think I gave you the
4 opportunity to do that on direct. I think it is outside
5 the scope of redirect.

6 MR. MULLIS: We would like to put the cards
7 in evidence, a copy of them.

8 MR. MCCALL: I have no objection.

9 THE COURT: You want the actual cards into
10 evidence?

11 MR. MULLIS: Yes, sir; just a copy of them.

12 THE COURT: Do you have copies of them?

13 MR. MULLIS: No. We would like to request
14 the court reporter make a copy, give us the cards back
15 and keep a copy for the record.

16 THE COURT: All right. We can get you a
17 copy at the conclusion of the hearing.

18 BY MR. MULLIS:

19 Q. Who put you on Oxycodone?

20 A. I think it was Dr. LaMotta.

21 Q. Are you still on that medication?

22 A. Yes, sir.

23 Q. Who suggested the medication by name to
24 begin with?

25 A. If you want who wrote the prescription,

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1 Dr. LaMotta wrote the prescription out.

2 Q. You didn't give him that particular name or
3 anything?

4 A. No, sir. I never heard of that name until
5 then.

6 MR. MULLIS: We have no further questions.

7 THE COURT: Mr. McCall, anything further?

8 MR. MCCALL: Nothing further.

9 THE COURT: All right. You may step down,
10 sir. Thank you very much. Mr. Mullis, your next
11 witness, sir? Sara, we will mark those as Claimant's
12 Exhibit 1, and just staple them together at the
13 conclusion of the proceeding.

14 COURT REPORTER: Yes, sir.

15 (CMT. EXH. NO. 1, Insurance Cards, marked
16 for identification.)

17 MR. MULLIS: We will call Quincy Pollard.

18 THE COURT: Mr. Pollard, will you raise
19 your right hand, please.

20 QUINCY JERMAINE POLLARD,
21 Having been first duly sworn, testified as follows:

22 DIRECT EXAMINATION

23 BY MR. MULLIS:

24 Q. State your full name for the record.

25 A. Quincy Jermaine Pollard.

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1 Q. I am required for the record to ask how old.
2 you are.

3 A. 38.

4 Q. Do you know my client in this case,
5 Mr. Mickle?

6 A. Yes, sir.

7 Q. How well do you know him?

8 A. I know him very well.

9 Q. How often do you see him?

10 A. How often do I see him?

11 Q. Yes, sir.

12 A. We may see each other maybe once a month.

13 Q. And do you know his physical condition at
14 this time?

15 A. Yes, sir.

16 Q. What have you observed?

17 A. I know that he is having a lot of problems
18 with his back.

19 Q. Have you noticed any change in his attitude
20 or disposition?

21 A. I haven't noticed a change in his attitude,
22 but I notice a change in his physical condition and that,
23 you know, he is not able to do what he used to do.

24 Q. Okay. What about his outlook on things?

25 A. His outlook?

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1 Q. Yes, sir; how he acts. Does he act
2 different?

3 A. Yes, sir.

4 Q. Tell the Commissioner about that.

5 A. He is not able to do what he used to do
6 because of his back, so his back is hampered. You know,
7 he is walking with a cane. He has slowed down. He just
8 can't do the things that he used to do.

9 Q. Did he complain to you about numbness in his
10 legs?

11 A. Yes, sir.

12 Q. What do you do for a profession?

13 A. I'm a truck driver.

14 Q. Tell the Commissioner how a truck affects
15 you when you're riding down the road and how it affects
16 you physically?

17 A. Well, driving a truck --

18 Q. Particularly 18-wheelers.

19 A. Right. Driving a truck, it affects you a
20 lot more than people actually think. They think when
21 you're driving a truck that's an easy job. But it's
22 actually not that easy. You're bouncing up and down in
23 your seat. And it takes a toll on you. And if your back
24 is bothering you it's almost impossible to drive and
25 bouncing up and down in a truck all day.

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1 MR. MULLIS: We have no further questions.

2 THE COURT: Mr. McCall?

3 MR. MCCALL: No questions.

4 THE COURT: You may step down. Mr. Mullis,
5 any other witnesses?

6 MR. MULLIS: Sir, you can stay or be
7 excused, whichever you wish.

8 THE COURT: Mr. McCall, any objection to him
9 being excused?

10 MR. MCCALL: No objection.

11 THE COURT: You're excused, sir.

12 MR. MULLIS: We would like to call
13 Ms. Lucille Glanton.

14 LUCILLE GLANTON

15 Having been first duly sworn, testified as follows:

16 THE COURT: Please state your full name for
17 the record.

18 THE WITNESS: Lucille Glanton.

19 DIRECT EXAMINATION

20 BY MR. MULLIS:

21 Q. Where do you live and how long have you
22 lived there?

23 A. 200 Atrium Way, Apartment 1401, Columbia.

24 Q. And you live with Mr. Mickle?

25 A. Yes, sir.

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1 Q. How long have you all been living together?

2 A. Since 2006, for seven years.

3 Q. Since when?

4 A. 2006, about seven years.

5 Q. Do you know his physical condition at this
6 time?

7 MR. MCCALL: Your Honor, I would be glad to
8 stipulate that Ms. Glanton would basically -- basically
9 the testimony would be similar to that of Mr. Mickle.

10 THE COURT: Mr. Mullis?

11 MR. MULLIS: She doesn't know anything about
12 trucks.

13 MR. MCCALL: Other than the operation of the
14 trucks.

15 THE COURT: You can discuss the physical
16 condition.

17 MR. MULLIS: Okay. Let me touch on
18 something that hasn't been talked about very much.

19 BY MR. MULLIS:

20 Q. How has this accident affected Mr. Mickle
21 emotionally?

22 A. He is not the same person that he used to
23 be.

24 Q. Why?

25 A. He can't do the things that he used to do.

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1 Q. What about his attitude and the way he looks
2 at things and that kind of stuff?

3 A. It's a different perspective. He gets
4 agitated a lot because he can't do the things he used to
5 do.

6 Q. Okay. And you've noticed that?

7 A. Yes.

8 Q. Does he stay down in the dumps a lot?

9 A. Yes.

10 Q. He stays on a lot of medication?

11 A. Yes.

12 THE COURT: You are leading, Mr. Mullis.

13 MR. MCCALL: Objection, leading.

14 MR. MULLIS: I'm trying to speed it up a

15 little bit. We have no further questions.

16 THE COURT: Mr. McCall, any questions?

17 MR. MCCALL: No questions.

18 THE COURT: All right. You may step down,

19 ma'am. Thank you very much.

20 THE WITNESS: You're welcome.

21 THE COURT: Mr. Mullis, any other witnesses?

22 MR. MULLIS: You can stay or leave.

23 No, sir.

24 THE COURT: Mr. McCall, you can call your

25 first witness, please.

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1 MR. MCCALL: I would like to call Lynn
2 Ingram Colley C-O-L-L-E-Y.

3 LYNN INGRAM COLLEY,

4 Having been first duly sworn, testified as follows:

5 THE COURT: Please state your full name for
6 the record.

7 THE WITNESS: Lynn Ingram Colley.

8 THE COURT: All right. Mr. McCall.

9 DIRECT EXAMINATION

10 BY MR. MCCALL:

11 Q. May I call you Lynn?

12 A. Yes, please.

13 Q. Ma'am, would you introduce yourself to
14 Commissioner Beck telling him about by whom you are
15 employed and what is the nature of your job?

16 A. I will. I'm the HR director for Boyd
17 Brothers but also help adjust -- well, Boyd Brothers and
18 WTI work comp claims.

19 MR. MULLIS: I can't hear her.

20 THE COURT: You need to speak up just a
21 little bit, ma'am.

22 THE WITNESS: Okay. HR director for Boyd
23 Brothers and adjust work comp claims for Boyd Brothers
24 and WTI.

25 BY MR. MCCALL:

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1 Q. Tell me about the relationship of WTI
2 Transport and Boyd Brothers.

3 A. WTI and Boyd Brothers operate as two
4 separate companies. They have -- you know, each company
5 has its own tax ID number. Each company has its own
6 president. Each company has its own recruiting
7 department. Boyd Brothers' recruiting department
8 recruits for Boyd Brothers and WTI for WTI.

9 Each company has its own fleet managers.
10 Each company sets its own pricing.

11 Q. What about customers, per se?

12 A. Each company has its own customers. Now, I
13 can't say that they may not have the same customers, but
14 they have their own customer base.

15 Q. All right. And what about dispatchers?

16 A. WTI has their own dispatchers who dispatch
17 WTI drivers. And Boyd has their own dispatchers who
18 dispatch Boyd drivers.

19 Q. All right. To your knowledge was Joseph
20 Mickle an owner/operator for WTI from July of 2010 until
21 April of 2010?

22 A. Yes, sir.

23 Q. And then did he become a full-time employee
24 for WTI?

25 MR. MULLIS: He is leading the witness;

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1 objection.

2 THE COURT: Rephrase it.

3 MR. MCCALL: All right. I will be glad to
4 rephrase it.

5 BY MR. MCCALL:

6 Q. Can you tell me what Mr. Mickle's position
7 with WTI was from April of 2010 up until the time he had
8 his accident on July 12, 2010?

9 A. Mr. Mickle was a company driver; a company
10 over-the-road driver.

11 Q. All right. When he reported an accident did
12 you adjust his claim?

13 A. Well, I did. There is another adjustor, as
14 well. So we both administer the claims.

15 Q. And how -- when you administer a claim for
16 WTI are there any charges that Boyd Brothers makes to WTI
17 for that work that you do and I think the other lady?

18 A. Yes, sir. Any benefits that are paid to or
19 for WTI employees for work comp benefits are charged back
20 to WTI. And then WTI is also charged an administration
21 or managing fee for our work in adjusting their claims.

22 Q. So is it a fair characterization to say that
23 WTI basically employs Boyd Brothers to handle its claims?

24 MR. MULLIS: Leading question.

25 MR. MCCALL: I'm sorry.

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1 BY MR. MCCALL:

2 Q. How would you characterize WTI's employment
3 with Boyd Brothers for the handling of its claims?

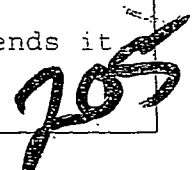
4 A. Well, Boyd Brothers issues, and I don't know
5 if it's an invoice or how it's actually issued, but they
6 -- WTI is requested to pay Boyd Brothers for our help in
7 administering the claims.

8 Q. What about medical benefits, how is that --
9 we've talked about some cards, medical cards and
10 prescription cards and things of that nature. How is
11 that handled to your knowledge?

12 A. To my knowledge it's a self-insured group
13 health plan, but it's administered by Blue Cross/Blue
14 Shield.

15 Q. All right. Do you know the relationship or
16 what the relationship is for Boyd Brothers as opposed to
17 WTI and the administration of that health plan?

18 A. The only thing that I do know is that, you
19 know, the WTI employees fill their paperwork out, they
20 complete it going through orientation with WTI. And let
21 me say Boyd and WTI have their own orientation classes.
22 They are separate. And Boyd employees will complete
23 their paperwork. And I believe it's sent to one person
24 with Boyd Brothers who then compiles it all and sends it
25 to Blue Cross/Blue Shield.



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1 Q. All right. Other than the administration of
2 that health plan as you have just described it and the
3 handling of the workers' compensation claims, which you
4 do, is there any other joint operation or business
5 between WTI Transport, Inc. and Boyd Brothers?

6 A. No, sir; not to my knowledge.

7 Q. What about employees such as Joseph Mickle?
8 Is there any work other than the prescription cards and
9 the handling of the workers' compensation claims? Is
10 there any overlap between WTI and Boyd Brothers, to your
11 knowledge?

12 A. Not to my knowledge.

13 Q. Did WTI Transport Inc., to your knowledge,
14 have four or more employees in the State of South
15 Carolina on July 12, 2010?

16 A. No, sir.

17 THE COURT: Ask that question again.

18 MR. MCCALL: Did WTI Transport, Inc. have
19 four or more employees in the State of South Carolina on
20 July 12, 2010?

21 BY MR. MCCALL:

22 Q. I want to show you the Defendants' APA No.
23 14 and ask if, to your knowledge, these were the only
24 employees WTI Transport had in South Carolina on July 12,
25 2010?

1 A. Yes. Well, the first one, Lee Gunter, was
2 not an employee in July. He was actually after.

3 Q. He was after?

4 A. He was after July. He was employed starting
5 in October. So he would have been employed after
6 Mr. Mickle's job injury. Michael Stori, the fourth one,
7 was not employed until January 6, 2011. So it would have
8 been after his injury.

9 Q. So how many employees did WTI Transport have
10 in South Carolina on July 12, 2010?

11 A. Mr. Mickle and Sean Smith.

12 Q. Just two, including Mr. Mickle?

13 A. Yes, sir.

14 Q. Does WTI Transport, Inc. have its own
15 payroll records?

16 A. Yes, sir.

17 Q. If Mr. Mickle received a paycheck from WTI
18 would it be from WTI that that paycheck was written on?

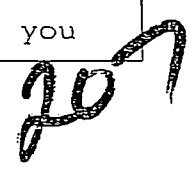
19 A. Yes, sir. I'm not sure if it was directly
20 deposited, but it would have routed through WTI. They
21 had their own payroll department. They administer their
22 own payroll.

23 Q. Do they have their own personnel department?

24 A. Yes, sir.

25 Q. Their own bookkeeping, per se, is what you

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1 meant by payroll?

2 A. Yeah. That's what I meant; yes, sir.

3 Q. Do they have their own trucks?

4 A. Yes, sir.

5 Q. Does WTI Transport have its own trucks?

6 A. They have their own fleet of trucks. And
7 Boyd has its own fleet of trucks.

8 Q. What about repair departments; to your
9 knowledge, does WTI do its own servicing of its trucks at
10 its site?

11 A. They have a service area. You know, I can't
12 say as far as -- depending on the situation, I can't say
13 if a WTI truck has ever, you know, been serviced anywhere
14 else. But WTI does have its own service and repair
15 shops.

16 Q. And WTI is located in what community?

17 A. Tuscaloosa.

18 Q. And Boyd Brothers is located where?

19 A. Well, there is a terminal in Birmingham.
20 The home office is in Clayton.

21 Q. In Clayton?

22 A. Yes, sir.

23 Q. And that's in Alabama?

24 A. Yes, sir.

25 Q. Okay. Does either WTI or Boyd Brothers have

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1 any terminals or offices in South Carolina to your
2 knowledge?

3 A. Not to my knowledge.

4 Q. Now, tell me the difference between an
5 owner/operator and a full-time employee at WTI Transport.

6 A. Owner/operators are considered contract
7 labor; they are not considered employees.

8 Q. All right. And would a contract --

9 MR. MULLIS: I'm going to object. That is a
10 legal conclusion that is contrary to what the law is.

11 THE COURT: I'm going to allow it. If she
12 has an understanding of it, I'm going to allow the
13 testimony. I'm going to allow the testimony.

14 BY MR. MCCALL:

15 Q. To your knowledge, would an owner/operator
16 get a W2 or a 1099?

17 A. A 1099.

18 Q. 1099?

19 A. Yes, sir.

20 Q. And when Mr. Mickle became a full-time
21 employee in April of 2010 with WTI Transport, Inc. would
22 he have then received a W2 at the end of that calendar
23 year?

24 A. Yes, sir.

25 Q. Do you handle Alabama workers' comp claims?

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1 A. Yes, sir.

2 Q. Can you tell me if Mr. Mickle would be
3 entitled to additional benefits under the Workers'
4 Compensation Act in Alabama in addition to what he's
5 already been paid?

6 A. Yes, sir.

7 MR. MULLIS: We object. That is a legal
8 conclusion.

9 THE COURT: I think she has personal
10 knowledge of the system. I'm going to allow it.

11 BY MR. MCCALL:

12 Q. Would that include medical?

13 A. Yes, sir.

14 Q. From your administration of the claim is
15 Mr. Mickle's Alabama workers' compensation claim still
16 pending?

17 A. Yes, sir; it's still open.

18 MR. MCCALL: Thank you. Would you answer
19 any questions Mr. Mullis might have?

20 THE COURT: Mr. Mullis?

21 CROSS EXAMINATION

22 BY MR. MULLIS:

23 Q. Give me your full name again, please, ma'am.

24 A. It's Lynn Ingram Colley.

25 Q. Your last name is?

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1 A. Colley, C-O-L-L-E-Y.
2 Q. Okay. Who do you work for, Ms. Colley?
3 A. Boyd Brothers Transportation.
4 Q. Ma'am?
5 A. Boyd Brothers Transportation.
6 Q. And you draw a paycheck from Boyd Brothers?
7 A. Yes, sir.
8 Q. And you handle Boyd Brothers workers' comp?
9 A. Yes, sir.
10 Q. And you handle the workers' comp for WTI?
11 A. Yes, sir.
12 Q. And you were handling this claim?
13 A. Yes, sir.
14 Q. Are you familiar with medical benefits
15 Mr. Mickle was getting?
16 A. I'm somewhat familiar. There is another
17 adjustor who was on the claim, as well.
18 Q. Okay. So do you know what medical benefits
19 he was getting?
20 A. Yes, sir.
21 Q. It is true that almost all of the medical
22 benefits he was getting were from medical providers in
23 the State of South Carolina?
24 A. I believe so. I can't say for sure.
25 Q. All the orthopedics?

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1 A. Yes, sir.

2 Q. Even the emergency care?

3 A. I'm not sure about that.

4 Q. Okay. He was paid weekly benefits in
5 Alabama?

6 A. Yes, sir.

7 Q. Does Alabama have total and permanent
8 disability?

9 A. Yes, sir.

10 Q. They cut off his weekly benefits in Alabama.
11 Was that your decision or whose decision --

12 A. It was according to Alabama guidelines. He
13 reached his -- his treating physician deemed him to be at
14 maximum medical improvement. So his weekly lost time
15 wages were suspended at that point.

16 Q. There is no hearing required in Alabama for
17 that?

18 A. No, sir.

19 Q. What does he have to do to get total and
20 permanent disability in Alabama?

21 A. Total and permanent?

22 Q. Yes, at this stage.

23 A. I -- well, you know, the doctor assigns an
24 impairment rating. And we go from there.

25 Q. What if the doctor says he can't work for

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1 the trucking company anymore?

2 A. We take a look at what the impairment rating
3 is, vocational loss and go from there.

4 Q. Okay. In this case he had been doing
5 nothing but driving trucks for 35 years, correct?

6 A. I have to go by what you said, yes.

7 Q. Okay. He can only do light work, very light
8 work?

9 A. Yes, sir.

10 Q. And driving a truck, you will agree, is not
11 very light work?

12 A. Not light work; no, sir.

13 Q. And so he couldn't drive a truck for Boyd
14 Brothers or WTI in the shape he is in; could he?

15 A. No, sir; I don't think his restrictions
16 would allow it.

17 Q. Now, it is true that WTI has been set out as
18 the subsidiary of Boyd?

19 A. Yes, sir.

20 Q. And a subsidiary means Boyd owns WTI
21 Transport?

22 A. Well, ~~Boyd and WTI have the same owners~~

23 Q. ~~Same exact owners?~~

24 A. ~~Yes, sir.~~

25 Q. In fact, they advertise together; don't

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1 they?

2 A. I don't know if they advertise together or
3 not.

4 Q. You haven't looked at the advertisements on
5 the Internet?

6 A. Not the advertisements.

7 Q. You haven't seen on the Internet where Boyd
8 Brothers lists WTI as a subsidiary of Boyd Brothers?

9 A. You know, I wouldn't be shocked or surprised
10 if they did, but I don't know that I've noticed that.

11 Q. In fact, you would expect they would;
12 wouldn't you, to save advertising costs?

13 A. I wouldn't say that I would expect them to,
14 but I wouldn't be surprised about it, either.

15 Q. So your answer is you don't know?

16 A. I'm trying to -- I'm thinking, because I
17 haven't pulled up the websites in awhile. Just drawing
18 from memory I think there is something. You know, the
19 website will include Boyd Brothers and WTI and a
20 logistics department, a Boyd logistics department and the
21 company, as well.

22 Q. Okay. And Boyd Brothers or employees of
23 Boyd Brothers handle WTI's health insurance?

24 A. Well, Blue Cross/Blue Shield administers
25 that plan.

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1 Q. But it goes through Boyd Brothers?

2 A. If it goes through Boyd Brothers and I don't
3 handle -- you know, I don't handle the group health
4 benefits. I'm just -- I believe that the paperwork does
5 route from WTI to Boyd. It's compiled together and it's
6 sent to Blue Cross.

7 Q. So they are combined?

8 A. The paperwork is put together and sent to
9 Blue Cross.

10 Q. And the workers' comp is handled by a
11 representative of Boyd Brothers?

12 A. Yes, sir.

13 Q. And the retirement plan is handled by a
14 representative of Boyd Brothers?

15 A. I don't know.

16 Q. You don't know that either way?

17 A. I don't know.

18 Q. Does that not come through your office?

19 A. Through my office?

20 Q. Yeah.

21 A. It falls under the HR umbrella.

22 Q. But you just --

23 A. But I don't have a hand in the retirement
24 plan.

25 Q. You aren't privy to that information, okay.

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1 The things that WTI does, providing trucking, is the
2 exact same thing that Boyd Brothers does?

3 A. Do you mean we are both flatbed carriers?

4 Q. Yes, ma'am.

5 A. Yes, sir.

6 Q. Service areas, the service areas are joining
7 or joined; aren't they?

8 A. I don't know.

9 Q. You don't know whether they are side by side
10 or together or what?

11 A. Boyd Brothers covers two-thirds of the
12 Eastern United States, I can tell you that. As far as
13 what WTI and what their coverage and their operations
14 are; I don't know.

15 Q. You are here representing Boyd Brothers or
16 WTI or both?

17 A. I'm here, I guess, as a representative of
18 this claim.

19 Q. Ma'am?

20 A. I'm here as a representative of -- I mean,
21 of Boyd Brothers and WTI, yeah.

22 Q. I'm handing you what was Page 100 of our
23 pretrial brief.

24 A. Yes, sir.

25 Q. About halfway down the page, would you read

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1 that into the record and explain it for us?

2 A. Yes, sir. "Boyd Brothers Transportation and
3 the WTI Division currently have 1,050 conventional
4 tractors." I didn't bring my glasses. 1,670 --

5 Q. You what?

6 A. I didn't bring my glasses up. "1,670
7 48-foot flatbed trailers and eight sets of six-inch wide"
8 --

9 Q. Yes, that's what I'm talking about there.

10 A. Yes, sir. That's what I read.

11 Q. Okay. What does it say the connection
12 between Boyd Brothers and WTI is?

13 A. It's stating the total trucks that both
14 companies have, but they have their own fleet of trucks.

15 Q. And this is an advertisement by Boyd
16 Brothers Transportation, Inc.?

17 A. Yes, sir.

18 Q. And it is advertising and clearly stating
19 that they have WTI trucks available?

20 A. Well, WTI has trucks available.

21 Q. Well, but this says that -- it says Boyd
22 Brothers Transportation; doesn't it?

23 A. It does.

24 Q. And it says WTI Division.

25 MR. MCCALL: I think the exhibit speaks for.

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1 itself.

2 MR. MULLIS: I can ask her what it says and
3 to explain.

4 BY MR. MULLIS:

5 Q. It says WTI is a division of Boyd Brothers;
6 doesn't it?

7 A. "The WTI Division currently has", yes.

8 Q. Okay. And that would lead one to believe
9 that they are certainly connected; wouldn't it?

10 A. They are a subsidiary of Boyd Brothers, so
11 yes, sir.

12 Q. So the owners could close down WTI?

13 A. They could.

14 Q. They could change what they're doing?

15 A. They could.

16 Q. They could direct where their trucks go and
17 deliver?

18 A. Yes, sir.

19 Q. And they could do the same thing for Boyd
20 Brothers?

21 A. Right.

22 Q. They have total control over WTI, same
23 people?

24 A. Uh-huh.

25 Q. Isn't it easier to administer a claim when

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1 you're at least in the same state as the medical
2 providers?

3 A. Is it easier to administer a claim when we
4 are in the same state as the medical provider?

5 Q. Right.

6 A. Not necessarily.

7 Q. So you don't think that it would be easier
8 for an adjustor in South Carolina to help Mr. Mickle get
9 medical care than one in Alabama?

10 A. Well, we have nurse case management and
11 medical professionals that can advise and refer and that
12 kind of thing. So we don't usually have a problem
13 building a rapport and communicating with out-of-state
14 doctors.

15 Q. But just from a proximity point of view,
16 knowing the doctors, it would certainly be easier;
17 wouldn't it?

18 A. You mean if we know the doctors?

19 Q. Yes, ma'am.

20 A. Why would it be easier? I don't understand
21 what you mean.

22 Q. Because you know what kind of care they
23 give.

24 A. Do you mean do I know the reputable doctors;
25 is that what you're saying?

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1 Q. Yes, ma'am.

2 A. We have, again, medical professionals and
3 nurse case managers throughout the state that will advise
4 and give recommendations for reputable doctors.

5 Q. If Mr. Mickle has a problem --

6 A. Yes, sir.

7 Q. -- with the medical care that's provided or
8 his payments or any problems with this claim, if it's in
9 Alabama, he has to come to Alabama to get the claim
10 adjudicated; doesn't he, if it stays in Alabama?

11 A. Do you mean from a legal standpoint?

12 Q. Yes, ma'am.

13 A. Will he have to come to court in Alabama; is
14 that what you're saying?

15 Q. Yes, ma'am.

16 A. Yes, sir.

17 MR. MULLIS: Excuse me, Commissioner.

18 THE COURT: Yes, sir.

19 BY MR. MULLIS:

20 Q. Do you know who Jeff Leoni is?

21 A. Jeff Leoni; yes, sir.

22 Q. Isn't he in Myrtle Beach?

23 A. He's in South Carolina.

24 Q. What's that?

25 A. He's in South Carolina.

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1 Q. He is in South Carolina. Okay. And he is
2 with WTI?

3 A. TSL is actually the employer of record for
4 Mr. Leoni.

5 Q. What?

6 A. TSL is the employer of record for Mr. Leoni.

7 Q. What do you mean employer of --

8 A. TSL is a professional employer organization
9 or PEO. They are registered as a PEO here in South
10 Carolina.

11 Q. And so what does he do?

12 A. He's a customer -- like a customer service
13 representative.

14 Q. Doesn't he represent WTI?

15 A. He does work for WTI; yes, sir.

16 Q. So that is one employee that wasn't listed
17 on the list?

18 A. Well, he is TSL's employee. TSL is the
19 employer of record.

20 Q. But he actually works for WTI?

21 A. WTI -- he -- legally TSL is the employer of
22 record. TSL -- his payroll goes through TSL. TSL has
23 full work comp coverage over Mr. Leoni. Mr. Leoni does
24 work -- I mean, WTI does direct his workday, yes

25 Q. So without going into your interpretation of

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1 the legal significance he does actually work for WTI?

2 A. They control his workday; yes, sir.

3 Q. How many other people do you have in this
4 state like that?

5 A. He's the only one.

6 Q. That you know of?

7 A. He's the only one, and I would be shocked if
8 there were anybody else. He's the only one that I know
9 of.

10 Q. You all provided us with a list?

11 A. Yes, sir.

12 Q. Did you have anything to do with providing
13 this list?

14 A. Let me take a look at that list. This came
15 from actually the HR department at WTI. Yes, sir.
16 Mr. Gunter was not employed with WTI at the time of
17 Mr. Mickle's injury. Mr. Mickle was injured in July of
18 2010, and Mr. Gunter came on in October. And Mr. Stori,
19 you know, again, he didn't come on until January of --

20 Q. What is with him?

21 A. Okay. Well then, that's two.

22 Q. Plus if you count --

23 A. Mr. Leoni, if you're counting him; that's
24 three.

25 MR. MULLIS: Thank you. I appreciate you

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1 coming up.

2 THE COURT: Anything further, Mr. McCall?

3 MR. MCCALL: Yes, sir.

4 REDIRECT EXAMINATION

5 BY MR. MCCALL:

6 Q. TSL is a staff leasing company?

7 A. Yes, sir.

8 Q. And so Mr. Leoni works for TSL as an
9 employee of TSL?

10 A. He is the employer of -- I mean, TSL is the
11 employer of record. He is paid through TSL.

12 Q. As a staff leasing company does, they have
13 employees in other locations?

14 MR. MULLIS: I object; leading the witness.

15 THE COURT: Let's get this cleared up. Go
16 ahead.

17 BY MR. MCCALL:

18 Q. TSL is a staff leasing company to your
19 knowledge?

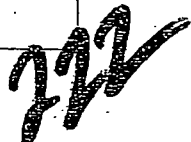
20 A. Yes, sir.

21 Q. And that staff leasing company is a company
22 used by WTI Transport?

23 A. Yes, sir.

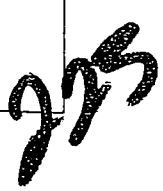
24 Q. And what do they use Mr. Leoni for in South
25 Carolina?

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1 A. Well, it was a business decision based on --
2 Q. What does it do?
3 A. Well, they provide the work comp coverage.
4 Q. But what does Leoni do?
5 A. Oh, what does he do? He is a customer
6 service representative.
7 Q. Okay.
8 A. He is a stationary employee. You know, he's
9 not a traveling employee, traveling throughout multiple
10 states. Rather, he is a stationary employee in South
11 Carolina.
12 Q. But he is a TSL employee?
13 A. He is a TSL employee.
14 Q. All right. Now, let me go back to -- you
15 were asked what the owners could do, WTI Transport and
16 Boyd Brothers. Let me ask you how they do operate. Does
17 WTI Transport, Inc. and Boyd Brothers, how do they
18 operate with respect to each other?
19 MR. MULLIS: He has not laid the foundation
20 for her telling us how these managers --
21 THE COURT: Mr. Mullis, I allowed you to go
22 through a series of probably eight or ten questions about
23 what they could do. I think it's fair game. Please
24 proceed.
25 THE WITNESS: I'm sorry.

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1 Carolina. Yes, sir.

2 Q. Do you have workers' comp coverage in South
3 Carolina?

4 A. Well, Boyd Brothers is self-insured in
5 Alabama, qualified self-insured in Alabama covering all
6 the over-the-road drivers.

7 Q. And you do not have any coverage in South
8 Carolina?

9 A. Boyd Brothers does not; no, sir.

10 Q. And WTI doesn't have any here?

11 A. No, sir.

12 Q. So Boyd Brothers, despite the fact they have
13 over four employees in South Carolina; they don't have
14 coverage here?

15 A. That's right. The over-the-road drivers are
16 fully covered under the self-insured plan in Alabama

17 MR. MULLIS: We have nothing further

18 THE COURT: Let me make sure I understand
19 the distinction here.

20 EXAMINATION

21 BY THE COURT:

22 Q. You don't have a policy in South Carolina,
23 but your self-insured coverage covers any injuries in
24 other states?

25 A. That's right. That is right. It covers --

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1 we are self-insured in Alabama and qualified self-insured
2 in Alabama. But it would cover any over-the-road-driver
3 injuries in any other state. We cover that.

4 Q. And you certainly cover any injuries that
5 would have occurred in Alabama?

6 A. Yes, sir.

7 THE COURT: Mr. McCall, anything further?

8 MR. MCCALL: No, nothing further.

9 THE COURT: Mr. Mullis?

10 CROSS EXAMINATION

11 BY MR. MULLIS:

12 Q. That coverage would be in Alabama?

13 A. Well, if an over-the-road driver is injured
14 in South Carolina or Georgia or wherever, they would fall
15 into our self-insured coverage. And they would be fully
16 covered by that.

17 Q. Under Alabama law in Alabama, correct?

18 A. Yes, sir. That's right.

19 Q. Okay. Thank you. No matter where the
20 accident happened?

21 A. Right.

22 THE COURT: Any other witnesses?

23 MR. MCCALL: No, that's all.

24 THE COURT: Any other witnesses to be heard
25 today?

PLEASE NOTE NEW ORDER SUBMISSION INSTRUCTIONS ON
PAGE 2

HEARING DATE: 11/18/11
WCC FILE NO.: 1022202

CLAIMANT: Joseph Mickle
EMPLOYER: Boyd Brothers Transportation
CARRIER: Lumbermens Underwriting Alliance

ATTORNEY(P): J. Marvin Mullis, Jr.
ATTORNEY(D): Duke K. McCall, Jr.

AWW: \$906.13 CR: \$604.12 MMI: 2/24/11

Period of TTD: - Return to Work: - DOI: 7/12/08

Extent of Disability: See below

COURT REPORTER:

Sara Quattlebaum
saraquattl@aol.com
803-356-7014

emailed on December 12, 2011

DIRECTIVES

Attorney Mullis, please draft the order consistent with the below findings and return to this office within 45 days:

1. Claimant is an employee of WTI Transport.
2. WTI is a wholly owned subsidiary of Boyd Brothers Transportation.
3. Defendant objection to claimant APA tab 10 & 11 is sustained.
4. Defendant objection to claimant APA tab 4-7 is overruled.
5. WTI did not regularly employ 4 or more employees in S.C.
6. While claimant was receiving benefits in Alabama (admitted claim), he now wishes to pursue permanency in South Carolina.
7. Boyd Brothers has coverage in S.C.
8. Boy Brothers is a statutory employer as contemplated in 42-1-400 and therefore responsible for benefits.
9. Claimant's injury is to his back with affect to both legs.
10. Claimant fails to meet his burden on Psyche.
11. FCE has placed claimant in a sedentary to light capacity.
12. Treating physicians limit claimant to sedentary capacity.

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13. Claimant is required to take significant prescription meds which prohibit him from driving a truck.
14. ATP's restrict him from driving trucks.
15. Most of claimant's work history involves driving trucks.
16. Claimant is 65 years of age with a high school education.
17. Vocational assessment of Robert Brabham concludes claimant is unable to perform any substantial gainful work activity.
18. Claimant is P&TD.
19. Claimant is entitled to lifetime causally related medical care.
20. Claimant is entitled to a lump sum payment with Utica Language within the body of the order.

INSTRUCTIONS: Please let our office know if you have difficulty obtaining a transcript or cannot complete the order within this timeframe. Draft the Order consistent with the above substance of the preceding Findings of Fact; however, you may add additional Findings of Fact consistent with the above ruling. The Order should also include biographical information, information regarding the Claimant's work history and previous medical history, if relevant to the case.

If you need a transcript, order it *immediately* from the court reporter listed above. Provide a copy of the proposed Order to opposing counsel or *pro se* claimant before or at the same time one is submitted to the Commission.

When submitting the proposed Order to the Commission, please **EMAIL** only, to abracy@wcc.sc.gov. The Commission is now going paperless and no longer needs hard copies of the proposed order unless the claimant is *pro se*.

Matters To Include In The Order:

1. APA Submissions
2. Stipulations
3. Statement of the Case (contentions of the parties, stated concisely)
4. Evidence of the Case (synopsis of the evidence, including testimony and medical reports)
5. Findings of Fact – numbered (Do NOT delete any of the above findings, however, the prevailing party may add to support the decision, except regarding credibility, unless I have instructed you to)
6. Conclusions of Law (cite applicable statutory sections and case law)
7. Award

Do not address credibility in the Order, unless it has been addressed in the preceding Order Notes.

Commissioner T. Scott Beck

2256a

BEFORE THE SOUTH CAROLINA
WORKERS' COMPENSATION COMMISSION

Joseph Mickle,)
Claimant,)
)
v.)
)
TSL, Ltd., Boyd Brothers)
Transportation, Inc.; WTI Transport,)
Employers,)
)
And)
Lumberman's Underwriting)
Alliance; Boyd Brothers)
Transportation, Inc., Carrier)
Carrier,)
Defendants)

BRIEF OF CLAIMANT-RESPONDENT

W.C.C. File No. 1022202

ISSUES PRESENTED ON APPEAL

- I. The Hearing Commissioner properly found that the Commission has jurisdiction over the claim upon correctly concluding that Boyd Brothers Transport, Inc. was Claimant's statutory employer under the Act.
- II. The Hearing Commissioner properly found that Claimant is totally and permanently disabled pursuant to Section 42-9-10 upon correctly concluding that where he is unable to perform any substantial gainful work activity as the result of the injuries to his back and legs.
- III. The Hearing Commissioner properly awarded a lump sum; however, the Order should be corrected and amended to include the correct credit to Appellants for prior payment of temporary benefits and to correct the calculations for the lump sum award.

STATEMENT OF THE CASE

By his July 1, 2011 Form 50, Claimant sought benefits for total and permanent disability resulting from injuries to his back and legs from an admitted work accident on July 12, 2010. On July 12, 2010, Claimant was pulling the tarp off the top of the load while he was in Vernon Alabama when he felt a pinch of pain in his back. Claimant recalled that at first he didn't think

too much about the pain in his back but that when he got ready to leave, there was no one there to pick up the tarp so that he and his co-worker had to pick up the tarp themselves and put it on the trailer. Claimant indicated that he reinjured his back picking up the tarp but that he kept going and he finished the trip; however, the next morning, Claimant was unable to get out of bed due to pain in his back and legs. Claimant reported the accident; the accident was admitted and the Defendants paid Claimant temporary benefits from July 12, 2010, until February 24, 2011.

The accident took place in Alabama and Claimant initially received benefits from Alabama; however, Claimant chose to pursue benefits for permanent disability in South Carolina, the state where he was hired, where he received medical care, and where he has lived for more than thirty years. Appellants, Boyd Brothers' Transportation, Inc., (Boyd Brothers) denied coverage for the claim in South Carolina, asserting that Claimant was actually employed by its wholly owned subsidiary, WTI Transport, Inc. (WTI). Boyd Brothers asserted that WTI had only three South Carolina employees.

An evidentiary hearing was held before Commissioner Scott T. Beck on November 18, 2011. On March 14, 2012, the Hearing Commissioner issued his Order finding that jurisdiction was proper before the Commission; that Claimant is entitled to a lump sum payment of benefits for his total and permanent disability resulting from the injuries to his back and legs; and that Claimant was entitled to lifetime medical care. Defendants appeal.

ARGUMENT

- I. The Hearing Commissioner properly found that the Commission has jurisdiction over the claim upon correctly concluding that Boyd Brothers was Claimant's statutory employer under the Act.

Claimant drove a flatbed truck in his work for WTI Transport, Inc., a Division of Boyd Brothers Transportation. Because the work activity Claimant engaged in for WTI, flatbed trucking, was part of the general trade, business, or occupation of the owner, Boyd Brothers, Commissioner Beck properly ruled that Claimant was a statutory employee of the owner pursuant to S.C. Code Section 42-1-400 (1985).

First, it should be recognized that Claimant's direct employer, WTI, is the wholly owned subsidiary of Boyd Brothers. Nevertheless, Boyd Brothers attempts to argue on brief, "It appears that the basis for the Hearing Commissioner's finding that the South Carolina Workers' Compensation Commission has jurisdiction in this case is that Boyd Brothers and WTI are subsidiaries." (Brief of Appellants p. 11). Boyd Brothers then wrongly suggests that there was no evidence as to any business relationship between the two companies. In fact, prior to the commencement of the hearing, a stipulation was entered into between the parties that WTI is a wholly owned subsidiary of Boyd Brothers. (Tr. p.6, line 23-p. 7, line 6; p. 9, lines 5-6).

The Hearing Commissioner actually indicated in his Order: "Defendants' objection to Claimant's APA Tab 11, comprised of information obtained from the companies' profiles on the internet and benefits forms provided by Boyd Brothers' Transportation, Inc. to Claimant, submitted for the purpose of showing that WTI, Transport, Inc. is Boyd Brothers' Transportation, Inc.'s subsidiary, was sustained in light of Defendants' stipulation that WTI Transport, Inc. is a wholly owned subsidiary of Boyd Brothers' Transportation, Inc." (Order at p.

4). Thus, as was undisputed before the Hearing Commissioner, these companies do not have a mere "business relationship" - - Boyd Brothers owns WTI outright.

Boyd Brothers conceded before the hearing Commissioner that the work of WTI and its employees, including Claimant, was flatbed trucking, i.e., the same work activity which is the trade, business, and occupation of Boyd Brothers. However, Boyd Brothers next argues, "It is completely irrelevant that WTI Transport and Boyd Brothers both happen to be in the flatbed trucking industry." (Brief of Appellants at 11). To the contrary, under the Act, the admitted fact that Boyd Brothers' subsidiary performs the same work performed by the parent company and its employees makes those working for WTI the statutory employees of Boyd Brothers as a matter of law.

The statutory employment doctrine depends upon the nature of the work being done.

South Carolina Code Section 42-1-400 (1985), specifically provides:

When any person, in this section and §§ 42-1-420 and 42-1-430 referred to as "owner," undertakes to perform or execute any work which is a part of his trade, business or occupation and contracts with any other person (in this section and § § 42-1-420 to 42-1-450 referred to as "subcontractor") for the execution or performance by or under such subcontractor of the whole or any part of the work undertaken by such owner, the owner shall be liable to pay to any workman employed in the work any compensation under this Title which he would have been liable to pay if the workman had been immediately employed by him.

As the Hearing Commissioner rightly found, under the plain meaning of the statute, where owner, Boyd Brothers, undertook to perform its work, the flatbed trucking of goods, i.e., the work which is its trade, business, and occupation, by having the employees of its subsidiary, WTI, perform flatbed trucking, Boyd Brothers is liable to pay to the workmen employed in the

work any compensation under this Title which it would have been liable to pay if the workman had been directly employed by Boyd Brothers.

The fact that the work being performed is the work of the owner is the basis for the Act's imposing liability on the owner. The point is that Boyd Brothers cannot avoid liability for benefits to the workers performing its flatbed trucking work by going through a subsidiary. The South Carolina Supreme Court has clearly explained that this is the purpose of the statute: "The rationale is to prevent owners and contractors from subcontracting out their work to avoid liability for injuries incurred in the course of employment." Glass v. Dow Chem. Co., 325 S.C. 198, 201 n.1, 482 S.E.2d 49, 50 n.1 (1997). In this case, because the employees of the subsidiary, WTL, perform flatbed trucking, and because flatbed trucking is the work of the owner, under the Act, the owner, Boyd Brothers, is the statutory employer of those employees who perform the owner's work through the subsidiary, WTL.

Boyd Brothers next wrongly argues that it is not Claimant's statutory employer because it did not contract directly with Claimant to perform work for Boyd Brothers. To the contrary, although coverage under the Act is generally dependent on the existence of an employer-employee relationship, the statutory employer doctrine set out in Section 42-1-400 (1985), provides an exception to this general rule by imposing on an owner, depending upon the nature of the work performed, liability for the payment of compensation benefits to a worker who is not directly employed by the owner. Thus, by statute, Boyd Brothers was properly determined to be Claimant's employer.

The statutory employment doctrine applies to cases involving a parent/subsidiary relation. In Poch v. Bayshore Concrete Products/South Carolina, Inc., 686 S.E.2d 689 (CtApp 2009), the South Carolina Court of Appeals found that the statutes and case law dealing with

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statutory employment in cases involving a contractor/subcontractor relationship would also apply to cases involving a parent/subsidiary relationship. The Court of Appeals found that Poch was directly employed by Bayshore SC, a wholly owned subsidiary of Bayshore Corp. and that Poch was a statutory employee of Bayshore Corp. because Poch's work activity was an essential part of Bayshore Corp's business.

There is no issue involving an independent contractor in this case; nevertheless, Boyd Brothers appears to confuse the doctrine of statutory employment with the question of control which arises in cases involving an independent contractor. Boyd Brothers argues that it was not properly found to be Claimant's statutory employer because it did not have the right to control the particular work or undertaking as to the manner or means of its accomplishment, citing S.C. Workers' Comp. Comm'n v. Ray Covington Realtors, Inc., 318 SC 546, 549, 459 S.E.2d 302, 303 (1995). Such an argument, wrongly attempting to rely upon the control test relevant to an independent contractor question to argue against statutory employment, has been soundly rejected by our Courts. Very recently, the South Carolina Court of Appeals in Collins v. Charlotte, 2012 WL 3323345, 3-4 (Ct.App.2012), agreed that the questions of control relevant to an independent contractor issue are not at all relevant to the question of statutory employment. The Collins Court explained, "Once the Commission determined Collins was an employee of Seko's subcontractor, West, which the parties in this case did not dispute, the Commission should have looked to whether Collins' activities were part of Seko's trade, business, or occupation. Thus, control is irrelevant to the question of statutory employment as a matter of law; the relevant question is as to the nature of the work being done and whether the work being done was part of the trade, business, and occupation of Boyd Brothers.

A three factor test is applied in determining whether the activity of an employee of a subcontractor is sufficient to make him a statutory employee within the meaning of § 42-1-400:

- (1) is the activity an important part of the owner's business or trade?;
- (2) is the activity a necessary, essential, and integral part of the owner's trade, business, or occupation?; or
- (3) has the identical activity previously been performed by the owner's employees?

Riden v. Kemet Elec. Corp., 313 S.C. 261, 437 S.E.2d 156 (Ct.App.1993); Smith v. T.H. Snipes and Sons, Inc., 306 S.C. 289, 411 S.E.2d 439 (1991)(listing the three factors of the statutory employee test). In Revels v. Hoechst Celanese Corp., the Court of Appeals found that the test to be used to determine if a worker is a statutory employee is "whether or not [the work] being done is or is not a part of the general trade, business or occupation of the owner." 301 S.C. 316, 318, 391 S.E.2d 731, 732 (Ct.App.1990).

Under our Act, the three factors are in the alternative so that, if the activity at issue meets even one of the three criteria, the worker qualifies as the statutory employee of the owner. Edens v. Bellini, 359 S.C. 433, 442-443, 597 S.E.2d 863, 868 (Ct.App. 2004); Olmstead v. Shakespeare, 354 S.C. 421, 581 S.E.2d 483 (2003). In this case, all three factors are met:

- (1) The activity is an important part of the owner's business or trade. Boyd Brothers is in the business of trucking. Likewise, WTI's business is trucking. Trucking is an important part of the business of Boyd Brothers and the success of the subsidiary is financially beneficial to the parent company;
- (2) The activity is a necessary, essential, and integral part of the owner's trade, business, or occupation. Flatbed trucking is a necessary, essential and integral part of the owner's trade, business or occupation in that Boyd Brothers is in the business of flatbed trucking.
- (3) The identical activity has previously been performed by the owner's employees. Boyd Brothers Transportation employs drivers to drive its flatbed trucks to deliver building materials - - this is precisely the same work activity Claimant performed for Boyd Brothers' wholly owned subsidiary, WTI.

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Appellants maintain that there is no evidence that Claimant was performing any work, trade or business of Boyd Brothers, nor is there any evidence that WTI was performing any work, trade or business of Boyd Brothers. To the contrary, it is undisputed that the work, trade or business of both Boyd Brothers and of WTI is the transportation of goods and materials by flatbed truck. It is also undisputed that this is precisely the work activity Claimant was performing at the time of his injury. Therefore, under all three criteria of the test for statutory employment under S.C. Code Ann. Section 42-1-400 (1985), Claimant was the statutory employee of the owner, Boyd Brothers Transportation.

Any doubts as to a worker's status should be resolved in favor of the claimant by including him under the Workers' Compensation Act rather than excluding him. Davis v. S.C. Dept. of Corrections, 289 S.C. 123, 345 S.E.2d 245 (1986); Ost v. Integrated Products, Inc. 296 S.C. 241, 248, 371 S.E.2d 796, 800 (1988); Riden, 313 S.C. at 263, 437 S.E.2d at 158; Edens, supra. While any doubt as to whether a claimant was a statutory employee must be resolved in favor of including the worker under the Act, here, there is no doubt that this Claimant was the statutory employee of Boyd Brothers. Therefore, as a matter of law, pursuant to S.C. Code Ann. Section 42-1-400 (1985), as applied by our Courts, the Hearing Commissioner correctly found that Claimant is covered under the Act as a statutory employee of Boyd Brothers. The Hearing Commissioner's decision should be affirmed.

- II. The Hearing Commissioner properly found that Claimant is totally and permanently disabled pursuant to Section 42-9-10 where he is unable to perform any substantial gainful work activity as the result of the injuries to his back and legs.

The general disability statute, 42-9-10, provides for benefits based on "incapacity for work." The disability is to be measured by the employee's capacity or incapacity to earn the wages which he was receiving at the time of his injury. Loss of earning capacity is the

criterion.” Keeter v. Clifton Manufacturing Co., 82 S.E.2d 520 (1954). “The whole philosophy of our Workers’ Compensation Act is to compensate for, or relieve from, the loss of employee’s capacity to earn...” Burnette v. Startex Mills, 193 S.C. 118, 10 S.E.2d 164 (1940). The term “disability” means incapacity because of injury to earn the wages which the employee was receiving at the time of injury in the same or any other employment. Under the traditional theory, the goal of worker’s compensation law is to compensate workers for reductions in their earning capacity caused by work-related injuries. Stephenson v. Rice Servs., Inc., 323 S.C. 113, 116, 473 S.E.2d 699, 700 (1996); Simmons v. City of Charleston, 349 S.C. 64, 73, 562 S.E.2d 476, 481 (Ct.App. 2002).

Under the Act “total disability” does not require complete, abject helplessness. Rather it is an inability to perform services other than those that are so limited in quality, dependability, or quantity that no reasonably stable market exists for them. Coleman v. Quality Concrete Products, Inc., 245 S.C. 625, 142 S.E.2d 43 (1965); McCollum v. Singer Co., 300 S.C. 103, 107, 386 S.E.2d 471, 474 (Ct.App. 1989). An injured worker is properly found totally disabled where he is “disabled to perform common labor and could not obtain employment as such, and he was not qualified by training or experience for any other.” Colvin v. E.I. Dupont De Nemours, 227 S.C. 465, 88 S.E.2d 581 (1955).

Here, the experts are unanimous in indicating that Claimant is not and will not be able to return to his prior work as a heavy truck driver. In fact, the doctors have all opined that his physical condition precludes him from performing anything more strenuous than sedentary work. However, as established by the evidence and confirmed by the vocational opinion, Claimant is not qualified by training or experience to obtain or perform a desk job. Claimant has never earned wages in a sedentary position; he has no experience working in an office or with a

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computer. (Claimant's APA, p. 4). In addition, he is precluded from performing sedentary work by his physical limitations and by the effects of his prescription medications. As opined by the Vocational Expert, Claimant is unable to perform any substantial gainful work activity which exists in South Carolina or the national economy. Directly as a result of his on-the-job injuries, the only services he could perform are "so limited in quality, dependability or quantity that no reasonably stable market for them exists" (Claimant's APA, p. 10).

Employees who because of a work-related injury can perform only limited tasks for which no reasonably stable market exists are considered totally disabled notwithstanding their nominal earning capacity. Stephenson v. Rice Services, Inc., *supra*. "The criterion of the right of Claimant to compensation under the Act is this: Has his injury lessened his earning capacity and deprived him in whole or in part of the power to obtain employment?" Manning v. Gossett Mills, 192 S.C. 262, 6 S.E.2d 256 (1939). In Claimant's case, the answer to this question is indisputably, "Yes." Claimant's injury has destroyed his earning capacity. Claimant cannot return to the strenuous truck driving he had performed for over thirty-five years and through which he had earned wages throughout his entire working life. Claimant's vocationally relevant work experience, as performed, was limited to heavy physical labor. Claimant's prior work required walking, standing, sitting, bending, and heavy to very heavy lifting, pushing and pulling. Prior to the admitted work injury, Claimant was able to earn wages by performing this heavy physical work.

Claimant is unqualified to obtain or perform a desk job. Claimant's injuries and condition further preclude sedentary work due to the fact that Claimant is unable to sit for long periods and also due to the effects of his prescribed medications. Therefore, as the result of his work accident, Claimant is no longer able to perform manual labor. In addition, Claimant is not

qualified or able to perform sedentary work. Claimant is a high school graduate, having obtained his diploma in 1963. Claimant agreed that pulling flatbeds was basically the work he had done during his working life of over thirty-five years. (Tr. p. 45, lines 20-22).

Claimant indicated that he drove a flatbed truck and that his work as a truck driver required him to do heavy manual labor tasks, including strapping down or tarping the loads. Claimant explained that this process required the driver to chain the load down, throw and pull chains, tarp them and untarp them, and that this was heavy work. Claimant further indicated that lifting the tarps weighing from 50 to some 150 pounds was heavy work. Claimant testified that 85% of the work of a truck driver is driving over the road and that that is a lot of hard work. He explained that just getting in the truck requires climbing, pulling, and twisting in order to sit in the driver's seat. Claimant described the physical demands of driving an 18-wheeler: "Well, for one, when you're climbing, you've got to pull, twist, sit. There's a lot of bumping and twisting and bending, looking at your -- trying to look in your mirror and stuff like that. It's a lot of physical work. Shifting gears, you've got to use your clutch all the time, braking, all that affects you. And it bothers your back a lot." (Tr. p. 50, lines 15-24). When asked how rough was the ride in a flatbed truck compared to a regular pickup truck or a car, Claimant responded, "It ain't even close." He explained, "It's very much different. The ride is just like riding in a wagon compared to a car. That's the way they ride....It's very rough." (Tr. p. 51, lines 13-17).

After the accident, it took Claimant approximately three hours to make the 100 miles home to South Carolina. He testified that he kept driving slowly, with stops to rest, in order to try to make it home. Since the injury, Claimant has not been able to drive trucks. He testified that he would love to be able to go back to work and that he would be working if he could, but that his physical condition would not allow him to perform physical labor. (Tr. p. 30, line 10-p.

31, line 3). Claimant reviewed his over thirty five year history as a heavy truck driver, concluding, "That's all I really ever done was drove trucks." (Tr. p. 23, lines 19-20; p. 33, lines, 17-22). Claimant indicated that even getting in and out of a truck is very difficult for him since his accident. However, Claimant testified that, even if he *were* able to get in, he knew that he could not drive a truck. (Tr. p. 40). Claimant indicated that he had tried to see what he could do by riding along with a friend driving a Peterbilt truck in the hopes that he would be able to do it. However, Claimant reported that after riding in the Peterbilt, he did not think he was going to make it back home due to the pain. (Tr. p. 30, lines 12-16). Thus, the only work this Claimant had performed over the last approximately thirty-five years was heavy flatbed truck driving, but he is now unable to drive or even ride in a flatbed truck given the condition of his back.

Claimant indicated that Hydrocodone and Oxycodone are prescribed for his pain but that the drugs make him drowsy so that he could not safely drive a truck under the influence of his medications. (Tr. p. 31, lines 19-21). Further, Claimant confirmed that the Department of Transportation would not allow him to drive commercially because he must take these medications. (Tr. p. 47). Claimant indicated that he had followed the advice of his doctors and that he was no longer working as a truck driver.

Claimant indicated that his back was painful and that his leg was going numb just from sitting in the witness chair to testify at the hearing. He explained that the bottom of his feet feels like pins sticking when he walks and that his back hurts him every day. Claimant indicated that his legs are numb 90 percent of the day and that that keeps him from walking. Claimant indicated that he has to take a pill to even try to do anything. Claimant's doctor recommended that he use a cane for balance and he uses the cane every day. (Tr. p. 40, lines 1-4).

The medical evidence submitted amply confirms the Hearing Commissioner's finding that Claimant is permanently and totally disabled by the injuries to his back and legs. Claimant was referred to Midlands Orthopedics. On August 25, 2010, Dr. Fowble noted that Claimant had pain radiating to both legs with numbness. On September 15, 2010, Dr. Fowble opined, "I don't think he can drive a large truck because of the vibration of this will irritate the facet joints." On November 24, 2010, Dr. Fowble noted that Claimant complained of constant radiation to the right leg with intermittent radiation to the left leg. Dr. Fowble diagnosed facet arthropathy at L4-5 on the right and he indicated that Claimant had failed multiple conservative modalities, including therapy, medications, and injections. Dr. Fowble noted Claimant's lower back pain with radiation and that the brace gave Claimant a lot of help while walking but that it did not seem to help him much while sitting. Dr. Fowble noted that Claimant's pain was constant. (Claimant's APA, p. 28).

On February 24, 2011, Dr. Ivan LaMotta noted complaints of low back pain since July 12, 2010. Dr. LaMotta noted that the constant lower back pain radiated down both legs, the right worse than the left, particularly when sitting or driving. Dr. LaMotta noted that physical therapy and epidural steroid injections had been tried without any significant relief of symptoms and that Claimant's pain was rated at a 7/10 for the back and 4/10 for the legs. Dr. LaMotta noted Claimant's stiffness, severe night-time pain, difficulty walking, fatigue, muscle weakness, and joint pain. Dr. LaMotta opined that Claimant's quality of life and ability to function had been significantly affected by his pain and that the pain increased with standing, bending, twisting, sitting, walking, coughing and sneezing. Dr. LaMotta noted that Claimant's lumbar range of motion was severely limited. Dr. LaMotta opined that based on the functional capacity evaluation, Claimant would be able to perform nothing more strenuous than sedentary work. Dr.

LaMotta indicated that Claimant was not a surgical candidate and that he had reached maximum medical improvement with a whole person impairment of 8% translating into an 11% regional impairment to the lumbar spine. (Claimant's APA pp. 14-20).

Claimant's physical therapist noted increased pain in Claimant's back and legs with standing and sitting, along with stiffness and limited flexion, continuous numbness in his legs, and difficulty walking, sitting or carrying. The therapist noted that Claimant is unable to sit long, that standing, sitting, and walking make his legs numb, and that his right leg feels like it will give out on him. (Claimant's APA, pp. 50-56). Claimant's family doctor noted that Claimant's pain radiated down both legs and that he was unable to do any significant activity due to back pain. Dr. Prashad noted decreased flexion in the back and that Claimant had an abnormal gait due to back pain. (Claimant's APA, pp. 77-82).

Claimant was seen by Dr. Steven Poletti for an IME. On August 30, 2011, Dr. Poletti observed, "I'm in agreement that his work restriction status would be sedentary. I would ascribe him impairment secondary to back pain and leg pain. I do think that he does have nerve compression. That is the nature of lateral recess stenosis and is the result of the facet arthropathy." Dr. Poletti assigned a ten percent permanent medical impairment for radiculopathy and an additional five percent impairment to the legs as the result of bilateral nerve root compression into his exit foramen. (Claimant's APA p. 12).

Claimant was evaluated by vocational expert, Dr. Robert E. Brabham, PhD, MRC, CRC. On September 9, 2011, Dr. Brabham noted, "his limitations on sitting and standing are such that vocationally even any sedentary work, which might otherwise have been suggested, is precluded. Vocationally, any work requires some combination of sitting, standing and/or walking for a full 8-hour workday, without the need to rest for prolonged periods of time, something he is unable

to do in his present condition. Furthermore, any such jobs would require that he be able to use his back, buttocks, hips, and bilateral lower extremities repetitively and continuously while meeting minimal productions standard...he would not be able to sustain any repetitive activity for an eight-hour basis, day after day, in his present condition..." (Claimant's APA, p. 10). Dr. Brabham opined, "He is unable to perform any substantial gainful work activity which exists in the South Carolina or the national economy. Directly as a result of his on-the-job injuries, the only services he could perform are so limited in quality, dependability or quantity that no reasonably stable market for them exists" (Claimant's APA, p. 10).

Lynn Ingram Colley is the Human Resources Director for Boyd Brothers Transportation, Inc. and she does the adjusting for Boyd Brothers and WTI's workers' compensation claims. Ms. Colley agreed that almost all the medical benefits Claimant was provided after his accident were from medical providers in South Carolina. Ms. Colley agreed that, according to the medical evidence, Claimant can now do only very light work which would not include driving a truck. Ms. Colley confirmed that Claimant would not be able to work for WTI or Boyd Brothers in light of his medical restrictions. (Tr. p. 70, lines 10-16).

Commissioner Beck found that Claimant is unable to perform any substantial gainful work activity and, therefore, that he is permanently and totally disabled as a result of his injuries to multiple body parts under §42-9-10. In making his disability determination, the Commissioner found that Claimant's work history was in manual labor - - almost exclusively in truck driving, but that the authorized treating physicians have restricted Claimant from driving trucks. The Commissioner found that Claimant is sixty-six (66) years of age with a high school education and that the Functional Capacity Evaluation (FCE) and Claimant's treating physicians limit him to no more than sedentary to a very light work capacity. The Commissioner found that Claimant is required to take significant prescription medications

which prohibit him from driving a truck and which would also substantially limit his ability to perform any other form of work. The Commissioner noted the results of the vocational assessment conducted by Vocational Expert, Dr. Robert Brabham, which concluded that Claimant is unable to perform any substantial gainful work activity.

Boyd Brothers argues that the Hearing Commissioner erred in not limiting his finding of disability so as to equal the percentage of permanent medical impairment assigned by the doctors. To the contrary, as a matter of law, "the degree of loss of use can in no way be limited to the percentage of medical impairment established by the medical testimony." Lyles v. Quantum Chemical Co. (Emery), 434 S.E.2d 292 (Ct.App. 1993). The Hearing Commissioner was not required, or even permitted, to judge loss of use or disability on the basis of Claimant's permanent medical impairment standing alone. Instead, it is well established under Workers' Compensation practice and as a matter of law that a finding of loss of use does not depend on the medical impairment rating percentage. Professor Larson observes, "As to issues touching disability...the fact-finders may find disability when the medical testimony denies its existence or may find a degree of disability different from any degree supported by medical testimony." 3 A. Larson, The Law of Workmen's Compensation §79.52(c) n. 33 (1983), quoted in Cropf v. Pantry, Inc., 344 S.E.2d-879 (Ct. App. 1986).

Boyd Brothers incorrectly argues that the Hearing Commissioner erred in finding that Claimant's medical impairment and resulting disability are permanent. To the contrary, the authorized treating physicians and the IME physician, Dr. Poletti, all agree that Claimant had reached maximum medical improvement. Dr. LaMotta opined that Claimant is not a surgical candidate and that he had reached maximum medical improvement as of February 24, 2011. (Claimant's APA p. 15). Thus, the authorized treating physicians have opined that Claimant is not a surgical candidate while the IME doctor, Dr. Poletti, suggested only that Claimant might

undergo an open procedure "as a last ditch effort" to control his pain "if the pain was bad enough that he couldn't live with it." However, Dr. Poletti did not indicate that such an effort, even if successful, would return to Claimant the ability to perform manual labor. (Claimant's APA, p. 12). Dr. Poletti opined that Claimant will continue to require pain management, epidural steroid injections, and continued pain medications in the future. (Claimant's APA, p. 12). Dr. Poletti indicated that, in his opinion, Claimant may be a candidate for retirement." (Claimant's APA, p. 12). Vocational expert, Dr. Brabham, opined, "...he must be expected to permanently remain unable to engage in full-time gainful, competitive employment as a result of his medical conditions..." (Claimant's APA, p. 9).

Thus, the overwhelming evidence supports the Commissioner's finding of total and permanent disability. Claimant is a classic example of a manual laborer who is no longer able to perform manual labor and who has neither the education nor training to perform any other job. Under these circumstances, the finding of total disability was required under the Act and the Hearing Commissioner's order should be affirmed.

III. The Hearing Commissioner properly awarded a lump sum payment; however, the Order should be corrected and amended to include the correct credit to Defendants for prior payment of temporary benefits and to correct the calculations for the lump sum award.

The Commissioner's decision to award a lump sum was unquestionably in the best interest of Claimant. Claimant's earnings were cut by a third as of the date of accident and his temporary benefits were stopped as of February 24, 2011, some eight months before the Hearing, resulting in predictable financial problems. (Order at p. 7; Tr. p. 25; Claimant's APA, p. 2). However, Appellants argue that the Hearing Commissioner erred in awarding a lump sum payment on the basis that the Commissioner was required to order periodic payments in the

absence of proof that this was an extraordinary case so as to justify a lump sum award. To the contrary, as of 1983, payment of benefits by lump sum is covered by S.C. Code Ann. § 42-9-301.

Under the prior statute, § 42-9-300, periodic payments were the standard and lump sum payments were required to be justified by exceptional and unusual circumstances. However, while the former statute did require that a lump sum be justified by and awarded only in unusual or exceptional circumstances, those requirements were deleted from the new statute. Section 42-9-301 provides for the lump sum payment of a disability compensation award "when the Employee so requests and the Commission deems it not to be contrary to the best interest of the Employee/Employer." Hooks vs. Southern Bell Tel. and Tel. Co., 291 SC 41, 351 SE 2d 900, 902 (Ct. App. 1986). The new statute further changed the standard of review so that the burden of proving that a lump sum was an abuse of discretion is on the party opposing the lump sum.

Before ordering a lump sum, the Commission must give the employer and carrier an opportunity to be heard on the issue. Todd v. Holt & Vereen Const. Co., 276 S.C. 615, 616, 281 S.E.2d 215, 216 (1981). Here, at the outset of the hearing, Commissioner Beck reviewed the positions of the parties, including Claimant's request for a lump sum and the fact that Appellants opposed the lump sum requested. Counsel for Appellants agreed that Boyd Brothers and WTI "oppose lump sum payment and assert that Claimant is not totally and permanently disabled." (Tr. p. 11, lines 19-22). However, Appellants did not expand on the bare objection and particularly made no argument that the lump sum requested would constitute an abuse of discretion. Thus, Appellants were given the opportunity to be heard, yet they raised no further objection or complaint. Without question, Appellants failed to carry the burden of proving that the lump sum award was an abuse of discretion which the statute explicitly places upon them.

Where Appellants did not argue and have not shown that the Commissioner's award of a lump sum was an abuse of discretion; the decision to award a lump sum should be affirmed.

However, Claimant does agree that the award of a single commissioner is not a final adjudication of a claim, unless both parties are satisfied, and unless neither of them asks for a review by the Full Commission. Riddle v. Fairforest Finishing Co., 198 S.C. 419, 424, 18 S.E.2d 341, 343 (1942). Here, the Panel should amend the Order to correct an error in the calculations.

Defendants had initially paid temporary total disability benefits to Claimant from the date of accident, July 12, 2010, until February 24, 2011. (Tr. p. 25, lines 7-11). Unfortunately, the order instructions forwarded to counsel on December 12, 2011, contained a typographical error which mistakenly indicated that Claimant's date of injury was 7/12/08. (Copy attached). Therefore, in performing the calculations for the lump sum award pursuant to Utica Mohawk, Counsel for Claimant's bookkeeper relied on the mistaken "7/12/08" date of accident and, therefore, performed his calculations by giving Defendants credit for payment of temporary total disability benefits from 7/12/08 until February 23, 2011, for a total credit of 136 weeks. Of course, it is undisputed that Defendants actually paid Claimant temporary benefits from the actual date of accident, July 12, 2010, until February 24, 2011, for a total credit of only 32 weeks. Thus, the Order signed by the Hearing Commissioner incorrectly calculated the lump sum award and incorrectly gave Defendants credit for payment of 136 weeks of benefits where they had actually paid only 32 weeks of temporary total benefits.

Claimant requests the Panel to correct the error and the award as follows: Subtracting the actual number of weeks paid, 32, from 500 weeks = 468 weeks remaining. The remaining indemnity, 468 weeks, reduced to current value = 386.4458 weeks. The 386.4458 weeks X the

compensation rate of \$ 604.12 = \$ 233,459.63. Therefore, Finding of Fact No. 7 on page 17 of the Order should be corrected and amended to read:

That the proceeds of the award will be allocated and disbursed under Utica Mohawk Mills v. Orr 227 S.C. 226, 87 S.E.2d 589 (1955), resulting in a weekly distribution to the Claimant of \$ 183.35 per week or a monthly entitlement of \$ 794.50 per month commencing upon execution of this Order and continuing for the rest of his life (See page 15 paragraph No. 8 for details).

The Utica Mohawk language in Conclusion of Law No. 8 on page 15 of the Order should be corrected and amended to read:

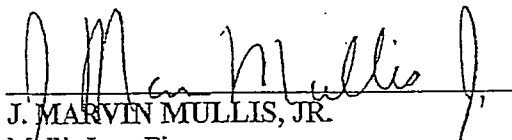
"It is ordered by the Commission that the proceeds of this Order of Two Hundred and Thirty-Three Thousand Four Hundred and Fifty-Nine and 63/100ths (\$ 233,459.63) Dollars shall be allocated as follows: Seventy-Seven Thousand Eight Hundred and Nineteen and 88/100ths (\$ 77,819.88) Dollars as attorney fees [one third (1/3)]; at least Two Thousand Three Hundred Thirty-Three and 57/100ths (\$ 2,333.57) Dollars for litigation costs; resulting in a Net to the Claimant of One Hundred Fifty-Three Thousand Three Hundred and Six and 18/100ths (\$ 153,306.18) Dollars. This amount shall be allocated and paid to the Claimant under Section 42-9-10 and Section 42-9-20 of the 1976 Code of Laws of South Carolina as interpreted by the Supreme Court decision of Utica Mohawk Mills v. Orr, 227 S. C. 226, 87 S.E. 2d 593 (1955); Sciarotta v. Bowen, 837 F. 2d 135; Lemire v. Secretary of Health and Human Services, 682 F. Supp 102 (D.C.N.H.1988) and Hatch v. Heckler , 626 F. Supp. 1367 (N.D. California 1986). The Claimant's life expectancy under S. C. Code Section 19-1-150 is 16.08 years (a Sixty-Six year old male). This therefore results in a weekly distribution to the Claimant of \$ 183.35 [\$ 153,306.18 divided by the life expectancy in weeks of 836.16 weeks (16.08 years times 52 weeks per year)] or a monthly entitlement of \$ 794.50 [\$ 153,306.18 divided by the life expectancy in months of 192.96 months (16.08 years times 12 months per year)] commencing upon the execution and approval of this Order and continuing for the rest of his life."

CONCLUSION

The Hearing Commissioner correctly determined as a matter of law that Boyd Brothers is Claimant's statutory employer under S.C. Code Ann. Section 42-1-400 (1985), and that the Commission properly has jurisdiction over this claim. The Commissioner further correctly

found that Claimant is a manual laborer who is no longer able to perform manual labor and who has neither the education nor training to perform any other job. The Commissioner's finding that Claimant is permanently and totally disabled as the result of the injuries to his back and legs so that the only services he can perform are so limited in quality, dependability or quantity that no reasonably stable market for them exists is overwhelmingly supported by the expert medical and vocational evidence submitted. Finally, the award, the Utica Mohawk language, and calculations should be corrected and amended to give Defendants credit only for the 32 weeks of temporary total disability benefits actually paid to Claimant.

Respectfully submitted,



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COUNSEL FOR CLAIMANT-RESPONDENT

August 22, 2012

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BEFORE THE SOUTH CAROLINA WORKERS'
COMPENSATION COMMISSION

WCC File No: 1022202

Joseph Mickle,

Claimant/Respondent

v.

WTI Transport, Inc., Boyd Brothers
Transportation, Inc. and TSL, Ltd.

Alleged Employers,

And

Lumberman's Underwriting
Alliance,

Carrier,

Defendants/Appellants

BRIEF OF DEFENDANTS WTI TRANSPORT,
INC. AND BOYD BROTHERS TRANSPORTATION, INC.

Duke K. McCall, Jr.
Smith Moore Leatherwood, LLC
300 East McBee Ave., P.O. Box 87
Greenville, S.C. 29602-0087
(864) 242-6440

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ISSUES PRESENTED ON APPEAL

- I. Does the South Carolina Workers' Compensation Commission Have Jurisdiction Where Claimant's Employer Is Exempt from The Workers' Compensation Act and/or Claimant Does Not Qualify as a Statutory Employee of Boyd Brothers.
- II. Is Claimant Entitled to 500 Weeks' Worth of Benefits and Lifetime Medical Care Where There Is No Showing of Evidence That He Is Either Totally or Permanently Disabled?
- III. Did the Hearing Commissioner error in his calculations of the amount of any lump sum Award that the Claimant may be entitled to assuming that South Carolina has jurisdiction in this matter?

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STATEMENT OF THE CASE

This is a Workers' Compensation Appeal arising out of the injuries sustained by Claimant/Respondent Joseph Mickle when he was removing a tarp from the load on his flatbed truck on July 12, 2010, in Vernon, Alabama. (Order at 6.) At the time of this injury, Claimant Mickle drove a flatbed truck for Defendant/Appellant WTI Transport, Inc. ("WTI Transport"). (Order at 5.)

Claimant was hired by WTI Transport in 2002 as an owner/operator. (Order at 4.) On April 19, 2010, Claimant became a full-time, regular employee of WTI Transport. (Order at 5.) After injuring his back in July 2010, Claimant reported his injury to WTI Transport, who paid him temporary benefits from July 12, 2010 until February 24, 2011 under the Alabama Workers' Compensation Act. (Order at 6.) On July 1, 2011, Claimant sought benefits for total and permanent disability resulting from the injury to his back and legs. (Order at 3.) Though his injury occurred in Alabama and he received his temporary total weekly benefits in Alabama, he now seeks benefits for personal disability in South Carolina. (Order at 3.)

Appellants WTI Transport and Boyd Brothers Transportation, Inc. ("Boyd Brothers") have taken the position that Claimant was employed by Appellant WTI Transport, and because WTI Transport does not regularly employ four or more employees in South Carolina, the South Carolina Workers' Compensation Commission ("Commission") does not have jurisdiction over this case. (Order at 3.) Further, Appellants disputed the assertion that Claimant is totally and permanently disabled, arguing that he is entitled to an award for only partial disability. (Order at 3-4.) In this appeal the Appellants take the position that there is no evidence to support the monetary Award of the Hearing Commissioner. A hearing was held in this matter before Commissioner T. Scott Beck on November 18, 2011, in Columbia, South Carolina. (Order at 1.)

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dated March 14, 2012, the Hearing Commissioner ruled that the Commission had jurisdiction in the proceeding pursuant to §§ 42-3-180 and 42-1-400 of the South Carolina Code and that Claimant is totally and permanently disabled as a result of the injury to his back and legs. (Order at 14-15.) Appellants have taken this appeal before the Appellate Panel of the Full Commission of the Workers' Compensation Commission.

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STANDARD OF REVIEW

The Full Commission has broad discretion to make its own findings of fact and conclusions of law in a case on appeal, as indicated by South Carolina Code § 42-17-50:

If an application for review is made to the Commission within fourteen days from the date when notice of the award shall have been given, the Commission shall review the award and, if good grounds be shown therefor, reconsider the evidence, receive further evidence, rehear the parties or their representatives and, if proper, amend the award.

S.C. CODE ANN. § 42-17-50.

Our Supreme Court has "construe[d] the statute to empower the full Commission to make its own findings of fact and to reach its own conclusions of law consistent with or inconsistent with those of the Hearing Commissioner." Green v. Raybestos-Manhattan, Inc., 250 S.C. 58, 64, 156 S.E.2d 318, 321 (1967); see also, Lowe v. Am-Can Transp. Servs., Inc., 283 S.C. 534, 537, 324 S.E.2d 87, 89 (1984) ("[T]he Commission may make its own findings of fact and reach its own conclusions of law either consistent or inconsistent with those of the hearing commissioner."). This is true, even as to the credibility of the parties. In fact, "[i]n workers' compensation cases, the Full Commission is the ultimate fact finder. The final determination of witness credibility and the weight to be accorded evidence is reserved to the Full Commission." Shealy v. Aiken County, 341 S.C. 448, 455, 535 S.E.2d 438, 442 (2000) (internal citations omitted). The award of a single commissioner is not a final adjudication of a claim, unless both parties are satisfied therewith, and unless neither of them asks for a review by the Full Commission. Riddle v. Fairforest Finishing Co., 198 S.C. 419, 424, 18 S.E.2d 341, 343 (1942). For these reasons, it is fully within the province of the Full Commission to reach its own conclusions in this case.

ARGUMENT

I. The South Carolina Workers' Compensation Commission Is Without Jurisdiction Because WTI Transport Did Not Regularly Employ Four or More Employees in South Carolina and/or Claimant Does Not Qualify as a Statutory Employee of Boyd Brothers.

1. WTI Transport Did Not Regularly Employ Four or More Employees in South Carolina at the Time of Claimant's Injury, Thus Claimant Is Not a Covered Employee Authorized to File a Worker's Compensation Claim, and the Commission Lacked Jurisdiction to Hear This Claim.

The Commission is without jurisdiction because WTI Transport did not regularly employ four or more employees in South Carolina at the time of Claimant's injury. (See Order at 2, 12.) Section 42-15-10 of the South Carolina Code conditions an employee's right to file a claim under the Workers' Compensation Act on the employee being "covered" by the Act. Nolan v. Nat'l Sales Co., 292 S.C. 1, 3-4, 354 S.E.2d 575, 577 (Ct. App. 1987), aff'd, 294 S.C. 371, 364 S.E.2d 752 (1988). Sections 42-1-50 and 42-1-360 of the Act exempt employers with fewer than four employees from coverage under the Act, and the Commission has no jurisdiction to hear any claims asserted against such employers. See Harding v. Plumley, 329 S.C. 580, 584, 496 S.E.2d 29, 31 (Ct. App. 1998) (stating that whether an employer regularly employs the requisite number of employees to be subject to the Act is a jurisdictional issue). Thus, where an employer does not regularly employ four or more employees in South Carolina, the employer is exempt from the Act, its employees are not covered by the Act, and they are therefore "not authorized to file a claim at all." Nolan, 292 S.C. at 4, 354 S.E.2d at 577.

To be authorized to file a worker's compensation claim, Claimant is required to show that he was an "employee covered by the provisions of [the Act]." § 42-15-10. This means that he first has to show that his employer, WTI Transport, was subject to the Act's provisions. The parties stipulated and the Single Commissioner held that WTI Transport did not regularly have

four or more employees in the state of South Carolina, (Order at 2, 12), thus WTI Transport is exempt from the Act's provisions, see § 42-1-360, and the Commission has no jurisdiction to hear any claims asserted against it. Claimant is employed by an exempt employer, thus he is not an employee "covered by the provisions" of the Act, and he was not authorized to file a worker's compensation claim. See Nolan, 292 S.C. at 3-4, 354 S.E.2d at 577 ("Unless the employee is 'covered by the provisions' of South Carolina's Workers' Compensation Act, he is not authorized to file a claim at all."). Claimant was an employee of WTI Transport at the time of his injury, and WTI Transport was exempt from the Act's provisions, thus the Act did not cover Claimant and the Commission lacked jurisdiction to hear his claim. See id. ("[T]his state's Workers' Compensation Act did not cover [Claimant] because [the employer] regularly employed less than four employees in South Carolina.").

2. Claimant Was Not a Statutory Employee of Boyd Brothers, Thus Claimant Was Not a Covered Employee Authorized to File a Worker's Compensation Claim, and the Commission Lacked Jurisdiction to Hear This Claim.

The Single Commissioner held that Claimant was a statutory employee of Boyd Brothers under § 42-1-400 of the Workers' Compensation Act and that because Boyd Brothers has more than four employees in South Carolina the Commission has jurisdiction in this proceeding. (Order at 14-15.) Appellants maintain that there is no jurisdiction. The consideration of the facts of this case mandates a holding that Claimant was not a statutory employee of Boyd Brothers.

South Carolina Code § 42-1-400 states:

When any person . . . referred to as 'owner,' undertakes to perform or execute any work which is a part of his trade, business or occupation and contracts with any other person . . . for the execution . . . of the whole or any part of the work undertaken by such owner, the owner shall be liable to pay to any workman employed in the work any compensation under this Title which he would have been liable to pay if the workman had been immediately employed by him.

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§ 42-1-400. Known as the Statutory Employer Doctrine, this provision states that employees of a subcontractor are statutory employees of a general contractor when the work they perform constitutes a part of the trade or business of the general contractor. See Marchbanks v. Duke Power Co., 190 S.C. 336, 362-63, 2 S.E.2d 825, 836 (1939). The determination of whether a worker is a statutory employee is jurisdictional, thus the question on appeal is one of law. Harrell v. Pineland Plantation, Ltd., 337 S.C. 313, 320, 523 S.E.2d 766, 769 (1999).

Three tests are applied to determine whether an employee's activity is sufficient to make him a statutory employee within the meaning of § 42-1-400: (1) Is the activity an important part of the owner's business or trade; (2) Is the activity a necessary, essential, and integral part of the owner's trade, business, or occupation; and (3) Has the identical activity previously been performed by the owner's employees? See Ost v. Integrated Prods., Inc., 296 S.C. 241, 245-47, 371 S.E.2d 796, 799 (1988); Edens v. Bellini, 359 S.C. 433, 442-43, 597 S.E.2d 863, 868 (Ct. App. 2004). If any one of these tests is satisfied, the injured worker is considered the statutory employee of the owner. Voss v. Ramco, Inc., 325 S.C. 560, 568, 482 S.E.2d 582, 586 (Ct. App. 1997). Whether an individual is a statutory employee is generally resolved by determining whether the alleged employer has the "right and authority to control and direct [the] particular work or undertaking, as to the manner or means of its accomplishment." Id. (citing S.C. Workers' Comp. Comm'n v. Ray Covington Realtors, Inc., 318 S.C. 546, 549, 459 S.E.2d 302, 303 (1995)).¹ For example, where the employer exerted almost complete control over the claimant, had the ability to terminate the claimant, and directed where the claimant would work,

¹ Voss was decided in the context of an independent contractor relationship. See Voss, 325 S.C. at 568, 482 S.E.2d at 586. However, cases decided in the context of a contractor/subcontractor relationship between the two employers are equally applicable to cases involving a parent/subsidiary relationship. See Poch v. Bayshore Concrete Prods., 386 S.C. 13, 29, 686 S.E.2d 689, 698 (Ct. App. 2009).

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how he engaged in sales of machinery, and to whom he could make his sales, the claimant was a statutory employee of the employer. Id. at 567-68, 482 S.E.2d at 586.

Because Claimant argues that WTI Transport's employees should be counted as statutory employees of Boyd Brothers, the relevant inquiry concerns the nature of WTI Transport's relationship with Boyd Brothers and the nature of the activities performed by WTI Transport's employees. See id. at 568, 482 S.E.2d at 586. An examination of the record will show that there is no evidence that the activity performed by Claimant is an important part of the Boyd Brothers' business or trade, that it is a necessary, essential, or integral part of Boyd Brothers' trade, business, or occupation, or that Claimant was performing said activity in furtherance of Boyd Brothers' business interests.

The record reveals that Claimant's activities as a flatbed truck driver are not a necessary or important part of Boyd Brothers' business or trade. Lynn Ingram Colley, the Human Resources Director for Boyd Brothers, (Tr. 59:16-18), testified that Boyd Brothers and WTI Transport operate as two separate and distinct entities, (Tr. 60:3-4). Each company has its own president, recruiting department, fleet managers, pricing schemes, and dispatchers. (Tr. 60:5-18.) WTI Transport maintains its own fleet of trucks, (Tr. 60:9-10; 65:3-6), has its own clients, (Tr. 60:12), and handles its own bookkeeping; (Tr. 64:23-65:2). This evidence makes clear that no work done by WTI Transport's employees benefits Boyd Brothers' business or trade.

Though Claimant testified that he considered himself to work for "WTI/Boyd Brothers," (Tr. 37:6-8), the remainder of the record shows that he is, at best, confused about the relationship between the two companies. He acknowledged that his paychecks came from only WTI Transport, not from Boyd Brothers, (Tr. 33:23-25; see Tr. 64:14-65:2), that he was dispatched by only WTI Transport, (Tr. 48:11-13), and that he drove for only WTI Transport, not for anyone

else, (Tr. 48:8-10). In fact, he explicitly testified that he did not know the nature of the relationship between WTI Transport and Boyd Brothers. (Tr. 50:4-7.)

The only evidence in the record of a business relationship between the two companies regards Boyd Brothers' administration of WTI Transport's employees' insurance claims. (See Tr. 35:7-36:22 (explaining that Claimant's insurance cards say "Boyd Care").) While Appellants acknowledge that Boyd Brothers administers WTI Transport's insurance benefits, the record shows that WTI Transport pays for these services and Boyd Brothers is merely providing an administrative service. (See Tr. 61:15-21.) That WTI Transport pays Boyd Brothers to administer its insurance plan does not show that Claimant's truck driving for WTI Transport constituted a necessary, essential, or integral part of Boyd Brothers' business.

Although both WTI Transport and Boyd Brothers are flatbed truck carriers, (Tr. 73:3-6), there is no evidence in the record that activities identical to those performed by Claimant have been performed by Boyd Brothers' employees, that Claimant was retained by Boyd Brothers to perform those activities, or that those activities were performed in furtherance of Boyd Brothers' business interests. This case is distinguishable from Smith v. T.H. Snipes & Sons, Inc., 306 S.C. 289, 290, 411 S.E.2d 439, 439 (1991), where the South Carolina Supreme Court held that the decedent employee was a statutory employee of the defendant, because the employee in that case was *hired by the defendant* to do work which was an essential part of the defendant's business. Similarly, in Woodard v. Westvaco Corp., 315 S.C. 329, 338, 433 S.E.2d 890, 895 (Ct. App. 1993) (overruled on other grounds), the employee was held to be a statutory employee of the defendant because the employee's firm was *hired by the defendant* to perform work that is a necessary part of the defendant's business.

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Flatbed truck driving may be a part of Boyd Brothers' business, but the instant case is distinguishable from cases like Smith and Woodward because there is *no evidence* that Boyd Brothers hired Claimant or WTI Transport to drive a truck for them. Further, unlike in Voss, there is no evidence that Boyd Brothers controlled or directed Claimant's work, had the ability to terminate him, or directed where and when he would work. See Voss, 325 S.C. 567-68, 482 S.E.2d at 586. In fact, all evidence in the record is to the contrary. Claimant testified that he was not dispatched by Boyd Brothers, did not drive for Boyd Brothers, and was not paid by Boyd Brothers. (See Tr. 33:23-25, Tr. 48:8-13 (explaining that Claimant's checks came from only WTI Transport, he was dispatched by only WTI Transport, and he drove for only WTI Transport).)

It is completely irrelevant that WTI Transport and Boyd Brothers both happen to be in the flatbed trucking industry. Claimant did not perform any activity that was an important part of Boyd Brothers' business or necessary, essential, or integral to Boyd Brothers' interests because none of his activities as an employee of WTI Transport benefitted Boyd Brothers' business interests. Though Boyd Brothers may have employees who perform the same work as Claimant—an assumption which has no evidentiary support in the record—Claimant was not a statutory employee of Boyd Brothers because he was not hired to perform any work for them. None of the three tests that qualify a worker as a statutory employee is satisfied, thus Claimant is not a statutory employee of Boyd Brothers, and the South Carolina Workers' Compensation Commission cannot rely on Boyd Brothers' coverage under the Workers' Compensation Act to derive jurisdiction in this case.

It appears that the basis for the Hearing Commissioner's finding that South Carolina Workers' Compensation Commission has jurisdiction in this case is that Boyd Brothers and WTI

are subsidiaries. Other than the testimony of Lynn Colley, HR Director of Boyd Brothers, that both companies have the same owners, there is no evidence as to any business relationship between the two companies other than Boyd Brothers being paid to adjust the workers' compensation and medical claims of WTI Transport, Inc. As mentioned above, the Claimant testified he was hired by WTI Transport, Inc., he drove for WTI Transport, Inc., was dispatched by WTI Transport, Inc. and was working for WTI Transport, Inc. at the time of his injury. There is no testimony that the Claimant was performing part of the trade, business or occupation of Boyd Brothers. Just because the two companies are subsidiaries does not make one the statutory employer of the other. There is no case law, without more evidence, that support this holding. Therefore, the finding that South Carolina has jurisdiction in this case is error.

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II. Claimant Has Not Introduced Substantial Evidence That He Made "Reasonable Efforts" to Obtain Other Employment, That His Injury Prevents Him from Working in Any Capacity, or That His Doctors Determined Him to Be Incapable of Working, Thus Claimant Has Failed to Show That He Is Permanently or Totally Disabled, and He is Not Entitled to 500 Weeks' Worth of Benefits or Lifetime Medical Care.

1. The Claimant Has Failed to Prove That He Is Incapable of Performing Any Meaningful, Gainful Work, Thus He Has Failed to Show That He Is Totally and Permanently Disabled.

In South Carolina, workers' compensation is not awarded for the physical injury as such, but for the "disability" produced by such injury. Outlaw v. Johnson Serv. Co., 254 S.C. 486, 489, 176 S.E.2d 152, 154 (1970). The disability is to be measured by the employee's capacity or incapacity to earn the wages he was receiving at the time of his injury. Id.; see also § 42-1-120. Thus, if an award is made under § 42-9-10 for total disability, there must be substantial evidence that the Claimant's "incapacity for work resulting from [the] injury is total." "The fact that after the injury the employee has not worked and has therefore earned no wages is not in itself determinative of the extent of loss of his earning capacity." Shealy, 250 S.C. at 112, 156 S.E.2d at 649. Loss of earning capacity is the criterion: Id.

The only way to show total loss of earning capacity is to prove the inability to work as a result of the injury. See id. at 113, 156 S.E.2d at 649. The mere fact that Claimant may experience some pain or difficulty performing further work does not equate with a lack of earning capacity. See id. at 112, 156 S.E.2d at 649. "There is no recognition of the elements of pain and suffering, or of increased discomfort and difficulty in performing the work, as long as there is no diminution in earning capacity." Id.; see Ingle v. Mills, 204 S.C. 505, 513, 30 S.E.2d 301, 304 (1944) ("The object of the Workmen's Compensation Act is to compensate for, or to relieve from, the loss or impairment of an employee's capacity to earn . . . and not to indemnify

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for any physical ailment or impairment as such . . . and to exclude from allowable elements of compensation everything except diminution of earning power.").

As an initial matter, the burden of proving the inability to work can be met only by evidence that the claimant has made reasonable efforts to obtain employment and failed because of an injury-induced handicap. Shealy, 250 S.C. at 113, 156 S.E.2d at 649; see also Coleman v. Quality Concrete Prods., Inc., 245 S.C. 625, 631, 142 S.E.2d 43, 45 (1965) ("Whenever claimant depends in part on a showing that he has been unable to get work because of his physical condition it naturally follows that claimant must prove that he has made reasonable efforts to secure employment."). Though Claimant testified that he attempted to ride in a truck and had great difficulty doing so, (Tr. 40: 5-15), he has not introduced a scintilla of evidence that he has made "reasonable efforts" to find work in another capacity or that his injury prevents him from doing so. His doctors have determined that he is capable of sedentary work, (Claimant's APA 2:11, 3:16, 5:32), yet he has elected to do nothing. Personal reluctance to return to work and pain or difficulty in performing work are insufficient to justify a finding of total and permanent disability. See Shealy, 250 S.C. at 113, 156 S.E.2d at 650.

In addition to failing to show that he has attempted to return to work but has been unable to do so, Claimant fails to show that any medical doctor has determined him to be totally and permanently disabled. The medical evidence in the record uniformly shows that Claimant has a 10-11% regional impairment to the lumbar spine. (Claimant's APA 2:11, 3:14.) The Functional Capacity Evaluation, as well as three of Claimant's own doctors, placed Claimant in the "sedentary to light work" capacity. (Order at 13; Claimant's APA 2:11, 3:16, 5:32.) The vocational psychologist concluded that Claimant is unable to perform any gainful work activity, but he is a licensed psychologist, not a medical doctor, who evaluated Claimant's psychological

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ability to return to work, not his physical ability to do so. (See Claimant's APA 1:10.) All three of the medical doctors who made determinations as to Claimant's work restrictions concluded that he is able to perform sedentary work. (Claimant's APA 2:11, 3:16, 5:32.)

Should the Full Commission give more weight to the report by the vocational psychologist than to those by Claimant's medical doctors and conclude that Claimant is currently unable to perform any gainful work activity, there is still no evidence in the Psychological and Vocational Evaluation—or anywhere else in the record—that Claimant's disability is permanent. Claimant may currently be taking "significant prescription medications which prohibit him from driving a truck," (Order at 13), but there is no evidence to support Claimant's proposition that these prescriptions are permanent or that the medications prevent him from performing any other form of work. As his doctors specifically noted, Claimant is capable of doing sedentary work (Claimant's APA 2:11, 3:16, 5:32.) Dr. Poletti even laid out several treatments that Claimant could pursue in the future should his back condition fail to improve. (Claimant's APA 2:12.) Because Claimant did not introduce evidence that he has made "reasonable efforts" to obtain other employment, much less that his injury prevented him from working or that his doctors determined him to be incapable of working, Claimant has not shown that he is permanently or totally disabled, and he is not entitled to 500 weeks' worth of benefits or lifetime medical care pursuant to § 42-9-10 of the Workers' Compensation Act.

2. The Commissioner Erred When He Awarded Claimant Benefits for a Period of 500 Weeks Because Claimant Is Not Permanently or Totally Disabled.

Because Claimant is not permanently or totally disabled, the Single Commissioner miscalculated his award. As discussed above, Claimant has not produced any evidence that he is permanently or totally disabled. Pursuant to § 42-9-20 of the South Carolina Code, when the incapacity for work resulting from a work-related injury is partial, the employer shall pay

benefits for a period not to exceed 340 weeks from the date of injury. For loss of use of the back in cases where the loss of use is 49% or less, including the instant case where the impairment is 10-11%, the claimant is entitled to benefits for a pro-rated period of 300 weeks. § 42-9-30(21). Claimants who suffered a back injury are presumed to have a permanent and total disability, thereby entitling them to benefits for a period of 500 weeks, only if there is 50% or more loss of use of their back. *Id.* Because Claimant suffered only a 10-11% impairment to his back, (Claimant's APA 2:11, 3:14), the Single Commissioner erred when he determined that Claimant is entitled to benefits for a period of 500 weeks plus lifetime medical care.

3. The Commissioner Erred When He Awarded Claimant His Payment in a Lump Sum Because Claimant Has Not Met His Burden of Proving That This Is an Extraordinary Case Justifying Payment in a Lump Sum Rather Than in Installments.

"It is ... settled that one of the obvious primary purposes of the Act was to prevent injured employees and those lawfully dependent upon them for support from becoming charges upon society and the public generally for support." *Flemon v. Dickert-Keowee, Inc.*, 259 S.C. 99, 104, 190 S.E.2d 751, 753-54 (1972). To that end, § 42-9-220 of the South Carolina Code lays out the manner in which compensation shall be paid, and it contains a presumption that benefits will be paid periodically, not in a lump sum. "A careful examination of this statute reveals a primary purpose and general scheme to pay compensation at intervals corresponding to the time the employee would have received his wages had he not been injured." *Ashley v. Ware Shoals Mfg. Co.*, 210 S.C. 273, 280, 42 S.E.2d 390, 393 (1947).

The reasoning for this presumption in favor of periodic payments to injured workers is "grounded in the underlying principle of workmen's compensation: the protection of income. Experience has taught that this income-protection is best accomplished through periodic payments." 29 S.C. L. Rev. 12 (1977); see also Ashley, 210 S.C. at 280, 42 S.E.2d at 393 ("The

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purpose of this method is to prevent an imprudent employee or dependent from wasting the means for his support and thereby becoming a burden upon society.”). Often, “the lump sum is soon dissipated and the worker is right back where he or she would have been if workers’ compensation had never existed.” Larson’s Worker’s Compensation Law, § 132.07[1]. To prevent this all-too-often occurrence, workers’ compensation benefits should be administered in weekly or monthly sums except in “those exceptional cases in which it can be demonstrated that the purpose of the Act will best be served by a lump-sum award.” Id.

The South Carolina Supreme Court has construed the statute “as permitting acceleration or commutation of weekly compensation only in unusual cases,” as the state legislature “intended that periodical payments should be the rule and lump sum settlements the exception.” Ashley, 210 S.C. at 280, 42 S.E.2d at 393. In a lump-sum benefits case, the burden of proving facts to justify such an award rests on the claimants. Woods v. Sumter Stress-Crete, Inc., 266 S.C.245, 248, 222 S.E.2d 760, 761 (1976). In the instant case, Claimant simply has not shown that his is an appropriate case that would justify the payment of a lump sum. Indeed, Claimant has introduced no evidence supporting an application for lump-sum benefits, thus there is no evidence to support a finding that his is an “extraordinary” case justifying the payment of benefits in a lump sum, and Claimant has failed to meet his burden of proof. As there is no evidence in the record or Order sufficient to overcome the statutory presumption in favor of “periodic” payments, see § 42-9-220, the award of lump sum benefits must be reversed, see, 29 S.C. L. Rev. 13 (1977).

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III. Did the Hearing Commissioner error in his calculations of the amount of any lump sum Award that the Claimant may be entitled to assuming that South Carolina has jurisdiction in this matter?

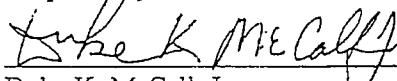
There is no evidence of the amount of weekly temporary total benefits paid weekly to the Claimant under the Alabama Workers' Compensation Act. Without a finding of the amount of weekly benefits that the Claimant has already been paid under the Alabama Act, or some evidence submitted to established the number of weeks paid and the amount of benefits paid to the Claimant, the figures in the Hearing Commissioner's Award are without merit. Therefore, without any evidence of the amount of benefits paid and the number of weeks paid under the Alabama Act, the Award of a specific amount of monies to the Claimant by the Hearing Commissioner must be based upon surmise, speculation and conjecture.

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CONCLUSION

WHEREFORE, for the foregoing reasons, Appellants request that the Appellate Panel of the Full Commission find: (1) that South Carolina does not have jurisdiction to hear this case because the Claimant's employer does not have four or more employees in the State at the time the Claimant was injured; (2) that Claimant is neither permanently nor totally disabled and thus does not qualify for 500 weeks' worth of benefits or lifetime medical care; (3) that Claimant's award, if any, should be limited to a percentage of disability to his back because he is not permanently or totally disabled; and (4) that the monetary award, assuming jurisdiction and total disability without conceding these issues, should be reversed since there is no evidence to support the monetary calculations of the Hearing Commissioner. Therefore, the Award of the Hearing Commissioner should be reversed.

Respectfully submitted,



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June 13, 2012

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THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM THE SOUTH CAROLINA
WORKERS COMPENSATION COMMISSION

Appellate Case No. 2013-001212

Joseph Mickle

Appellant Respondent

Boyd Brothers Transportation, Inc.
Employer and Lumbermans
Underwriting Alliance, Carrier

Respondents Appellants

FINAL BRIEF OF RESPONDENTS-APPELLANTS
BOYD BROTHERS TRANSPORTATION, INC. EMPLOYER AND
LUMBERMANS UNDERWRITING ALLIANCE, CARRIER

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ISSUES PRESENTED ON APPEAL

- I. Did the South Carolina Workers' Compensation Commission Have Jurisdiction Where Appellant-Respondent's Employer Is Exempt from The Workers' Compensation Act and/or Appellant-Respondent Did Not Qualify as a Statutory Employee of Boyd Brothers..
- II. Whether the Appellant-Respondent is entitled to 500 Weeks' Worth of Benefits and Lifetime Medical Care Where There Is No Substantial Evidence That He was Either Totally or Permanently Disabled?
- III. Whether the Appellate Panel of the South Carolina Workers' Compensation Commission committed error in adopting the Hearing Commissioner's calculations of the amount of any lump sum Award that the Appellant-Respondent may be entitled to assuming that South Carolina has jurisdiction in this matter?

STATEMENT OF THE CASE

This is a Workers' Compensation Appeal arising out of the injuries sustained by Appellant-Respondent, Joseph Mickle, when he was removing a tarp from the load on his flatbed truck on July 12, 2010, in Vernon, Alabama. (R. p. 17) At the time of this injury, Appellant-Respondent Mickle drove a flatbed truck for WTI Transport, Inc. ("WTI Transport"). (R. p. 16)

Appellant-Respondent was hired by WTI Transport in 2002 as an owner/operator. (R. p. 15) On April 19, 2010, Appellant-Respondent became a full-time, regular employee of WTI Transport. (R. p. 16) After injuring his back in July 2010, Appellant-Respondent reported his injury to WTI Transport, who paid him temporary benefits from July 12, 2010 until February 24, 2011 under the Alabama Workers' Compensation Act. (R. p. 17) On July 1, 2011, Appellant-Respondent sought benefits for total and permanent disability resulting from the injury to his back and legs. (R. p. 14) Though his injury occurred in Alabama and he received his temporary total weekly benefits in Alabama, Appellant-Respondent now seeks benefits for personal disability in South Carolina. (R. p. 14)

WTI Transport and Respondent-Appellant, Boyd Brothers Transportation, Inc. ("Boyd Brothers") have taken the position that Appellant-Respondent was employed by WTI Transport, and because WTI Transport does not regularly employ four or more employees in South Carolina, the South Carolina Workers' Compensation Commission ("Commission") does not have jurisdiction over this case. (R. p. 14) Further, Respondent-Appellants disputed the assertion that Appellant-Respondent is totally and permanently disabled, arguing that he is entitled to an award for only partial disability. (R. pp. 14-15) In this appeal, the Respondents-Appellants take

the position that there is no evidence to support the monetary Award of the Hearing Commissioner which was adopted by the Appellate Panel. A hearing was held in this matter on November 18, 2011, in Columbia, South Carolina. (R. p. 12) In an Order dated March 14, 2012, the Hearing Commissioner ruled that the Commission had jurisdiction in the proceeding pursuant to §§ 42-3-180 and 42-1-400 of the South Carolina Code and that Appellant-Respondent is totally and permanently disabled as a result of the injury to his back and legs. (R. pp. 25-26) Respondents-Appellants appealed to the Appellate Panel of the Full Commission of the Workers' Compensation Commission which affirmed the Hearing Commissioner in its Order of May 14, 2013. Respondents-Appellants now take an Appeal from the Appellate Panel Order.

STANDARD OF REVIEW

“The South Carolina Administrative Procedures Act governs judicial review of a decision of the workers’ compensation commission.” Lark v. Bi-Lo, Inc., 276 S.C. 130, 134, 276 S.E.2d 304, 306 (1982); Bass v. Isochem, 365 S.C. 454, 467, 617 S.E.2d 369, 376 (Ct. App. 2005) cert. dismissed as improvidently granted Aug. 2007; Hargrove v. Titan Textile Co., 360 S.C. 276, 288, 599 S.E.2d 604, 610 (Ct. App. 2004). Pursuant to the APA, an appellate Court’s review is limited to deciding whether the Appellate Panel’s decision is unsupported by substantial evidence or is controlled by some error of law. Grant v. Grant Textiles, 372 S.C. 196, 200, 641 S.E.2d 869, 871 (2007); S.C. Code Ann. Section 1-23-380(A)(5) (Supp. 2006).

1. Substantial Evidence Standard

The judicial review of the Appellate Panel’s factual findings is governed by the substantial evidence standard. Gadson v. Mikasa Corp., 368 S.C. 214, 221, 628 S.E.2d 262, 266 (Ct. App. 2006); Frame v. Resort Servs., Inc., 357 S.C. 520, 527, 593 S.E.2d 491, 494 (Ct. App. 2004); Corbin v. Kohler Co., 351 S.C. 613, 617, 571 S.E.2d 92, 94-95 (Ct. App. 2002); Lockridge v. Santens of America, Inc., 344 S.C. 511, 515, 544 S.E.2d 842, 844 (Ct. App. 2001). The Appellate Panel’s decision must be affirmed if supported by substantial evidence in the record. Shuler v. Gregory Elec., 366 S.C. 435, 440, 622 S.E.2d 569, 571 (Ct. App. 2005) (citing Sharpe v. Case Produce, Inc., 366 S.C. 154, 160, 519 S.E.2d 102, 105 (1999)). A reviewing court may not substitute its judgment for the judgment of the agency as to the weight of the evidence on questions of fact. S.C. Code Ann. Section 1-23-380(A)(5)(d)(e)(Supp. 2006); see, also, Hall v. United Rentals, Inc., 371 S.C. 69, 77, 636 S.E.2d 876, 881 (Ct. App. 2006). However, a reviewing court may reverse or modify a decision of the Appellate Panel if the

findings, inferences, conclusions, or decisions of them are "clearly erroneous in view of the reliable, probative and substantial evidence on the whole record." S.C. Code Ann. Section 1-23-380(A)(5)(e)(Supp. 2006); Bass v Kenco Group, 366 S.C. 450, 457, 622 S.E.2d 577, 580 (Ct. App. 2005); Bursey v. S.C. Dep't of Health & Env'tl. Control, 360 S.C. 135, 141, 600 S.E.2d 80, 84 (Ct. App. 2004) *aff'd*, 369 S.C. 176, 631 S.E.2d 899 (2006).

It is not within the appellate court's province to reverse the Appellate Panel's factual findings if they are supported by substantial evidence. Etheredge v. Monsanto Co., 349 S.C. 451, 454, 562 S.E.2d 679, 681 (Ct. App. 2002) (citing Hoxit v. Michelin Tire Corp., 304 S.C. 461, 405 S.E.2d 407 (1991)); Muir v. C.R. Bard, Inc., 366 S.C. 266, 282, 519 S.E.2d 583, 591 (Ct. App. 1999). Substantial evidence is not a mere scintilla of evidence, nor the evidence viewed blindly from one side of the case, but is evidence which, considering the record as a whole, would allow reasonable minds to reach the conclusion the administrative agency reached in order to justify its action. Pratt v. Morris Roofing, Inc., 357 S.C. 619, 622, 594 S.E.2d 272, 274 (2004); Jones v. Georgia-Pacific Corp., 355 S.C. 413, 417, 586 S.E.2d 111, 113 (2003); Brown v. Greenwood Mills, Inc., 366 S.C. 379, 392, 622 S.E.2d 546, 554 (Ct. App. 2005) *cert. denied* Jan. 2007; Broughton v. South of the Border, 336 S.C. 488, 495, 520 S.E.2d 634, 637 (Ct. App. 1999). The possibility of drawing two inconsistent conclusions from the evidence does not prevent an administrative agency's findings from being supported by substantial evidence. Sharpe, 366 S.C. at 160, 519 S.E.2d at 105; Smith v. NCCI Inc., 369 S.C. 236, 247, 631 S.E.2d 268, 274 (Ct. App. 2006); DuRant v. S.C. Dep't of Health & Env'tl. Control, 361 S.C. 416, 420, 604 S.E.2d 704, 707 (Ct. App. 2004).

The Appellate Panel is the ultimate fact finder in Workers' Compensation cases and is not bound by the single commissioner's findings of fact. Bass v. Isochem, 365 S.C. at 468, 617 S.E.2d at 376; Frame, 357 S.C. at 528, 593 S.E.2d 495; Muir, 336 S.C. at 281, 519 S.E.2d at 591. The final determination of witness credibility and the weight assigned to the evidence is reserved to the Appellate Panel. Shealy v. Aiken County, 341 S.C. 448, 455, 535 S.E.2d 438, 442 (2000); Frame, 357 S.C. at 528, 593 S.E.2d 495. Where there are conflicts in the evidence over a factual issue, the findings of the Appellate Panel are inconclusive. Brown, 366 S.C. at 393, 622 S.E.2d at 554; Etheredge, 349 S.C. at 455, 562 S.E.2d at 681; see also Mullinax v. Winn Dixie Stores, Inc., 318 S.C. 431, 435, 458 S.E.2d 76, 78 (Ct. App. 1995) ("Where the medical evidence conflicts, the findings of fact of the [Appellate Panel] are conclusive.").

The findings of the Appellate Panel are presumed correct and will be set aside only if unsupported by substantial evidence. Bass v. Kenco Group, 366 S.C. at 458, 622 S.E.2d at 581; Frame, 357 S.C. at 528, 593 S.E.2d 495; Broughton, 336 S.C. at 496, 520 S.E.2d at 637. The appellate court is prohibited from overturning findings of fact of the Appellate Panel unless there is no reasonable probability the facts could be as related by the witness upon whose testimony the finding was based. Liberty Mut. Ins. Co. v. South Carolina Second Injury Fund, 363 S.C. 612, 621, 611 S.E.2d 297 (Ct. App. 2005) cert. denied July 2007; Hargrove, 360 S.C. at 290, 599 S.E.2d at 611; Etheredge, 349 S.C. at 455-56, 562 S.E.2d at 681. The Appellate Panel's factual findings will normally be upheld; however, such a finding may not be based upon surmise, conjecture, or speculation, but must be founded on evidence of sufficient substance to afford a reasonable basis for it. Tiller v. Nat'l Health Care Ctr. of Sumter, 334 S.C. 333, 339, 513 S.E.2d

843, 845 (1999); Muir, 336 S.C. at 282, 519 S.E.2d at 591; Sharpe v. Case Produce Co., 329 S.C.534, 543, 495 S.E.2d 790, 794 (Ct. App. 1997) rev'd on other grounds.

ARGUMENT

I. Whether the South Carolina Workers' Compensation Commission was Without Jurisdiction Because WTI Transport Did Not Regularly Employ Four or More Employees in South Carolina and/or Appellant-Respondent Did Not Qualify as a Statutory Employee of Boyd Brothers.

1. WTI Transport Did Not Regularly Employ Four or More Employees in South Carolina at the Time of Claimant's Injury, Thus Appellant-Respondent Is Not a Covered Employee Authorized to File a Worker's Compensation Claim, and the Commission Lacked Jurisdiction to Hear This Claim.

The Commission is without jurisdiction because WTI Transport did not regularly employ four or more employees in South Carolina at the time of Appellant-Respondent's injury. (See, R. pp. 13, 23.) Section 42-15-10 of the South Carolina Code conditions an employee's right to file a claim under the Workers' Compensation Act on the employee being "covered" by the Act. Nolan v. Nat'l Sales Co., 292 S.C. 1, 3-4, 354 S.E.2d 575, 577 (Ct. App. 1987), aff'd, 294 S.C. 371, 364 S.E.2d 752 (1988). Sections 42-1-50 and 42-1-360 of the Act exempt employers with fewer than four employees from coverage under the Act, and the Commission has no jurisdiction to hear any claims asserted against such employers. See, Harding v. Plumley, 329 S.C. 580, 584, 496 S.E.2d 29, 31 (Ct. App. 1998) (stating that whether an employer regularly employs the requisite number of employees to be subject to the Act is a jurisdictional issue). Thus, where an

employer does not regularly employ four or more employees in South Carolina, the employer is exempt from the Act, its employees are not covered by the Act, and they are therefore “not authorized to file a claim at all.” Nolan, 292 S.C. at 4, 354 S.E.2d at 577.

To be authorized to file a worker’s compensation claim, Appellant-Respondent is required to show that he was an “employee covered by the provisions of [the Act].” § 42-15-10. This means that he first has to show that his employer, WTI Transport, was subject to the Act’s provisions. The parties stipulated and the Single Commissioner held that WTI Transport did not regularly have four or more employees in the state of South Carolina, (R. pp. 13, 23), thus WTI Transport is exempt from the Act’s provisions, see § 42-1-360, and the Commission has no jurisdiction to hear any claims asserted against it. Appellant-Respondent is employed by an exempt employer, thus he is not an employee “covered by the provisions” of the Act, and he was not authorized to file a worker’s compensation claim. See Nolan, 292 S.C. at 3-4, 354 S.E.2d at 577 (“Unless the employee is ‘covered by the provisions’ of South Carolina’s Workers’ Compensation Act, he is not authorized to file a claim at all.”). Appellant-Respondent was an employee of WTI Transport at the time of his injury, and WTI Transport was exempt from the Act’s provisions, thus the Act did not cover Appellant-Respondent and the Commission lacked jurisdiction to hear his claim. See id. (“[T]his state’s Workers’ Compensation Act did not cover [Claimant] because [the employer] regularly employed less than four employees in South Carolina.”).

2. Appellant-Respondent Was Not a Statutory Employee of Boyd Brothers, Thus Appellant-Respondent Was Not a Covered Employee Authorized to File a Worker's Compensation Claim, and the Commission Lacked Jurisdiction to Hear This Claim.

The Single Commissioner held that Respondent/Appellant was a statutory employee of Boyd Brothers under § 42-1-400 of the Workers' Compensation Act and that because Boyd Brothers has more than four employees in South Carolina the Commission has jurisdiction in this proceeding. (R. pp. 25-26) Respondents-Appellants maintain that there is no jurisdiction. The consideration of the facts of this case mandates a holding that Appellant-Respondent was not a statutory employee of Boyd Brothers.

South Carolina Code § 42-1-400 states:

When any person . . . referred to as 'owner,' undertakes to perform or execute any work which is a part of his trade, business or occupation and contracts with any other person . . . for the execution . . . of the whole or any part of the work undertaken by such owner, the owner shall be liable to pay to any workman

employed in the work any compensation under this Title which he would have been liable to pay if the workman had been immediately employed by him. § 42-1-400.

Known as the Statutory Employer Doctrine, this provision states that employees of a subcontractor are statutory employees of a general contractor when the work they perform constitutes a part of the trade or business of the general contractor. See Marchbanks v. Duke Power Co., 190 S.C. 336, 362-63, 2 S.E.2d 825, 836 (1939). The determination of whether a worker is a statutory employee is jurisdictional, thus the question on appeal is one of law. Harrell v. Pineland Plantation, Ltd., 337 S.C. 313, 320, 523 S.E.2d 766, 769 (1999).

Three tests are applied to determine whether an employee's activity is sufficient to make him a statutory employee within the meaning of § 42-1-400: (1) Is the activity an important part of the owner's business or trade; (2) Is the activity a necessary, essential, and integral part of the owner's trade, business, or occupation; and (3) Has the identical activity previously been performed by the owner's employees? See Ost v. Integrated Prods., Inc., 296 S.C. 241, 245-47, 371 S.E.2d 796, 799 (1988); Edens v. Bellini, 359 S.C. 433, 442-43, 597 S.E.2d 863, 868 (Ct. App. 2004). If any one of these tests is satisfied, the injured worker is considered the statutory employee of the owner. Voss v. Ramco, Inc., 325 S.C. 560, 568, 482 S.E.2d 582, 586 (Ct. App. 1997). Whether an individual is a statutory employee is generally resolved by determining whether the alleged employer has the "right and authority to control and direct [the] particular work or undertaking, as to the manner or means of its accomplishment." Id. (citing S.C. Workers' Comp. Comm'n v. Ray Covington Realtors, Inc., 318 S.C. 546, 549, 459 S.E.2d 302, 303 (1995)).¹ For example, where the employer exerted almost complete control over the Claimant, had the ability to terminate the claimant, and directed where the claimant would work, how he engaged in sales of machinery, and to whom he could make his sales, the claimant was a statutory employee of the employer. Id. at 567-68, 482 S.E.2d at 586.

Because Appellant-Respondent argues that WTI Transport's employees should be counted as statutory employees of Boyd Brothers, the relevant inquiry concerns the nature of WTI Transport's relationship with Boyd Brothers and the nature of the activities performed by WTI Transport's employees. See id. at 568, 482 S.E.2d at 586. An examination of the record will show that there is no evidence that the activity performed by Appellant-Respondent is an

¹ Voss was decided in the context of an independent contractor relationship. See Voss, 325 S.C. at 568, 482 S.E.2d at 586. However, cases decided in the context of a contractor/subcontractor relationship between the two employers are equally applicable to cases involving a parent/subsidiary relationship. See Poch v. Bayshore Concrete Prods., 386 S.C. 13, 29, 686 S.E.2d 689, 698 (Ct. App. 2009).

important part of the Boyd Brothers' business or trade, that it is a necessary, essential, or integral part of Boyd Brothers' trade, business, or occupation, or that Respondent/Appellant was performing said activity in furtherance Boyd Brothers' business interests.

The record reveals that Appellant-Respondent's activities as a flatbed truck driver are not a necessary or important part of Boyd Brothers' business or trade. Lynn Ingram Colley, the Human Resources Director for Boyd Brothers, (R. p. 202, lines 16-18), testified that Boyd Brothers and WTI Transport operate as two separate and distinct entities, (R. p. 203, lines 3-4). Each company has its own president, recruiting department, fleet managers, pricing schemes, and dispatchers. (R. p. 203, lines 5-18) WTI Transport maintains its own fleet of trucks, (R. p. 203, lines 9-10; R. p. 208, lines 3-6), has its own clients, (R. p. 203, line 12), and handles its own bookkeeping, (R. p. 207, line 23 – p. 208, line 2). This evidence makes clear that no work done by WTI Transport's employees benefits Boyd Brothers' business or trade.

Though Appellant-Respondent testified that he considered himself to work for "WTI/Boyd Brothers," (R. p. 180, lines 6-8), the remainder of the record shows that he is, at best, confused about the relationship between the two companies. He acknowledged that his paychecks came from only WTI Transport, not from Boyd Brothers, (R. p. 176, lines 23-25; see, R. p. 207, line 14 – p. 208, line 2), that he was dispatched by only WTI Transport, (R. p. 191, lines 11-13), and that he drove for only WTI Transport, not for anyone else, (R. p. 191, lines 8-10). In fact, he explicitly testified that he did not know the nature of the relationship between WTI Transport and Boyd Brothers. (R. p. 193, lines 4-7)

The only evidence in the record of a business relationship between the two companies regards Boyd Brothers' administration of WTI Transport's employees' insurance claims. (See R. p. 178, line 7 – R. p. 179, line 22) (explaining that Appellant-Respondent's insurance cards say "Boyd Care").) While Appellants acknowledge that Boyd Brothers administers WTI Transport's insurance benefits, the record shows that WTI Transport pays for these services and Boyd Brothers is merely providing an administrative service. (See, R. p. 204, lines 5-21) That WTI Transport pays Boyd Brothers to administer its insurance plan does not show that Appellant-Respondent's truck driving for WTI Transport constituted a necessary, essential, or integral part of Boyd Brothers' business.

Although both WTI Transport and Boyd Brothers are flatbed truck carriers, (R. p. 215, lines 3-6), there is no evidence in the record that activities identical to those performed by Appellant-Respondent have been performed by Boyd Brothers' employees, that Appellant-Respondent was retained by Boyd Brothers to perform those activities, or that those activities were performed in furtherance of Boyd Brothers' business interests. This case is distinguishable from Smith v. T.H. Snipes & Sons, Inc., 306 S.C. 289, 290, 411 S.E.2d 439, 439 (1991), where the South Carolina Supreme Court held that the decedent employee was a statutory employee of the defendant, because the employee in that case was *hired by the defendant* to do work which was an essential part of the defendant's business. Similarly, in Woodard v. Westvaco Corp., 315 S.C. 329, 338, 433 S.E.2d 890, 895 (Ct. App. 1993) (overruled on other grounds), the employee was held to be a statutory employee of the defendant because the employee's firm was *hired by the defendant* to perform work that is a necessary part of the defendant's business.

Flatbed truck driving may be a part of Boyd Brothers' business, but the instant case is distinguishable from cases like Smith and Woodward because there is *no evidence* that Boyd Brothers hired Appellant-Respondent or WTI Transport to drive a truck for them. Further, unlike in Voss, there is no evidence that Boyd Brothers controlled or directed Appellant-Respondent's work, had the ability to terminate him, or directed where and when he would work. See Voss, 325 S.C. 567-68, 482 S.E.2d at 586. In fact, all evidence in the record is to the contrary. Appellant-Respondent testified that he was not dispatched by Boyd Brothers, did not drive for Boyd Brothers, and was not paid by Boyd Brothers. (See, R. p. 176, lines 23-25; R. p. 191, lines 8-13) (explaining that Respondent/Appellant's checks came from only WTI Transport, he was dispatched by only WTI Transport, and he drove for only WTI Transport).)

It is completely irrelevant that WTI Transport and Boyd Brothers both happen to be in the flatbed trucking industry. Appellant-Respondent did not perform any activity that was an important part of Boyd Brothers' business or necessary, essential, or integral to Boyd Brothers' interests because none of his activities as an employee of WTI Transport benefitted Boyd Brothers' business interests. Though Boyd Brothers may have employees who perform the same work as Appellant-Respondent—an assumption which has no evidentiary support in the record—Appellant-Respondent was not a statutory employee of Boyd Brothers because he was not hired to perform any work for them. None of the three tests that qualify a worker as a statutory employee is satisfied, thus Appellant-Respondent is not a statutory employee of Boyd Brothers, and the South Carolina Workers' Compensation Commission cannot rely on Boyd Brothers' coverage under the Workers' Compensation Act to derive jurisdiction in this case.

It appears that the basis for the Hearing Commissioner's finding as affirmed by the Appellate Panel that South Carolina Workers' Compensation Commission has jurisdiction in this case is that Boyd Brothers and WTI are subsidiaries. Other than the testimony of Lynn Colley, HR Director of Boyd Brothers, that both companies have the same owners, there is no evidence as to any business relationship between the two companies other than Boyd Brothers being paid to adjust the workers' compensation and medical claims of WTI Transport, Inc. As mentioned above, the Appellant-Respondent testified he was hired by WTI Transport, Inc., he drove for WTI Transport, Inc., was dispatched by WTI Transport, Inc. and was working for WTI Transport, Inc. at the time of his injury. There is no testimony that the Appellant-Respondent was performing part of the trade, business or occupation of Boyd Brothers. Just because the two companies are subsidiaries does not make one the statutory employer of the other. There is no case law, without more evidence, that support this holding. Therefore, the finding that South Carolina has jurisdiction in this case is error.

II. **Appellant-Respondent Has Not Introduced Substantial Evidence That He Made "Reasonable Efforts" to Obtain Other Employment, That His Injury Prevents Him from Working in Any Capacity, or That His Doctors Determined Him to Be Incapable of Working, Thus Appellant-Respondent Has Failed to Show That He Is Permanently or Totally Disabled, and He is Not Entitled to 500 Weeks' Worth of Benefits or Lifetime Medical Care.**

1. **The Appellant-Respondent Has Failed to Prove That He Is Incapable of Performing Any Meaningful, Gainful Work, Thus He Has Failed to Show That He Is Totally and Permanently Disabled.**

In South Carolina, workers' compensation is not awarded for the physical injury as such, but for the "disability" produced by such injury. Outlaw v. Johnson Serv. Co., 254 S.C. 486, 489, 176 S.E.2d 152, 154 (1970). The disability is to be measured by the employee's capacity or incapacity to earn the wages he was receiving at the time of his injury. Id.; see, also, § 42-1-120. Thus, if an award is made under § 42-9-10 for total disability, there must be substantial evidence that the Appellant-Respondent's "incapacity for work resulting from [the] injury is total." "The fact that after the injury the employee has not worked and has therefore earned no wages is not in itself determinative of the extent of loss of his earning capacity." Shealy, 250 S.C. at 112, 156 S.E.2d at 649. Loss of earning capacity is the criterion. Id.

The only way to show total loss of earning capacity is to prove the inability to work as a result of the injury. See, id. at 113, 156 S.E.2d at 649. The mere fact that Appellant-Respondent may experience some pain or difficulty performing further work does not equate with a lack of earning capacity. See, id. at 112, 156 S.E.2d at 649. "There is no recognition of the elements of pain and suffering, or of increased discomfort and difficulty in performing the work, as long as there is no diminution in earning capacity." Id.; see, Ingle v. Mills, 204 S.C. 505, 513, 30 S.E.2d 301, 304 (1944) ("The object of the Workmen's Compensation Act is to compensate for, or to

relieve from, the loss or impairment of an employee's capacity to earn . . . and not to indemnify for any physical ailment or impairment as such . . . and to exclude from allowable elements of compensation everything except diminution of earning power.").

As an initial matter, the burden of proving the inability to work can be met only by evidence that the Appellant-Respondent has made reasonable efforts to obtain employment and failed because of an injury-induced handicap. Shealy, 250 S.C. at 113, 156 S.E.2d at 649; see also, Coleman v. Quality Concrete Prods., Inc., 245 S.C. 625, 631, 142 S.E.2d 43, 45 (1965) ("Whenever claimant depends in part on a showing that he has been unable to get work because of his physical condition it naturally follows that claimant must prove that he has made reasonable efforts to secure employment."). Though Appellant-Respondent testified that he attempted to ride in a truck and had great difficulty doing so, (R., p. 183, ll. 5-15), he has not introduced a scintilla of evidence that he has made "reasonable efforts" to find work in another capacity or that his injury prevents him from doing so. His doctors have determined that he is capable of sedentary work, (R., pp. 55, 60; and 75), yet he has elected to do nothing. Personal reluctance to return to work and pain or difficulty in performing work are insufficient to justify a finding of total and permanent disability. See, Shealy, 250 S.C. at 113, 156 S.E.2d at 650.

In addition to failing to show that he has attempted to return to work but has been unable to do so, Appellant-Respondent fails to show that any medical doctor has determined him to be totally and permanently disabled. The medical evidence in the record uniformly shows that Appellant-Respondent has a 10-11% regional impairment to the lumbar spine. (R., pp. 55; 58) The Functional Capacity Evaluation, as well as three of Appellant-Respondent's own doctors, placed him in the "sedentary to light work" capacity. (R., p. 24; R. pp. 55, 60, and 75) The

vocational psychologist concluded that Appellant-Respondent is unable to perform any gainful work activity, but he is a licensed psychologist, not a medical doctor, who evaluated Appellant-Respondent's psychological ability to return to work, not his physical ability to do so. (See, R., p. 54) All three of the medical doctors who made determinations as to Appellant-Respondent's work restrictions concluded that he is able to perform sedentary work. (R., pp. 55, 60, and 75)

Should the Full Commission had given more weight to the report by the vocational psychologist than to those by Appellant-Respondent's medical doctors and conclude that Appellant-Respondent is currently unable to perform any gainful work activity, there is still no evidence in the Psychological and Vocational Evaluation—or anywhere else in the record—that Respondent/Appellant's disability is **permanent**. Appellant-Respondent may currently be taking "significant prescription medications which prohibit him from driving a truck," (R., p. 24), but there is no evidence to support Appellant-Respondent's proposition that these prescriptions are permanent or that the medications prevent him from performing any other form of work. As his doctors specifically noted, Appellant-Respondent is capable of doing sedentary work. (R., pp. 55, 60, and 75) Dr. Poletti even laid out several treatments that Appellant-Respondent could pursue in the future should his back condition fail to improve. (R., p. 56) Because Appellant-Respondent did not introduce evidence that he has made "reasonable efforts" to obtain other employment, much less that his injury prevented him from working or that his doctors determined him to be incapable of working, Appellant-Respondent has not shown that he is permanently or totally disabled, and he is not entitled to 500 weeks' worth of benefits or lifetime medical care pursuant to § 42-9-10 of the Workers' Compensation Act.

2. The Workers' Compensation Appellate Panel Erred When It Awarded Appellant-Respondent Benefits for a Period of 500 Weeks Because Respondent/Appellant Is Not Permanently or Totally Disabled.

Because Appellant-Respondent is not permanently or totally disabled, the Commission miscalculated his award. As discussed above, Appellant-Respondent has not produced any evidence that he is permanently or totally disabled. Pursuant to § 42-9-20 of the South Carolina Code, when the incapacity for work resulting from a work-related injury is partial, the employer shall pay benefits for a period not to exceed 340 weeks from the date of injury. For loss of use of the back in cases where the loss of use is 49% or less, including the instant case where the impairment is 10-11%, the injured employee is entitled to benefits for a pro-rated period of 300 weeks. § 42-9-30(21). Employees who suffered a back injury are presumed to have a permanent and total disability, thereby entitling them to benefits for a period of 500 weeks, only if there is 50% or more loss of use of their back. Id. Because Appellant-Respondent suffered only a 10-11% impairment to his back, (R., pp. 55 and 58), the Commission erred when it determined that Appellant-Respondent is entitled to benefits for a period of 500 weeks plus lifetime medical care.

3. The Workers' Compensation Commission Appellate Panel Errored When It Awarded Appellant-Respondent His Payment in a Lump Sum Because Appellant-Respondent Has Not Met His Burden of Proving That This Is an Extraordinary Case Justifying Payment in a Lump Sum Rather Than in Installments.

"It is ... settled that one of the obvious primary purposes of the Act was to prevent injured employees and those lawfully dependent upon them for support from becoming charges

upon society and the public generally for support.” Flemon v. Dickert-Keowee, Inc., 259 S.C. 99, 104, 190 S.E.2d 751, 753-54 (1972). To that end, § 42-9-220 of the South Carolina Code lays out the manner in which compensation shall be paid, and it contains a presumption that benefits will be paid periodically, not in a lump sum. “A careful examination of this statute reveals a primary purpose and general scheme to pay compensation at intervals corresponding to the time the employee would have received his wages had he not been injured.” Ashley v. Ware Shoals Mfg. Co., 210 S.C. 273, 280, 42 S.E.2d 390, 393 (1947).

The reasoning for this presumption in favor of periodic payments to injured workers is “grounded in the underlying principle of workmen’s compensation: the protection of income. Experience has taught that this income-protection is best accomplished through periodic payments.” 29 S.C. L. Rev. 12 (1977); see, also, Ashley, 210 S.C. at 280, 42 S.E.2d at 393 (“The purpose of this method is to prevent an imprudent employee or dependent from wasting the means for his support and thereby becoming a burden upon society.”). Often, “the lump sum is soon dissipated and the worker is right back where he or she would have been if workers’ compensation had never existed.” Larson’s Worker’s Compensation Law, § 132.07[1]. To prevent this all-too-often occurrence, workers’ compensation benefits should be administered in weekly or monthly sums except in “those exceptional cases in which it can be demonstrated that the purpose of the Act will best be served by a lump-sum award.” Id.

The South Carolina Supreme Court has construed the statute “as permitting acceleration or commutation of weekly compensation only in unusual cases,” as the state legislature “intended that periodical payments should be the rule and lump sum settlements the exception.”

Ashley, 210 S.C. at 280, 42 S.E.2d at 393. In a lump-sum benefits case, the burden of proving facts to justify such an award rests on the employees. Woods v. Sumter Stress-Crete, Inc., 266 S.C.245, 248, 222 S.E.2d 760, 761 (1976). In the instant case, Appellant-Respondent simply has not shown that this is an appropriate case that would justify the payment of a lump sum. Indeed, Appellant-Respondent has introduced no evidence supporting an application for lump-sum benefits, thus there is no evidence to support a finding that this is an "extraordinary" case justifying the payment of benefits in a lump sum, and Appellant-Respondent has failed to meet his burden of proof. As there is no evidence in the record or Order sufficient to overcome the statutory presumption in favor of "periodic" payments, see § 42-9-220, the award of lump sum benefits must be reversed, see, 29 S.C. L. Rev. 13 (1977).

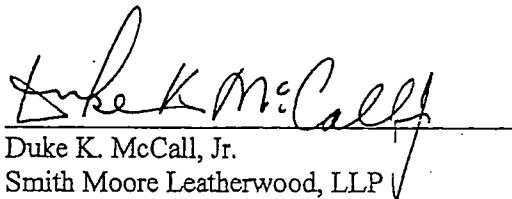
III. Did the Appellate Panel of the Workers' Compensation Commission in adopting the Hearing Commissioner findings error in its calculations of the amount of any lump sum Award that the Appellant-Respondent may be entitled to assuming that South Carolina has jurisdiction in this matter?

There is no evidence of the amount of weekly temporary total benefits paid weekly to the Appellant-Respondent under the Alabama Workers' Compensation Act. Without a finding of the amount of weekly benefits that the Appellant-Respondent has already been paid under the Alabama Act, or some evidence submitted to established the number of weeks paid and the amount of benefits paid to the Appellant-Respondent, the figures in the Hearing Commissioner's Award as affirmed by the Appellate Panel are without merit. Therefore, without any evidence of the amount of benefits paid and the number of weeks paid under the Alabama Act, the Award of a specific amount of monies to the Appellant-Respondent by the Hearing Commissioner as affirmed by the Appellate Panel must be based upon surmise, speculation and conjecture.

CONCLUSION

WHEREFORE, for the foregoing reasons, Respondents-Appellants request that this Court find: (1) that South Carolina did not have jurisdiction to hear this case because the Appellant-Respondent's employer did not have four or more employees in the State at the time the Respondent/Appellant was injured; (2) that Appellant-Respondent is neither permanently nor totally disabled and thus does not qualify for 500 weeks' worth of benefits or lifetime medical care; (3) that Appellant-Respondent's award, if any, should be limited to a percentage of disability to his back because he is not permanently or totally disabled; and (4) that the monetary award, assuming jurisdiction and total disability without conceding these issues, should be reversed since there is no evidence to support the monetary calculations of the Hearing Commissioner as affirmed by the Appellate Panel. Therefore, the Award of the South Carolina Workers' Compensation Commission should be reversed.

Respectfully submitted,



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April 23, 2014

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM THE SOUTH CAROLINA
WORKERS COMPENSATION COMMISSION

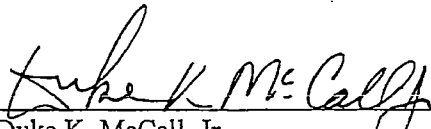
Appellate Case No: 2013-001212

Joseph Mickle,	)
	)
Appellant-Respondent.	)
	)
v.	)
	)
Boyd Brothers Transportation, Inc.	)
Employer, and Lumbermans	)
Underwriting Alliance, Carrier,	)
	)
Respondents-Appellants.	)

CERTIFICATION OF RESPONDENTS-APPELLANTS
BOYD BROTHERS TRANSPORTATION, INC., EMPLOYER AND
LUMBERMANS UNDERWRITING ALLIANCE, CARRIER

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This is to certify that the Final Brief of Boyd Brothers Transportation, Inc., Employer,
and Lumbermans Underwriting Alliance, Carrier, Respondents-Appellants complies with Rule
211(b) of the South Carolina Rules of Court.


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April 23rd, 2014

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM THE SOUTH CAROLINA
WORKERS' COMPENSATION COMMISSION

Appellate Case No. 1013-001212

Joseph Mickle,

Appellant-Respondent

v.

Boyd Brothers Transportation, Inc.,
Employer, and Lumbermans
Underwriting Alliance, Carrier,

Respondents-Appellants

FINAL BRIEF OF
APPELLANT-RESPONDENT

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STATEMENT OF ISSUE ON APPEAL

- I. Should the decision of the South Carolina Workers' Compensation Commission be corrected in order to adjust and correct the credit to Defendants for prior payment of temporary benefits and to correct the award calculations according to the undisputed evidence?

STATEMENT OF THE CASE

By his July 1, 2011 Form 50, Claimant sought benefits for total and permanent disability resulting from injuries to his back and legs from an admitted work accident on July 12, 2010. On July 12, 2010, Claimant was pulling the tarp off the top of the load while he was in Vernon Alabama when he felt a pinch of pain in his back. Claimant recalled that at first he didn't think too much about the pain in his back but that when he got ready to leave, there was no one there to pick up the tarp so that he and his co-worker had to pick up the tarp themselves and put it on the trailer. Claimant indicated that he reinjured his back picking up the tarp but that he kept going and he finished the trip; however, the next morning, Claimant was unable to get out of bed due to pain in his back and legs. Claimant reported the accident; the accident was admitted and the Defendants paid Claimant temporary benefits from July 12, 2010, until February 24, 2011.

The accident took place in Alabama and Claimant initially received benefits from Alabama; however, Claimant chose to pursue benefits for permanent disability in South Carolina, the state where he was hired, where he received medical care, and where he has lived for more than thirty years. Defendants, Boyd Brothers' Transportation, Inc., (Boyd Brothers) denied coverage for the claim in South Carolina, asserting that Claimant was actually employed by its wholly owned subsidiary, WTI Transport, Inc. (WTI). Boyd Brothers asserted that WTI had only three South Carolina employees.

An evidentiary hearing was held before Commissioner Scott T. Beck on November 18, 2011. On March 14, 2012, the Hearing Commissioner issued his Order finding that jurisdiction was proper before the Commission; that Claimant was entitled to lump sum payment of benefits for his total and permanent disability resulting from the injuries to his back and legs with credit

to Defendants for temporary benefits paid; and that Claimant was entitled to lifetime medical care. (R. p. 12).

Defendants appealed before the Appellate Panel. Claimant asserted in his Brief of Respondent-Claimant before the Appellate Panel that the credit awarded the employer for temporary benefits should be corrected and the award and Utica Mohawk language adjusted accordingly. (R. p. 226). The Appellate Panel affirmed the Order of the Hearing Commissioner in full. (R. p. 1). Both parties appeal.

ARGUMENT

- I. **Should the decision of the South Carolina Workers' Compensation Commission be corrected in order to adjust and correct the credit to Defendants for prior payment of temporary benefits and to correct the calculations for the award according to the undisputed evidence?**

When reviewing the award of a Single Commissioner, the Appellate Panel makes its own Findings of Fact and reaches its own Conclusions of Law either consistent or inconsistent with those of the Single Commissioner. S.C. Code Ann. § 42-17-50 (1985); Lowe v. Am-Can Trans Servs., Inc.; 283 SC 534, 324 SE 2d 87 (Ct. App. 1984); Green v. Raybestos-Manhattan, Inc., 156 S.E.2d 318 (1967). The award of a single commissioner is not a final adjudication of a claim, unless both parties are satisfied, and unless neither of them asks for a review by the Full Commission. Riddle v. Fairforest Finishing Co., 198 S.C. 419, 424, 18 S.E.2d 341, 343 (1942). Here, the award of the single commissioner which was drafted in reliance on a typographical error in the Order Directives issued by the Hearing Commissioner was not final where review of the award was sought before the Full Commission's Appellate Panel.

Defendants had paid temporary total disability benefits to Claimant from the date of accident, July 12, 2010, until February 24, 2011. (R. p. 17; p. 168, lines 7-11; p. 249). Unfortunately, the Order Directives forwarded by the Hearing Commissioner on December 12,

2011, contained a typographical error which mistakenly indicated that Claimant's date of injury was "7/12/08" rather than the actual date of accident, July 12, 2010. (R. p, 225). Therefore, in performing the calculations for the lump sum award pursuant to Utica Mohawk, Counsel for Claimant's bookkeeper relied on the mistaken "7/12/08" date of accident and calculated a credit to Defendants for payment of temporary total disability benefits from July 12, 2008, until February 24, 2011, for a total credit of 136 weeks. It was undisputed that Defendants actually paid Claimant temporary benefits from the date of accident, July 12, 2010, until February 24, 2011, for a total credit due of only 32 weeks. Thus, the Order issued by the Hearing Commissioner incorrectly gave Defendants credit for payment of 136 weeks of temporary benefits where they had actually paid only 32 weeks of temporary total benefits and accordingly miscalculated the lump sum award.

Given that there is no procedure allowing for rehearing or reconsideration of Commission decisions, Counsel for Claimant brought the error in credit and award calculations to the attention of the Appellate Panel and Defendants through his Brief of Respondent-Claimant. Claimant requested that the error be corrected and that the calculations be amended accordingly. In fact, the Appellate Panel's Order specifically indicates:

In his Brief of Respondent which was properly filed with the Commission and properly served on all interested parties, and at oral arguments before the Appellate Panel on February 20, 2013, Claimant asserted that as the result of a typographical error in the Hearing Commissioner's December 12, 2011, Order Directives, the Hearing-Commissioner's Order incorrectly gave the employer credit for having paid 136 weeks of temporary total disability benefits despite the fact that it was undisputed that Claimant had been paid only 32 weeks of benefits. Claimant took the position that the Appellate Panel should amend the Order so as to correct the mistaken credit and adjust the calculation of benefits due.

(R. p. 6). However, by its Order, the Appellate Panel ordered that the Hearing Commissioner's decision be affirmed in full and adopted as the Decision of the Commission without correcting or adjusting the award.

Notably, Defendants had made no response to Claimant's assertion that the credit was erroneous and Defendants made no attempt to dispute the fact that the credit awarded was in excess of the temporary benefits actually paid. Accordingly, where it was undisputed that the credit for 136 weeks was excessive and that Defendants were actually due only credit for 32 weeks of benefits paid, the Appellate Panel erred in failing to amend the Order so as to correct the error in the credit to Defendants to allow credit only for payment of temporary benefits actually paid.

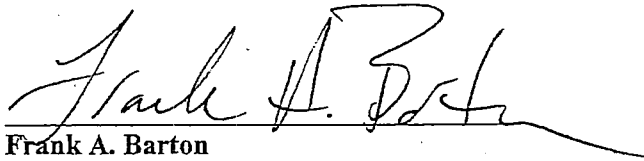
Where the amount of the credit due Defendants was undisputed, the Court should affirm the Commission's substantive decision in favor of Claimant, but correct the erroneous credit and mistaken award or, in the alternative, remand to the Commission for correction of the credit due to Defendants and for correction of the award.

CONCLUSION

The Court should affirm the Commission's substantive ruling but correct the erroneous credit and award or, in the alternative, remand to the Commission for correction of the credit and award along with the Utica Mohawk language so as to give Defendants credit only for temporary total disability benefits actually paid to Claimant after his accident on July 12, 2010.

Respectfully submitted,

May 6, 2014



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THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM THE SOUTH CAROLINA
WORKERS' COMPENSATION COMMISSION

Appellate Case No. 2013-001212

Joseph M. McKie

Appellant-Respondent

Royce Brothers
Transportation, Inc.
Employers and Claimants
Underwriting Alliance
Carrier

Respondents-Appellants

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STATEMENT OF ISSUES ON APPEAL

- I. Did the South Carolina Workers' Compensation Commission properly exercise jurisdiction over the case, having properly found that Claimant was a statutory employee of Boyd Brothers' Transportation Inc. under the South Carolina Workers' Compensation Act?
- II. Did the Commission properly find that Claimant is totally and permanently disabled pursuant to Section 42-9-10, where the substantial evidence established that he is unable to perform any substantial gainful work activity as the result of the injuries to his back and legs?
- III. Should the Commission decision to award a lump sum be affirmed where there has been no evidence or argument suggesting that the Commission's award was the result of an abuse of discretion?
- IV. Should the Order of the South Carolina Workers' Compensation Commission be affirmed and remanded for correction in order to correct the credit to the employer for prior payment of temporary benefits according to the undisputed evidence?

STATEMENT OF THE CASE

By his July 1, 2011 Form 50, Claimant sought benefits for total and permanent disability resulting from injuries to his back and legs from an admitted work accident on July 12, 2010. On July 12, 2010, Claimant was pulling the tarp off the top of the load while he was in Vernon Alabama when he felt a pinch of pain in his back. Claimant recalled that at first he didn't think too much about the pain in his back but that when he got ready to leave, there was no one there to pick up the tarp so that he and his co-worker had to pick up the tarp themselves and put it on the trailer. Claimant indicated that he reinjured his back picking up the tarp but that he kept going and he finished the trip; however, the next morning, Claimant was unable to get out of bed due to pain in his back and legs. Claimant reported the accident; the accident was admitted and the Defendants paid Claimant temporary benefits from July 12, 2010, until February 24, 2011.

The accident took place in Alabama and Claimant initially received benefits from Alabama; however, Claimant chose to pursue benefits for permanent disability in South Carolina, the state where he was hired, where he received medical care, and where he has lived for more than thirty years. The owner/employer, Boyd Brothers' Transportation, Inc., (Boyd Brothers), denied coverage for the claim in South Carolina, asserting that Claimant was actually employed by its wholly owned subsidiary, WTI Transport, Inc. (WTI). Boyd Brothers asserted that WTI had only three South Carolina employees.

An evidentiary hearing was held before Commissioner Scott T. Beck on November 18, 2011. On March 14, 2012, the Hearing Commissioner issued his Order finding that jurisdiction was proper before the Commission; that Claimant was entitled to lump sum payment of benefits for his total and permanent disability resulting from the injuries to his back and legs with credit to Defendants for temporary benefits paid; and that Claimant was entitled to lifetime medical

care. Boyd Brothers appealed before the Appellate Panel. By its May 14, 2013, Order, the Appellate Panel affirmed the Order of the Hearing Commissioner in full. Both parties have appealed.

STANDARD OF REVIEW

The South Carolina Administrative Procedures Act (APA) establishes the standard for judicial review of decisions by the Appellate Panel. S.C.Code Ann. § 1-23-380 (Supp.2011); Lark v. Bi-Lo, Inc., 276 S.C. 130, 134-35, 276 S.E.2d 304, 306 (1981). Under the scope of review established in the APA, this court may not substitute its judgment for that of the Appellate Panel as to the weight of the evidence on questions of fact, but may reverse where the decision is affected by an error of law. Stone v. Traylor Bros., Inc., 360 S.C. 271, 274, 600 S.E.2d 551, 552 (Ct.App.2004); Hamilton v. Martin Color-Fi, Inc., 405 S.C. 478, 485, 748 S.E.2d 76, 80 (Ct.App.,2013).

The substantial evidence rule governs the standard of review in a workers' compensation decision. Frame v. Resort Servs. Inc., 357 S.C. 520, 527, 593 S.E.2d 491, 494 (Ct.App.2004). The Appellate Panel's decision must be affirmed if supported by substantial evidence in the record. Shuler v. Gregory Elec., 366 S.C. 435, 440, 622 S.E.2d 569, 571 (Ct.App.2005). "Substantial evidence" is not a mere scintilla of evidence nor the evidence viewed blindly from one side of the case, but is evidence which, considering the record as a whole, would allow reasonable minds to reach the conclusion that the administrative agency reached or must have reached in order to justify its action. Lark, 276 S.C. at 135, 276 S.E.2d at 306; Broughton v. S. of the Border, 336 S.C. 488, 495, 520 S.E.2d 634, 637 (Ct.App.1999). The possibility of drawing two inconsistent conclusions from the evidence does not prevent an administrative agency's finding from being supported by substantial evidence." Palmetto Alliance, Inc. v. S.C.

Pub. Serv. Comm'n, 282 S.C. 430, 432, 319 S.E.2d 695, 696 (1984); Hargrove v. Titan Textile Co., 360 S.C. 276, 290, 599 S.E.2d 604, 611 (Ct.App.2004). In workers' compensation cases, the Appellate Panel is the ultimate finder of fact; therefore, the final determination of witness credibility and the weight to be accorded evidence is reserved to the Appellate Panel. Hamilton v. Martin Color-Fi, Inc. *supra*; Bass v. Kenco Grp., 366 S.C. 450, 458, 622 S.E.2d 577, 581 (Ct.App.2005); Shealy v. Aiken Cnty., 341 S.C. 448, 535 S.E.2d 438 (2000).

When the jurisdiction of the Commission is at issue, the reviewing court is not bound by the Commission's findings of fact upon which jurisdiction are dependent; this Court's review is governed by the preponderance of the evidence standard. Gray v. Club Group, Ltd., 339 S.C. 173, 181, 528 S.E.2d 435, 439 (Ct.App.2000). However, "[i]n determining jurisdictional questions, doubts of jurisdiction will be resolved in favor of inclusion of employees within workers' compensation coverage rather than exclusion." Wilson v. Georgetown County, 316 S.C. 92, 94, 447 S.E.2d 841, 842 (1994). Any reasonable doubt as to the construction of the Act will be resolved in favor of coverage. Mauldin v. Dyna-Color/Jack Rabbit, 308 S.C. 18, 22, 416 S.E.2d 639, 641 (1992). It is the policy of South Carolina courts to resolve jurisdictional doubts in favor of the inclusion of employers and employees under the Workers' Compensation Act. Hill v. Eagle Motor Lines, 373 S.C. 422, 429, 645 S.E.2d 424, 427 (2007); Wilkinson ex rel. Wilkinson v. Palmetto State Transp. Co. 382 S.C. 295, 676 S.E.2d 700 (2009).

The South Carolina Workers' Compensation Commission's decision to award benefits by lump sum is reviewed for abuse of discretion. Swilling v. Pride Masonry of Gaffney, 401 S.C. 178, 190, 736 S.E.2d 672, 678 (Ct.App. 2012).

ARGUMENT

I. The South Carolina Workers' Compensation Commission properly exercised jurisdiction over the case where the Commission rightly found that Claimant was a statutory employee of Boyd Brothers' Transportation Inc. under the South Carolina Workers' Compensation Act.

Joseph Mickle, Claimant, drove a flatbed truck in his work for WTI Transport, Inc., a Division of Boyd Brothers Transportation, Inc. Because the work activity Claimant engaged in for WTI, flatbed trucking, was part of the general trade, business, or occupation of the owner, Boyd Brothers, the Workers' Compensation Commission properly ruled that Claimant was a statutory employee of the owner pursuant to S.C. Code Section 42-1-400 (1985).

First, the Workers' Compensation Commission recognized that Claimant's direct employer, WTI, was stipulated to be the wholly owned subsidiary of Boyd Brothers. Nevertheless, Boyd Brothers argues on brief, "It appears that the basis for the Hearing Commissioner's finding that the South Carolina Workers' Compensation Commission has jurisdiction in this case is that Boyd Brothers and WTI are subsidiaries." (Brief of Respondent-Appellant p. 14). Boyd Brothers then wrongly suggests that there was no evidence as to any business relationship between the two companies. In fact, prior to the commencement of the hearing before Commissioner Beck, a stipulation was entered into between the parties that WTI is a wholly owned subsidiary of Boyd Brothers. (R. p. 149, line 23- R. p. 150, line 6; R. p. 152, lines 5-6).

The Hearing Commissioner actually indicated in his Order: "Defendants' objection to Claimant's APA Tab 11, comprised of information obtained from the companies' profiles on the internet and benefits forms provided by Boyd Brothers' Transportation, Inc. to Claimant, submitted for the purpose of showing that WTI, Transport, Inc. is Boyd Brothers' Transportation, Inc.'s subsidiary, was sustained in light of Defendants' stipulation that WTI

Transport, Inc. is a wholly owned subsidiary of Boyd Brothers' Transportation, Inc." (R. p. 15). Thus, as was undisputed before the Hearing Commissioner, these companies do not have a mere "business relationship" - - Boyd Brothers owns WTI outright.

Boyd Brothers conceded before the hearing Commissioner that the work of WTI and its employees, including Claimant, was flatbed trucking, i.e., the same work activity which is the trade, business, and occupation of Boyd Brothers. However, Boyd Brothers fails to grasp the substance of the statutory employment concept, arguing: "It is completely irrelevant that WTI Transport and Boyd Brothers both happen to be in the flatbed trucking industry." (Brief of Respondent-Appellant p. 11). To the contrary, under the Act, the admitted fact that Boyd Brothers' subsidiary and its employees performed precisely the same work performed by the parent company and its employees is wholly relevant to the ruling that Claimant was a statutory employee of Boyd Brothers. It is the fact that the employees of the owner and the employees of the subsidiary/direct employer perform precisely the same work which makes those working for the subsidiary the statutory employees of the owner, Boyd Brothers, as a matter of law.

In fact, the statutory employment doctrine depends upon the nature of the work being done. South Carolina Code Section 42-1-400 (1985), specifically provides:

When any person, in this section and §§ 42-1-420 and 42-1-430 referred to as "owner," undertakes to perform or execute any work which is a part of his trade, business or occupation and contracts with any other person (in this section and § 42-1-420 to 42-1-450 referred to as "subcontractor") for the execution or performance by or under such subcontractor of the whole or any part of the work undertaken by such owner, the owner shall be liable to pay to any workman employed in the work any compensation under this Title which he would have been liable to pay if the workman had been immediately employed by him.

As the Commission rightly found, under the plain meaning of the statute, where owner, Boyd Brothers, undertook to perform its work, the flatbed trucking of goods, i.e., the work which is its trade, business, and occupation, by having the employees of its subsidiary, WTI, perform flatbed trucking, Boyd Brothers became liable to pay to the workmen employed in performing the work any compensation under this Title which it would have been liable to pay if the workman had been directly employed by Boyd Brothers.

The fact that the work being performed is the work of the owner is the basis for the Act's imposing liability on the owner. The point is that Boyd Brothers cannot avoid liability for benefits to the workers performing its flatbed trucking work by going through a subsidiary. The South Carolina Supreme Court has clearly explained that this is the purpose of the statute: "The rationale is to prevent owners and contractors from subcontracting out their work to avoid liability for injuries incurred in the course of employment." Glass v. Dow Chem. Co., 325 S.C. 198, 201 n.1, 482 S.E.2d 49, 50 n.1 (1997). In this case, because the employees of the subsidiary, WTI, perform flatbed trucking, and because flatbed trucking is the work of the owner, under the Act, the owner, Boyd Brothers, is the statutory employer of those employees who perform the owner's work through the subsidiary, WTI.

Boyd Brothers wrongly argues that it is not Claimant's statutory employer because it did not contract directly with Claimant to perform work for Boyd Brothers. To the contrary, although coverage under the Act is generally dependent on the existence of an employer-employee relationship, the statutory employer doctrine set out in Section 42-1-400 (1985), provides an exception to this general rule by imposing on an owner, depending upon the nature of the work performed, liability for the payment of compensation benefits to a worker who is not

directly employed by the owner. Thus, by statute, Boyd Brothers was properly determined to be Claimant's statutory employer.

The statutory employment doctrine applies to cases involving a parent/subsidiary relation. In Poch v. Bayshore Concrete Products/South Carolina, Inc., 686 S.E.2d 689 (CtApp 2009), the South Carolina Court of Appeals found that the statutes and case law dealing with statutory employment in cases involving a contractor/subcontractor relationship would also apply to cases involving a parent/subsidiary relationship. The Court of Appeals found that Poch was directly employed by Bayshore SC, a wholly owned subsidiary of Bayshore Corp. and that Poch was a statutory employee of Bayshore Corp. because Poch's work activity was an essential part of Bayshore Corp's business.

There is no issue involving an independent contractor in this case; nevertheless, Boyd Brothers appears to confuse the doctrine of statutory employment with the question of control which arises in cases involving an independent contractor. Boyd Brothers argues that it was not properly found to be Claimant's statutory employer because it did not have the right to control the particular work or undertaking as to the manner or means of its accomplishment, citing S.C. Workers' Comp. Comm'n v. Ray Covington Realtors, Inc., 318 SC 546, 549, 459 S.E.2d 302, 303 (1995). Such an argument, wrongly attempting to rely upon the control test relevant to an independent contractor question to argue against statutory employment, has been soundly rejected by our Courts. Recently, the South Carolina Court of Appeals in Collins v. Charlotte, 400 S.C. 50, 732 S.E.2d 630 (Ct. App. 2012), agreed that the questions of control relevant to an independent contractor issue are not at all relevant to the question of statutory employment. The Collins Court explained, "Once the Commission determined Collins was an employee of Seko's subcontractor, West, which the parties in this case did not dispute, the Commission should have

looked to whether Collins' activities were part of Seko's trade, business, or occupation." Thus, control is irrelevant to the question of statutory employment as a matter of law; the relevant question is as to the nature of the work being done and whether the work being done was part of the trade, business, and occupation of Boyd Brothers.

A three factor test is applied in determining whether the activity of an employee of a subcontractor is sufficient to make him a statutory employee within the meaning of § 42-1-400:

- (1) is the activity an important part of the owner's business or trade?;
- (2) is the activity a necessary, essential, and integral part of the owner's trade, business, or occupation?; or
- (3) has the identical activity previously been performed by the owner's employees?

Riden v. Kemet Elec. Corp., 313 S.C. 261, 437 S.E.2d 156 (Ct.App.1993); Smith v. T.H. Snipes and Sons, Inc., 306 S.C. 289, 411 S.E.2d 439 (1991). In Revels v. Hoechst Celanese Corp., the Court of Appeals found that the test to be used to determine if a worker is a statutory employee is "whether or not [the work] being done is or is not a part of the general trade, business or occupation of the owner." Revels, 301 S.C. 316, 318, 391 S.E.2d 731, 732 (Ct.App.1990).

Under our Act, the three factors are in the alternative so that, if the activity at issue meets even one of the three criteria, the worker qualifies as the statutory employee of the owner. Edens v. Bellini, 359 S.C. 433, 442-443, 597 S.E.2d 863, 868 (Ct.App. 2004); Olmstead v. Shakespeare, 354 S.C. 421, 581 S.E.2d 483 (2003). In this case, all three factors are met:

- (1) The activity is an important part of the owner's business or trade. Boyd Brothers is in the business of trucking. Likewise, WTI's business is trucking. Trucking is an important part of the business of Boyd Brothers and the success of the subsidiary is financially beneficial to the parent company;
- (2) The activity is a necessary, essential, and integral part of the owner's trade, business, or occupation. Flatbed trucking is a necessary, essential and integral part of the owner's trade, business or occupation in that Boyd Brothers is in the business of flatbed trucking.

(3) The identical activity has previously been performed by the owner's employees. Boyd Brothers Transportation employs drivers to drive its flatbed trucks to deliver building materials - - this is precisely the same work activity Claimant performed for Boyd Brothers' wholly owned subsidiary, WTI.

Boyd Brothers maintains that there is no evidence that Claimant was performing any work, trade or business of Boyd Brothers, nor is there any evidence that WTI was performing any work, trade or business of Boyd Brothers. To the contrary, it is undisputed that the work, trade or business of both Boyd Brothers and of WTI is the transportation of goods and materials by flatbed truck. It is also undisputed that this is precisely the work activity Claimant was performing at the time of his injury. Therefore, under all three criteria of the test for statutory employment under S.C. Code Ann. Section 42-1-400 (1985), Claimant was the statutory employee of the owner, Boyd Brothers Transportation.

Any doubts as to a worker's status should be resolved in favor of the claimant by including him under the Workers' Compensation Act rather than excluding him. Davis v. S.C. Dept. of Corrections, 289 S.C. 123, 345 S.E.2d 245 (1986); Ost v. Integrated Products, Inc. 296 S.C. 241, 248, 371 S.E.2d 796, 800 (1988); Riden, 313 S.C. at 263, 437 S.E.2d at 158; Edens, supra. While any doubt as to whether a claimant was a statutory employee must be resolved in favor of including the worker under the Act, here, there is no doubt that this Claimant was the statutory employee of Boyd Brothers. Therefore, as a matter of law, pursuant to S.C. Code Ann. Section 42-1-400 (1985), as applied by our Courts, the Commission correctly found that Claimant is covered under the Act as a statutory employee of Boyd Brothers. The Commission's decision should be affirmed.

II. The Commission properly found that Claimant is totally and permanently disabled pursuant to Section 42-9-10 where the substantial evidence established that he is unable to perform any substantial gainful work activity as the result of the injuries to his back and legs.

The general disability statute, 42-9-10, provides for benefits based on "incapacity for work." The disability is to be measured by the employee's capacity or incapacity to earn the wages which he was receiving at the time of his injury. Loss of earning capacity is the criterion." Keeter v. Clifton Manufacturing Co., 225 S.C. 389, 82 S.E.2d 520 (1954). "The whole philosophy of our Workers' Compensation Act is to compensate for, or relieve from, the loss of employee's capacity to earn..." Burnette v. Startex Mills, 193 S.C. 118, 10 S.E.2d 164 (1940). The term "disability" means incapacity because of injury to earn the wages which the employee was receiving at the time of injury in the same or any other employment. Under the traditional theory, the goal of worker's compensation law is to compensate workers for reductions in their earning capacity caused by work-related injuries. Stephenson v. Rice Servs., Inc., 323 S.C. 113, 116, 473 S.E.2d 699, 700 (1996); Simmons v. City of Charleston, 349 S.C. 64, 73, 562 S.E.2d 476, 481 (Ct.App. 2002).

Under the Act "total disability" does not require complete, abject helplessness. Rather it is an inability to perform services other than those that are so limited in quality, dependability, or quantity that no reasonably stable market exists for them. Coleman v. Quality Concrete Products, Inc., 245 S.C. 625, 142 S.E.2d 43 (1965); McCollum v. Singer Co., 300 S.C. 103, 107, 386 S.E.2d 471, 474 (Ct.App.1989). An injured worker is properly found totally disabled where he is "disabled to perform common labor and could not obtain employment as such, and he was not qualified by training or experience for any other." Colvin v. E.I. Dupont De Nemours, 227 S.C. 465, 88 S.E.2d 581 (1955).

Here, the experts are unanimous in indicating that Claimant is not and will not be able to return to his prior work as a heavy truck driver. In fact, the doctors have all opined that his physical condition precludes him from performing anything more strenuous than sedentary work. However, as established by the evidence and confirmed by the vocational opinion, Claimant is not qualified by training or experience to obtain or perform a desk job. Claimant has never earned wages in a sedentary position; he has no experience working in an office or with a computer. (R. p. 48). In addition, he is precluded from performing sedentary work by his physical limitations and by the effects of his prescription medications. As opined by the Vocational Expert, Claimant is unable to perform any substantial gainful work activity which exists in South Carolina or the national economy. Directly as a result of his on-the-job injuries, the only services he could perform are "so limited in quality, dependability or quantity that no reasonably stable market for them exists" (R. p. 54).

Employees who because of a work-related injury can perform only limited tasks for which no reasonably stable market exists are considered totally disabled notwithstanding their nominal earning capacity. Stephenson v. Rice Services, Inc., *supra*. "The criterion of the right of Claimant to compensation under the Act is this: Has his injury lessened his earning capacity and deprived him in whole or in part of the power to obtain employment?" Manning v. Gossett Mills, 192 S.C. 262, 6 S.E.2d 256 (1939). In Claimant's case, the answer to this question is indisputably, "Yes." Claimant's injury has destroyed his earning capacity. Claimant cannot return to the strenuous truck driving he had performed for over thirty-five years and through which he had earned wages throughout his entire working life. Claimant's vocationally relevant work experience, as performed, was limited to heavy physical labor. Claimant's prior work required walking, standing, sitting, bending, and heavy to very heavy lifting, pushing and

pulling. Prior to the admitted work injury, Claimant was able to earn wages by performing this heavy physical work.

Claimant is unqualified to obtain or perform a desk job. Claimant's injuries and condition further preclude sedentary work due to the fact that Claimant is unable to sit for long periods and also due to the effects of his prescribed medications. Therefore, as the result of his work accident, Claimant is no longer able to perform manual labor. In addition, Claimant is not qualified or able to perform sedentary work. Claimant is a high school graduate, having obtained his diploma in 1963. Claimant agreed that pulling flatbeds was basically the work he had done during his working life of over thirty-five years. (R. p. 188. 45, lines 20-22).

Claimant indicated that he drove a flatbed truck and that his work as a truck driver required him to do heavy manual labor tasks, including strapping down or tarping the loads. Claimant explained that this process required the driver to chain the load down, throw and pull chains, tarp them and untarp them, and that this was heavy work. Claimant further indicated that lifting the tarps weighing from 50 to some 150 pounds was heavy work. Claimant testified that 85% of the work of a truck driver is driving over the road and that that is a lot of hard work. He explained that just getting in the truck requires climbing, pulling, and twisting in order to sit in the driver's seat. (R. p. 189). Claimant described the physical demands of driving an 18-wheeler: "Well, for one, when you're climbing, you've got to pull, twist, sit. There's a lot of bumping and twisting and bending, looking at your - - trying to look in your mirror and stuff like that. It's a lot of physical work. Shifting gears, you've got to use your clutch all the time, braking; all that affects you. And it bothers your back a lot." (R. p. 193, lines 15-24). When asked how rough was the ride in a flatbed truck compared to a regular pickup truck or a car, Claimant responded, "It ain't even close." He explained, "It's very much different. The ride is

just like riding in a wagon compared to a car. That's the way they ride....It's very rough." (R. p. 194, lines 13-17).

After the accident, it took Claimant approximately three hours to make the 100 miles home to South Carolina. He testified that he kept driving slowly, with stops to rest, in order to try to make it home. Since the injury, Claimant has not been able to drive trucks. He testified that he would love to be able to go back to work and that he would be working if he could, but that his physical condition would not allow him to perform physical labor. (R. p. 173, line 10-p. 31, line 3). Claimant reviewed his over thirty five year history as a heavy truck driver, concluding, "That's all I really ever done was drove trucks." (R. p. 166, lines 19-20; R. p. 176, lines, 17-22). Claimant indicated that even getting in and out of a truck is very difficult for him since his accident. However, Claimant testified that, even if he *were* able to get in, he knew that he could not drive a truck. (R. p. 183). Claimant indicated that he had tried to see what he could do by riding along with a friend driving a Peterbilt truck in the hopes that he would be able to do it. However, Claimant reported that after riding in the Peterbilt, he did not think he was going to make it back home due to the pain. (R. p. 173, lines 12-16). Thus, the only work this Claimant had performed over the last approximately thirty-five years was heavy flatbed truck driving, but he is now unable to drive or even ride in a flatbed truck given the condition of his back.

Claimant indicated that Hydrocodone and Oxycodone are prescribed for his pain but that the drugs make him drowsy so that he could not safely drive a truck under the influence of his medications. (R. p. 174, lines 19-21). Further, Claimant confirmed that the Department of Transportation would not allow him to drive commercially because he must take these medications. (R. p. 190). Claimant indicated that he had followed the advice of his doctors and that he was no longer working as a truck driver.

Claimant indicated that his back was painful and that his leg was going numb just from sitting in the witness chair to testify at the hearing. He explained that the bottom of his feet feels like pins sticking when he walks and that his back hurts him every day. Claimant indicated that his legs are numb 90 percent of the day and that that keeps him from walking. (R. p. 182).

Claimant indicated that he has to take a pill to even try to do anything. Claimant's doctor recommended that he use a cane for balance and he uses the cane every day. (R. p. 183, lines 1-4).

The medical evidence submitted amply confirms the Commission's finding that Claimant is permanently and totally disabled by the injuries to his back and legs. Claimant was referred to Midlands Orthopedics. On August 25, 2010, Dr. Fowble noted that Claimant had pain radiating to both legs with numbness. On September 15, 2010, Dr. Fowble opined, "I don't think he can drive a large truck because of the vibration of this will irritate the facet joints." On November 24, 2010, Dr. Fowble noted that Claimant complained of constant radiation to the right leg with intermittent radiation to the left leg. Dr. Fowble diagnosed facet arthropathy at L4-5 on the right and he indicated that Claimant had failed multiple conservative modalities, including therapy, medications, and injections. Dr. Fowble noted Claimant's lower back pain with radiation and that the brace gave Claimant a lot of help while walking but that it did not seem to help him much while sitting. Dr. Fowble noted that Claimant's pain was constant. (R. pp. 67-85).

On February 24, 2011, Dr. Ivan LaMotta noted complaints of low back pain since July 12, 2010. Dr. LaMotta noted that the constant lower back pain radiated down both legs, the right worse than the left, particularly when sitting or driving. Dr. LaMotta noted that physical therapy and epidural steroid injections had been tried without any significant relief of symptoms and that Claimant's pain was rated at a 7/10 for the back and 4/10 for the legs. Dr. LaMotta noted

Claimant's stiffness, severe night-time pain, difficulty walking, fatigue, muscle weakness, and joint pain. Dr. LaMotta opined that Claimant's quality of life and ability to function had been significantly affected by his pain and that the pain increased with standing, bending, twisting, sitting, walking, coughing and sneezing. Dr. LaMotta noted that Claimant's lumbar range of motion was severely limited. Dr. LaMotta opined that based on the functional capacity evaluation, Claimant would be able to perform nothing more strenuous than sedentary work. Dr. LaMotta indicated that Claimant was not a surgical candidate and that he had reached maximum medical improvement with a whole person impairment of 8% translating into an 11% regional impairment to the lumbar spine. (R. pp. 58-64).

Claimant's physical therapist noted increased pain in Claimant's back and legs with standing and sitting, along with stiffness and limited flexion, continuous numbness in his legs, and difficulty walking, sitting or carrying. The therapist noted that Claimant is unable to sit long, that standing, sitting, and walking make his legs numb, and that his right leg feels like it will give out on him. (R. pp. 93-99). Claimant's family doctor noted that Claimant's pain radiated down both legs and that he was unable to do any significant activity due to back pain. Dr. Prashad noted decreased flexion in the back and that Claimant had an abnormal gait due to back pain. (R. pp. 120-125).

Claimant was seen by Dr. Steven Poletti for an IME. On August 30, 2011, Dr. Poletti observed, "I'm in agreement that his work restriction status would be sedentary. I would ascribe him impairment secondary to back pain and leg pain. I do think that he does have nerve compression. That is the nature of lateral recess stenosis and is the result of the facet arthropathy." (R. p. 55). Dr. Poletti assigned a ten percent permanent medical impairment for

radiculopathy and an additional five percent impairment to the legs as the result of bilateral nerve root compression into his exit foramen. (R. p. 55).

Claimant was evaluated by vocational expert, Dr. Robert E. Brabham, PhD, MRC, CRC. On September 9, 2011, Dr. Brabham noted, "his limitations on sitting and standing are such that vocationally even any sedentary work, which might otherwise have been suggested, is precluded. Vocationally, any work requires some combination of sitting, standing and/or walking for a full 8-hour workday, without the need to rest for prolonged periods of time, something he is unable to do in his present condition. Furthermore, any such jobs would require that he be able to use his back, buttocks, hips, and bilateral lower extremities repetitively and continuously while meeting minimal productions standard...he would not be able to sustain any repetitive activity for an eight-hour basis, day after day, in his present condition..." (R. p. 54). Dr. Brabham opined, "He is unable to perform any substantial gainful work activity which exists in the South Carolina or the national economy. Directly as a result of his on-the-job injuries, the only services he could perform are so limited in quality, dependability or quantity that no reasonably stable market for them exists" (R. p. 54).

Lynn Ingram Colley is the Human Resources Director for Boyd Brothers Transportation, Inc. and she does the adjusting for Boyd Brothers and WTI's workers' compensation claims. Ms. Colley agreed that almost all the medical benefits Claimant was provided after his accident were from medical providers in South Carolina. Ms. Colley agreed that, according to the medical evidence, Claimant can now do only very light work which would not include driving a truck. Ms. Colley confirmed that Claimant would not be able to work for WTI or Boyd Brothers in light of his medical restrictions. (R. p. 212, lines 10-16).

The Commission found that Claimant is unable to perform any substantial gainful work activity and, therefore, that he is permanently and totally disabled as a result of his injuries to multiple body parts under §42-9-10. In making the disability determination, the Commission found that Claimant's work history was in manual labor - - almost exclusively in truck driving, but that the authorized treating physicians have restricted Claimant from the manual labor required to drive trucks. The Commission found that Claimant is sixty-six (66) years of age with a high school education and that the Functional Capacity Evaluation (FCE) and Claimant's treating physicians limit him to no more than sedentary to a very light work capacity. The Commission found that Claimant is required to take significant prescription medications which prohibit him from driving a truck and which would also substantially limit his ability to perform any other form of work. (R. p. 24). The Commission took into consideration the results of the vocational assessment conducted by Vocational Expert, Dr. Robert Brabham, which concluded that Claimant is unable to perform any substantial gainful work activity. (R. pp. 2-3; 24-25). Dr. Brabham found that Claimant "is unable to perform any substantial gainful work activity which exists in the South Carolina or the national economy." (R. p. 54). Dr. Brabham opined, "Directly as a result of his on-the-job injuries, the only services he could perform are so limited in quality, dependability or quantity that no reasonably stable market for them exists." (R. p. 54). Thus, the Commission's finding of total and permanent disability is well supported by substantial evidence.

Boyd Brothers argues incorrectly that the opinion of Dr. Brabham was not relevant to the issue of Claimant's loss of earning capacity on the grounds that Dr. Brabham is a licensed psychologist and not a medical doctor. To the contrary, the testimony of a vocational expert is

relevant to the question of earning capacity and loss of employability. As noted by the South Carolina Supreme Court in Stephenson v. Rice Services, Inc.,

...[T]he medical evidence here goes directly to the issue of employability....In fact, one of the medical experts specialized in vocational psychology and, therefore, his opinion was directly relevant to the issue whether Stephenson was capable of sustained, continuous employment prior to his accident.

Stephenson, 323 S.C. at 121, 473 S.E.2d at 703. The medical expert with a specialty in vocational psychology whose opinion was found directly relevant to the question of employability in Stephenson was actually Dr. Robert Brabham, the vocational expert who has opined that this Claimant is unable to perform any substantial gainful work activity in the national or South Carolina economy as the result of his work injuries. Although not the exclusive means of proof, the two most common types of evidence proving a loss of earning capacity under the Act are (1) the testimony of a vocational expert and (2) evidence of reasonable efforts to obtain employment. As recognized in Stephenson, supra, expert vocational evidence is relevant to a finding regarding employability and loss of earning capacity. See also Hutson v. South Carolina State Ports Authority, 399 S.C. 381, 390, 732 S.E.2d 500, 504 (2012) (“The only evidence in the record bearing on Hutson’s future earning capabilities is from the vocational expert...”).

Boyd Brothers argues that the Commission erred in not limiting his finding of disability so as to equal the percentage of permanent medical impairment assigned by the doctors. To the contrary, as a matter of law in South Carolina, “the degree of loss of use can in no way be limited to the percentage of medical impairment established by the medical testimony.” Lyles v. Quantum Chemical Co. (Emery), 315 S.C. 440, 434 S.E.2d 292 (Ct.App. 1993). The Commission was not required, or even permitted, to judge loss of use or disability on the basis of

Claimant's permanent medical impairment standing alone. Instead, it is well established under Workers' Compensation practice and as a matter of law that a finding of loss of use does not depend on the medical impairment rating percentage. Professor Larson observes, "As to issues touching disability...the fact-finders may find disability when the medical testimony denies its existence or may find a degree of disability different from any degree supported by medical testimony." 3 A. Larson, The Law of Workmen's Compensation §79.52(c) n. 33 (1983), quoted in Cropf v. Pantry, Inc., 289 S.C. 106, 344 S.E.2d 879 (Ct. App. 1986).

Boyd Brothers incorrectly argues that the Commission erred in finding that Claimant's medical impairment and resulting disability are permanent. To the contrary, the authorized treating physicians and the IME physician, Dr. Poletti, all agree that Claimant had reached maximum medical improvement. Dr. LaMotta opined that Claimant is not a surgical candidate and that he had reached maximum medical improvement as of February 24, 2011. (R. p. 58). Thus, the authorized treating physicians have opined that Claimant is not a surgical candidate while the IME doctor, Dr. Poletti, suggested only that Claimant might undergo an open procedure as a last ditch effort to control his pain "if the pain was bad enough that he couldn't live with it." However, Dr. Poletti did not indicate that such an effort, even if successful, would return to Claimant to the ability to perform manual labor. (R. p. 56). Dr. Poletti opined that Claimant will continue to require pain management, epidural steroid injections, and continued pain medications in the future. (R. p. 56). Dr. Poletti indicated that, in his opinion, Claimant may be a candidate for retirement." (R. pp. 55-56). Vocational expert, Dr. Brabham, opined, "...he must be expected to permanently remain unable to engage in full-time gainful, competitive employment as a result of his medical conditions..." (R. p. 53).

Thus, the substantial evidence amply supports the Commission's finding of total and permanent disability. Claimant is a classic example of a manual laborer who is no longer able to perform manual labor and who has neither the education nor training to perform any other job. Under these circumstances, the finding of total disability was required under the Act and the Workers' Compensation Commission's decision should be affirmed.

III. The Commission decision to award a lump sum should be affirmed where there has been no evidence or argument suggesting that the Commission's decision to award a lump sum was the result of an abuse of discretion.

The Commission's decision to award a lump sum was unquestionably in the best interest of Claimant. Claimant's earnings were cut by a third as of the date of accident and his temporary benefits were stopped as of February 24, 2011, some eight months before the hearing, resulting predictably in financial devastation for Claimant. (R. pp. 7; 24-26; 168; 46). However, Appellants argue that the Commission erred in awarding a lump sum payment on the basis that the Commission was required to order periodic payments in the absence of proof that this was an extraordinary case so as to justify a lump sum award. To the contrary, as of 1983, payment of benefits by lump sum is covered by S.C. Code Ann. § 42-9-301.

Under the prior statute, § 42-9-300, periodic payments were the standard and lump sum payments were required to be justified by exceptional and unusual circumstances. However, while the former statute did require that a lump sum be justified by and awarded only in unusual or exceptional circumstances, those requirements were deleted from the new statute. Section 42-9-301 provides for the lump sum payment of a disability compensation award "when the Employee so requests and the Commission deems it not to be contrary to the best interest of the Employee/Employer." Hooks vs. Southern Bell Tel. and Tel. Co., 291 SC 41, 351 SE 2d 900, 902 (Ct. App. 1986). The new statute further changed the standard of review so that the burden

of proving that a lump sum was an abuse of discretion is on the party opposing the lump sum.

"An abuse of discretion occurs if the Commission's findings are wholly unsupported by the evidence or the conclusions reached are controlled by an error of law." Swilling v. Pride Masonry of Gaffney, supra.

Before ordering a lump sum, the Commission must give the employer and carrier an opportunity to be heard on the issue. Todd v. Holt & Vereen Const. Co., 276 S.C. 615, 616, 281 S.E.2d 215, 216 (1981). Here, at the outset of the hearing, Commissioner Beck reviewed the positions of the parties, including Claimant's request for a lump sum and the fact that Appellants opposed the lump sum requested. Counsel for Appellants agreed that Boyd Brothers and WTI "oppose lump sum payment and assert that Claimant is not totally and permanently disabled." (R. p. 154, lines 19-22). However, Appellants did not expand on the bare objection and particularly made no argument that the lump sum requested would constitute an abuse of discretion. Thus, Appellants were given the opportunity to be heard, yet they raised no further objection or complaint and they failed to make any argument or assertion that a lump sum award would cause any hardship. In Swilling, supra, just as in this case, the employer offered no evidence of hardship arising from a lump sum award; the Court of Appeals found, "Accordingly, we find no abuse of discretion by the Commission in awarding a lump sum." Swilling, 401 S.C. at 191, 736 S.E.2d at 678. Likewise, here, where the employer submitted no evidence or argument that the lump sum award would cause hardship, Appellants failed to carry the burden of proving that the lump sum award was an abuse of discretion which the statute explicitly places upon them.

Where Appellants did not argue or show that the Commission's award of a lump sum was an abuse of discretion; the decision to award a lump sum should be affirmed.

IV. The Order of the South Carolina Workers' Compensation Commission should be affirmed and remanded for correction by the Commission in order to correct the credit to the employer for prior payment of temporary benefits according to the undisputed evidence.

By his appeal, Claimant sought correction of an error in calculating the credit owed to Boyd Brothers against the award for its prior payment of temporary benefits from the date of the accident until benefits were stopped on February 24, 2011. Because the calculations for the award relied upon a typographical error in the Hearing Commissioner's Order Instructions which wrongly indicated that the accident took place on "7/12/08," rather than on the correct date of accident in 2010, 7/12/10, the Order mistakenly gave Boyd Brothers credit for previously paying temporary benefits from the mistaken date of accident of July 12, 2008, through the date of MMI, February 24, 2011. This error resulted in Boyd Brothers being mistakenly given credit against the award for 136 weeks of temporary benefits. Boyd Brothers actually paid only 32 weeks of temporary benefits, from July 12, 2010, the actual, undisputed, date of the accident, through the date of MMI, February 24, 2011. (R. pp. 17; 46; 168; 186; 211; 249).

Therefore, the Commission's Order mistakenly provided a credit to Boyd Brothers for payment of 136 weeks of temporary benefits despite the undisputed fact that only 32 weeks of temporary benefits were actually paid. Notably, Boyd Brothers has not disputed that it paid only 32 weeks of temporary benefits, rather than the 136 weeks of payments for which it has mistakenly been credited.

Boyd Brothers does argue that there is no evidence of the amount of weekly temporary benefits it paid to Claimant from July 12, 2010 through February 24, 2011. Therefore, Boyd Brothers argues that the calculation error is impossible to correct. To the contrary, the actual date of the accident on July 12, 2010, is undisputed as is the fact that Boyd Brothers actually paid only 32 weeks of temporary benefits. Therefore, the error may be corrected by

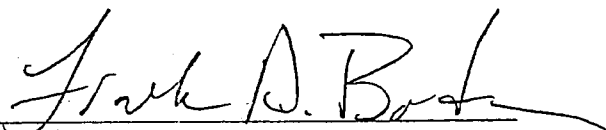
giving Boyd Brothers credit against the award for only having paid temporary benefits for 32 weeks.

Therefore, the Order should be affirmed and remanded to the Commission for correction so that the employer is properly given credit only for paying temporary benefits which were actually paid.

CONCLUSION

The Commission correctly determined as a matter of law that Boyd Brothers is Claimant's statutory employer under S.C. Code Ann. Section 42-1-400 (1985) and that the Commission properly has jurisdiction over this claim. The Commission further correctly found that Claimant is a manual laborer who is no longer able to perform manual labor and who has neither the education nor training to perform any other job. The Commissioner's finding that Claimant is permanently and totally disabled as the result of the injuries to his back and legs so that the only services he can perform are so limited in quality, dependability, or quantity that no reasonably stable market for them exists is overwhelmingly supported by the expert medical and vocational evidence submitted. Finally, the decision to award a lump sum has not been shown to be an abuse of discretion and, accordingly, should be affirmed. However, the award should be remanded to the Commission so that the credit to Boyd Brothers may be corrected to give the employer credit only for temporary benefits actually paid.

Respectfully submitted,



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June 23, 2014

THIS OPINION HAS NO PRECEDENTIAL VALUE. IT SHOULD NOT BE
CITED OR RELIED ON AS PRECEDENT IN ANY PROCEEDING
EXCEPT AS PROVIDED BY RULE 268(d)(2), SCACR.

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

Joseph Mickle, Appellant-Respondent,

v.

Boyd Brothers' Transportation, Inc., Employer, and
Lumbermans' Underwriting Alliance, Carrier,
Respondents-Appellants.

Appellate Case No. 2013-001212

Appeal From The Workers' Compensation Commission

Unpublished Opinion No. 2015-UP-068
Heard December 11, 2014 – Filed February 11, 2015

**AFFIRMED IN PART, REVERSED IN PART, AND
REMANDED**

Frank A. Barton, Mullis Law Firm, of Columbia, for
Appellant-Respondent.

Duke K. McCall, Jr., Smith Moore Leatherwood, LLC,
of Greenville, for Respondents-Appellants.

PER CURIAM: Joseph Mickle was a truck driver and employee of WTI—a wholly-owned subsidiary of Boyd Brothers' Transportation, Inc.—and was based in South Carolina. Mickle suffered injury to his back after pulling the tarp off of a

truck load in Alabama. Boyd Brothers paid Mickle benefits in Alabama initially, but Mickle decided to pursue benefits in South Carolina where he lived. After a hearing, the single commissioner issued an order finding: (1) the commission had jurisdiction over Mickle's claim; (2) Mickle was permanently and totally disabled; and (3) Boyd Brothers, as Mickle's statutory employer, was responsible for paying him benefits. Both parties appealed to the Appellate Panel, which affirmed the single commissioner's order in full. We affirm in part, reverse in part, and remand.

I. Jurisdiction

Boyd Brothers challenges the commission's determination that it had jurisdiction over Mickle's claim. We believe the jurisdiction issue raises two sub-issues: (1) whether WTI was covered by the Workers' Compensation Act and (2) if WTI was not covered by the Act, whether the commission had jurisdiction over Mickle's claim because of an employer-employee relationship between Boyd Brothers and Mickle. "Because both issues are jurisdictional . . . this Court has the power and duty to review the record and decide the issue in accordance with the preponderance of the evidence." *Voss v. Ramco, Inc.*, 325 S.C. 560, 565, 482 S.E.2d 582, 584-85 (Ct. App. 1997) (citations and internal quotation marks omitted). The parties stipulated WTI did not regularly employ four or more employees in South Carolina at the time of Mickle's injury. Thus, we find WTI was exempt from the Act's coverage. See S.C. Code Ann. § 42-1-360(2) (2015). However, this stipulation is not dispositive of the jurisdiction issue.

The parties also stipulated WTI was Boyd Brothers' wholly-owned subsidiary. The parties framed—and the commission addressed—the jurisdiction issue as whether Boyd Brothers was Mickle's statutory employer. In doing so, the commission relied on this court's decision in *Poch v. Bayshore Concrete Products/S.C., Inc.*, 386 S.C. 13, 686 S.E.2d 689 (Ct. App. 2009) (*Poch I*). In *Poch v. Bayshore Concrete Products/S.C., Inc.*, 405 S.C. 359, 747 S.E.2d 757 (2013) (*Poch II*), however, our supreme court held "the Court of Appeals applied an incorrect legal standard." 405 S.C. at 370, 747 S.E.2d at 763. The supreme court provided "eight factors that courts should consider in determining whether" a parent company and its wholly-owned subsidiary "are separate and distinct corporations" or a single economic entity "for workers' compensation purposes." 405 S.C. at 372-73, 747 S.E.2d at 764 (stating "no one factor is controlling"). At oral argument the parties agreed *Poch II*, which was not decided until after the parties' initial briefs had already been filed with this court, changes the jurisdictional analysis. However, neither party advised the court of *Poch II* while this appeal was pending. See Rule 208(b)(7), SCACR ("When pertinent and significant authorities come to the

attention of a party after his initial brief(s) has been served and filed, the party shall promptly advise the clerk of the appellate court, by letter, with a copy to all counsel, setting forth the citations."). Therefore, we question whether the applicability of *Poch II* is before us. See Rule 208(b)(1)(B), SCACR ("Ordinarily, no point will be considered which is not set forth in the statement of the issues on appeal."); *Walde v. Ass'n Ins. Co.*, 401 S.C. 431, 435 n.1, 737 S.E.2d 631, 633 n.1 (Ct. App. 2012) (refusing to address an issue when the appellant's brief did not "include an issue on appeal addressing this contention").

Reviewing the commission's analysis under the law of statutory employment, we find by the preponderance of the evidence the commission had jurisdiction over Mickle's claim. See S.C. Code Ann. § 42-1-400 (2015); *Poch II*, 405 S.C. at 368, 747 S.E.2d at 762 ("In determining whether an employee is engaged in activity that is part of [the owner's] trade, business, or occupation as required under section 42-1-400, this Court has applied three tests." (alteration in original) (quoting *Olmstead v. Shakespeare*, 354 S.C. 421, 424, 581 S.E.2d 483, 485 (2003)) (internal quotation marks omitted)); *id.* ("If the activity at issue meets even *one* of these three criteria, the injured employee qualifies as the statutory employee of 'the owner.'" (citation and internal quotation marks omitted)).

Additionally, if we apply the *Poch II* test, as Boyd Brothers asks this court to do rather than remand to the commission, we find the following facts relevant under the *Poch II* analysis. Boyd Brothers' human resources director, Lynn Colley, testified, "I'm here as a representative . . . of Boyd Brothers and WTI." In addition, she stated the companies maintained "a self-insured group health plan . . . administered by Blue Cross/Blue Shield," and "the paperwork does route from WTI to Boyd. It's compiled together and sent to Blue Cross." Furthermore, Boyd Brothers' website includes "Boyd Brothers and WTI and a logistics department, a Boyd logistics department and the company, as well," and Colley confirmed Boyd Brothers advertised to its customers the "WTI Division currently has [trucks available]." Moreover, "both [WTI and Boyd Brothers] are flatbed carriers," and advertise "the total trucks that both companies have"—consisting of "1,050 conventional tractors" and "1,670 48-foot flatbed trailers." In addition, Colley stated, "I can't say that [Boyd Brothers and WTI] may not have the same customers, but they have their own customer base." While Colley briefly stated "[e]ach company has its own president," she thereafter addressed only the "owners" of Boyd Brothers and WTI, and explained Boyd Brothers and WTI have the exact same owners. Colley acknowledged the owners of Boyd Brothers: "could close down WTI"; "could change what [WTI was] doing"; "could direct where [WTI's] trucks go and deliver"; and "they could do the same thing for Boyd

Brothers." Finally, when asked whether the owners of Boyd Brothers "have total control over WTI," Colley answered affirmatively.

We also note Mickle testified the trucks he drove had "WTI, Subsidiary of Boyd Brothers" on them and he considered himself as working for "WTI/Boyd Brothers." Mickle acknowledged he was "dispatched by WTI to different locations," but stated he was switched from "one dispatcher to another" and he did not "know who [he] was talking to." In addition, Mickle's "medical cards," medical paperwork, and dental coverage papers were labeled "Boyd Care." He also stated that after WTI accepted his workers' compensation claim in Alabama, "[WTI] switched me to Boyd Brothers. They told me I had to call Boyd Brothers." Thus, under *Poch II*, we find by the preponderance of the evidence the commission had jurisdiction over Mickle's claim.

II. Boyd Brothers' Liability

Boyd Brothers argues the commission erred in determining Mickle was permanently and totally disabled. We disagree. In reaching its determination, the commission relied on the following facts: (1) treating physicians' conclusions that Mickle was limited "to sedentary work capacity"; (2) a functional capacity evaluation finding the same; (3) treating physicians' restriction on Mickle driving trucks; (4) Mickle's age—sixty-six—and high school education; (5) Mickle's working "almost exclusively in truck driving"; (6) Mickle's prescribed medication that prohibited him from driving trucks and substantially limited "his ability to perform any other form of work"; and (7) Dr. Robert Brabham's vocational assessment. Thus, we find substantial evidence exists to support the commission's decision. See *White v. Med. Univ. of S.C.*, 355 S.C. 560, 564, 586 S.E.2d 157, 159 (Ct. App. 2003) ("The appellate court's review is limited to deciding whether the Commission's decision is unsupported by substantial evidence or is controlled by some error of law." (citation and internal quotation marks omitted)). Additionally, we disagree with Boyd Brothers' assertion that the commission erred in awarding Mickle a lump sum payment of benefits because the burden of proving facts to justify such an award rests on the employee. Pursuant to section 42-9-301 of the South Carolina Code (2015), when the commission makes a finding to award a lump sum payment, the *employer* bears the burden of proof to demonstrate the commission's finding was an abuse of discretion. We find Boyd Brothers did not meet this burden.

III. Award Calculation

In a cross appeal, Mickle argues the commission erred by not correcting a miscalculation in the single commissioner's order giving Boyd Brothers credit for 136 weeks of benefits payments when it had only paid 32 weeks. At oral argument Boyd Brothers conceded the commission's miscalculation should be corrected if we found the commission had jurisdiction over Mickle's claim. Therefore, we reverse because there was not substantial evidence in the record to support the commission's determination. We remand for the commission to correct the miscalculation.

AFFIRMED IN PART, REVERSED IN PART, AND REMANDED.

FEW, C.J., and THOMAS and LOCKEMY, JJ., concur.

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

Joseph Mickle, Appellant-Respondent,

v.

Boyd Brothers' Transportation, Inc., Employer, and
Lumbermans' Underwriting Alliance, Carrier,
Respondents-Appellants

Appellate Case No. 2013-001212

Appeal from the Workers' Compensation Commission

Unpublished Opinion No. 2015-UP-068
Heard December 11, 2014 – Filed February 11, 2015

RESPONDENTS-APPELLANTS' PETITION FOR REHEARING

Pursuant to Rules 221 and 224 of the South Carolina Appellate Court Rules, Boyd Brothers Transportation, Inc., Employer and Lumbermans' Underwriting Alliance, Carrier (collectively, "Petitioners") respectfully submit this Petition for Rehearing in connection with the Court's Opinion No. 2015-UP-068 filed February 11, 2015, on the grounds that the Court error in concluding that South Carolina has jurisdiction of this Alabama Workers' Compensation claim. It is submitted that the conclusion that WTL, Appellant-Respondent's (Mickle) employer, did not regularly employ four or more employees in South Carolina at the time of the Respondent's injury was indeed dispositive of the issue of jurisdiction.

Casting the jurisdiction net to the Respondents-Appellant on the basis that WTI was a wholly owned subsidiary failed to determine whether the Appellant-Respondent (Mickle) was performing any part of the trade, business or occupation of the Respondents-Appellant under Section 42-1-400, Code of Laws of South Carolina as amended. WTI, a wholly owned subsidiary, then was a subcontractor of the owner, Boyd Bros. Transportation, Respondent-Appellant. This failure requires an Award in favor of the Respondents-Appellant.

In so moving, Petitioners reassert and incorporate by reference all arguments and grounds previously set forth in their Final Brief filed with the Court. The ground for Petitioner's request is that the record does not contain evidence sufficient to establish the vocational consultant as an expert qualified to render the opinions expressed in the report admitted. This ground is addressed in the accompanying Memorandum in Support of Petition for Rehearing.

WHEREFORE, Petitioners respectfully request that the Court grant rehearing and reconsider its affirmance of the admissibility of the vocational consultant's report in this matter.



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March 2, 2015

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

Joseph Mickle, Appellant-Respondent,

v.

Boyd Brothers' Transportation, Inc., Employer, and
Lumbermans' Underwriting Alliance, Carrier,
Respondents-Appellants.

Appellate Case No. 2013-001212

MEMORANDUM OF RESPONDENTS-APPELLANTS IN
SUPPORT OF PETITION FOR REHEARING

The Court of Appeals concluded that the South Carolina Workers Compensation Commission had jurisdiction of this Alabama Workers' Compensation claim on the basis that the employer, WTI who was an exempt employer not having four or more employees in this State at the time of the Appellant-Respondent's injury, was a wholly owned subsidiary of Boyd Brothers' Transportation, Inc., a qualified employer in South Carolina. The Court of Appeals stopped there in its decision and did not go the second step which was to determine whether the Appellant-Respondent Mickle was performing part of the trade, business or occupation of the Respondent-Appellant Boyd Brothers at the time of his injury.

Section 42-1-400, Code of Laws of South Carolina, 1976, as amended says:

"When any person, in this section and Sections 42-1-420 and 42-1-430 referred to as "owner", undertakes to perform or execute any work which is part of his trade, business or occupation and contracts with any other person (in this section and Sections 42-1-420 to 42-1-450 referred to as

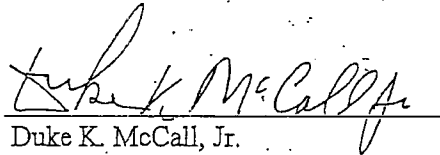
"subcontractor) for the execution or performance by or under such subcontractor of the whole or any part of the work undertaken by such owner, the owner shall be liable to pay to any workman employed in the work any compensation under this title which he would have been liable to pay if the workman had been immediately employed by him."

Even if the Appellant-Respondent was working for a wholly owned subsidiary of the Respondent-Appellant, Boyd Brothers, the Respondent-Appellant is not liable until and unless the Appellant-Respondent was performing the trade, business or occupation of the owner, Boyd Brothers under this Code Section. The owner is not automatically liable for the workmen of the subcontractor/wholly owned subsidiary because the subcontractor would have been liable if it had the required number of employees in South Carolina at the time of the accident. There is no Code Section which declares this to be true, and Workers' Compensation in South Carolina is Statutory.

Further, it is submitted the Court misconstrued the testimony of Ms. Colley as to the "owners". The owners own both WTI and Boyd Brothers Transportation, Inc. They control both companies. However, there is no contention by the Appellant-Respondent, that because the owners control both companies they are subject to the South Carolina Workers' Compensation Act. There is no contention that the Appellant-Respondent was performing the trade, business or occupation of the owners. The owners owned WTL. The fact that they coincidentally owned Boyd Brothers Transportation does not make the two companies a single company either under Alabama law or under South Carolina law. The factors of *Poch v. Bayshore Concrete Products/S.C., Inc.*, 386 S.C. 13, 686 S.E. 2d 763, do not lead to this conclusion.

Therefore, it is submitted that the Court should re-consider this matter and Reverse the Award in favor of the Respondents-Appellants.

Respectfully submitted,



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March 2, 2015

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THE STATE OF SOUTH CAROLINA
In the Court of Appeals

Joseph Mickle, Appellant-Respondent,

v.

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Appellate Case No. 2013-001212

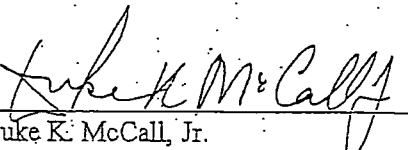
Appeal from the Workers' Compensation Commission

Unpublished Opinion No. 2015-UP-068
Heard December 11, 2014 – Filed February 11, 2015

PROOF OF SERVICE

I certify that I have served the RESPONDENTS-APPELLANTS' PETITION FOR REHEARING and RESPONDENTS-APPELLANTS' MEMORANDUM IN SUPPORT OF PETITION FOR REHEARING by depositing a copy of it in the United States Mail, postage prepaid, on the 2nd day of March, 2015, addressed to her attorney of record as follows:

Frank A. Barton, Esq.
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(864) 751-7600; (864) 751-7800 (fax)
Attorney for Respondents-Appellants/Petitioners

The South Carolina Court of Appeals

Joseph Mickle, Appellant-Respondent,

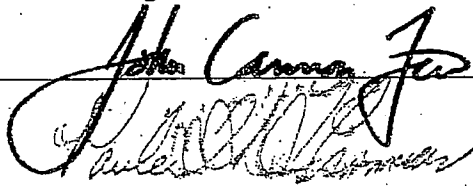
v.

Boyd Brothers' Transportation, Inc., Employer, and
Lumbermans' Underwriting Alliance, Carrier,
Respondents-Appellants.

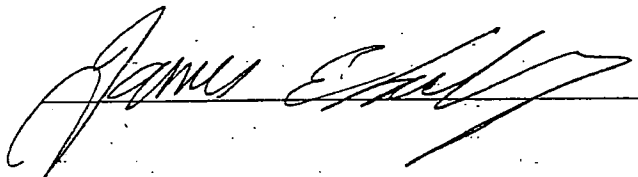
Appellate Case No. 2013-001212

ORDER

After careful consideration of the Respondents-Appellants' 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.

 C.J.

 J.

 J.

Columbia, South Carolina

RECEIVED

JUL 17 2015

cc:

Frank Anthony Barton, Esquire
Duke K. McCall, Jr., Esquire
Amy Bracy

FILED

S.C. Supreme Court

March 13, 2015