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THE STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

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SC Court of Appeals

APPEAL FROM LAURENS COUNTY

Eugene C. Griffith, Jr., Circuit Court Judge
Trial Court Case No.: 2013-CP-30-506

Appellate Case No.: 2014-001459

American Home Assurance Company, (Carrier).....Appellant

v.

South Carolina Second Injury Fund.....Respondent

(In Re: Ben Johnson (Employee/Claimant) v. American Services, Inc. (Employer))

RECORD ON APPEAL

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Greenville, SC 29603
864-271-5354

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AND

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(803) 750-2214

ATTORNEY FOR APPELLANT

ATTORNEY FOR RESPONDENT

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American Home Assurance Company, Carrier, Appellant

v.

South Carolina Second Injury Fund, Respondent

(In Re: Ben Johnson, Employee / Claimant,

v.

American Services, Inc., Employer)

Appellate Case No.: 2014-001459

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Ben Johnson, Employee,
Claimant,

vs.

American Services, Inc., Employer, and
AIG Claim Services, Carrier,

Defendants.

W.C.C. File No. 0520716

MAR 5 2009

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Ben Johnson vs. American Services, Inc.
W.C.C. File No. 0520310

every liability of whatsoever nature or kind under the South Carolina Workers' Compensation Act growing out of, or in any way connected with, said injury by accident occurring on or about November 15, 2005, while the claimant was an employee of American Services, Inc. As an integral part of this settlement agreement, it is expressly understood and agreed that the defendants shall be responsible, under the Fee Schedule, for all future causally related medical expenses authorized by them and related to the November 15, 2005, injury. Defendants reserve the right to set up a Medicare Set Aside at some point in the future with a structured settlement (annuity) containing a reversionary clause, upon the death of Claimant. Further, the claimant agrees that the consideration payable under this agreement is sufficient for a complete release and covenant not to sue regarding any and all actual or potential claims against the defendants under Title 42 of the S.C. Code.

The claimant, Ben Johnson hereby requests the Commission to approve the allocation of the aforementioned proposed settlement sum as follows:

Thirty-two thousand five hundred forty-three and 03/100ths (\$32,543.03) in compromise settlement of future disability benefits at the rate of eighteen and 09/100ths (\$18.09) Dollars per week, commencing on November 15, 2008, and continuing thereafter for 1799 weeks, which is his life expectancy pursuant to §19-1-150 of the South Carolina Code of Laws; Ten thousand nine hundred sixteen and 50/100ths (\$10,916.50) Dollars of the disability settlement of forty-five thousand and 00/100ths (\$45,000.00) Dollars as attorneys fees in the case, plus costs of one thousand five hundred forty and 47/100ths (\$1,540.47) Dollars.

The defendants take no position with respect to the above allocation of the proceeds.

The claimant and his attorney represent that the claimant is not presently eligible for Medicare.

The claimant hereby asserts that he has been fully advised by his attorney of record of all his rights under the South Carolina Workers' Compensation Act, and that the claimant is of the opinion that the proposed settlement is reasonable and fair and in this opinion the claimant's attorney concurs and asserts that she has fully advised the claimant of all his rights under the South Carolina Workers' Compensation

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Ben Johnson vs. American Services, Inc.
W.C.C. File No. 0520310

Act, and they respectfully request that this Commission approve the settlement as set forth above. The claimant hereby asserts that he recognizes that his consent to, and the approval of, this Order is a final determination and adjudication of all benefits under the South Carolina Workers' Compensation Act growing out of, or in any way connected with, the aforesaid injury by accident occurring on or about November 15, 2005, while the claimant was an employee of American Services, Inc.

The parties hereto acknowledge that the South Carolina Workers' Compensation Commission relies upon the representation of the attorney for the claimant that the claimant has been fully apprised of his rights under the South Carolina Workers' Compensation Act.

The parties hereto further acknowledge that any opinions stated by physicians and providers/caregivers regarding the nature and extent of the employee's medical condition and disability are opinions, not facts, and that, to the extent they are relying on those opinions, they are doing so with the knowledge that such opinions may be incorrect. Accordingly, employee, employer, and carrier and/or servicing agent agree that this settlement agreement cannot be voided in the future on the basis that either or both parties relied on statements or opinions from physicians or other medical providers/caregivers, in entering into this agreement.

Except where required by legal or administrative proceedings, the parties to this Agreement agree to not discuss the terms thereof with any other persons, corporations, or entities other than immediate family who will not discuss said terms with any other persons, corporations, or entities.

The claimant hereby confirms that he either fully comprehends by reading all written herein or has had this agreement read to him and fully understands the contents of same.

NOW, THEREFORE, IT IS ORDERED that upon the payment of the sum of forty-five thousand and 00/100ths (\$45,000.00) Dollars by the defendants, and the acceptance of said sum by the claimant, and the payment of the medical expenses by the defendants as specifically set forth hereinabove, the defendants be, and they hereby are, fully and forever discharged of all liability of whatsoever nature and kind under the

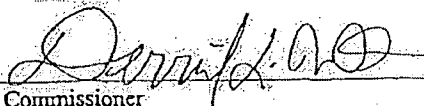
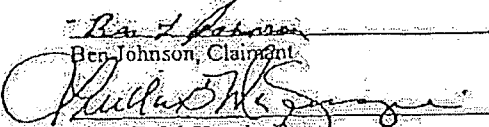
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W.C.C. File No. 0520310

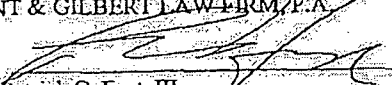
South Carolina Workers' Compensation Act growing out of, or in any way connected with, the aforesaid injury by accident occurring on or about November 15, 2005, while the claimant was an employee of American Services, Inc., so that upon such payment and the acceptance as aforesaid, this matter be, and it hereby is, res judicata and not subject to review under any conditions.

IT IS FURTHER ORDERED that the allocation of the lump sum payment as requested by the claimant should be and is hereby approved.

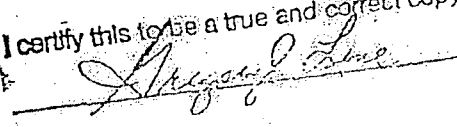
WE CONSENT TO THE
FOREGOING ORDER:

SOUTH CAROLINA WORKERS'
COMPENSATION COMMISSIONBY: 
CommissionerDATED: 3.25.09
Ben Johnson, Claimant
Linda B. McKenzie, Esq.
Attorney for Claimant

FANT & GILBERT LAW FIRM, P.A.

BY: 
Patrick C. Fant, III
Attorneys for Defendants

FEE SUBJECT TO FORM 61

I certify this to be a true and correct copy.


South Carolina Workers' Compensation Commission
1612 Marion St. • P.O. BOX 1715
Columbia, SC 29202-1715
(803) 737-5723



WCC File #: **0520310**
Carrier File #: **709-252373**
Carrier Code #: **170**
Employer FEIN #:

Claimant's Name: BEN JOHNSON SSN: 248 - 41 - 6693 Employer's Name: AMERICAN SERVICES INC
Address: 805 FLORIDA ST Address: 1300 RUTHERFORD RD
City: CLINTON State: SC Zip: 29325 City: GREENVILLE State: SC Zip: 29609
Home Phone: () Work Phone: () Insurance Carrier: AHA C/O AIGDC
Preparer's Name: EDWARD GILLAM Law Firm: Preparer's Phone #: (704) 553-5100

Compensation Paid:	Number of Weeks	From (m/d/yyyy)	To (m/d/yyyy)	Amount
1. Number of Weeks T.T.	<u>171</u>	<u>11/16/2005</u>	<u>2/24/2009</u>	\$ <u>28128.23</u>
2. Number of Weeks T.P.				\$
3. Number of Weeks P.P.				\$
4. Disfigurement				\$
5. Agreement and Final Release				\$ <u>45000.00</u>
Total Compensation Paid				\$ <u>73128.23</u>
6. Total Medical Benefits* Paid				\$ <u>87440.12</u>
7. Funeral Benefits				\$

☐ Case Denied

Date of Injury: 11/15/2005
(m/d/yyyy)

By signing this receipt, I acknowledge that I have received the compensation shown above.

By: Ben Johnson
Claimant

By: [Signature]
Employer's Representative

3/16/09
Date
(m/d/yyyy)

Print or type the name of the person, other than the claimant, receiving benefits and sign below.

By: [Signature]

Report of Additional Fees and Recoupment

- A. Carrier Reimbursement by Third Party \$
- B. Attorney's Fee Paid by Employer \$
- C. Attorney's Fee Paid by Claimant
(Non-contingent fees only) \$

RECEIVED

MAR 26 2009
Division of Claims
Claims Administrator
S.C. Workers' Comp. Comm.

File this form with the Claims Department according to R.67-414 and R.67-1204. A person, other than the claimant, receiving benefits should sign on the line provided. * Do not include as medical costs fees paid for expert testimony, fees for determining carrier's liability, costs of autopsy, birth and death certificates and impartial examination. Form 19 must be filed within 16 days of final payment of compensation. Form 19 must be filed when a claim is denied.

WCC Form # 19
Rev. Date 3/96

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STATUS REPORT AND COMPENSATION RECEIPT

ROA -005

DECISION AND ORDER
OF THE
SOUTH CAROLINA WORKERS' COMPENSATION COMMISSION
SCWCC NO. 0520310; SCSIF NO. 131817
CHARTIS INSURANCE COMPANY
V.
SOUTH CAROLINA SECOND INJURY FUND

[In Re: Ben Johnson, Employee v. American Services Inc., Employer]

HEARING: August 24, 2011, in Clinton, South Carolina.

APPEARANCES: American Services, Incorporated, Employer, and
Chartis Insurance Company, Carrier, represented by
T.J. Hadley, Esquire, Gallivan White & Boyd, P.A.,
of Greenville, South Carolina.

The South Carolina Second Injury Fund represented
by Latonya Dilligard Edwards, Esquire, Boykin &
Davis, LLC, Columbia, South Carolina.

PURPOSE OF HEARING: To determine issues as set forth in the Forms 54 and
55.

OPINION AND AWARD: By Avery B. Wilkerson, Jr., Commissioner

FILED: October 12, 2011

ADMINISTRATIVE PROCEDURE ACT (APA) SUBMISSIONS

By Carrier:

<u>APA NO.</u>	<u>ITEM</u>	<u>DATE</u>	<u>PAGES</u>
1	Dr. Vincent S. Toussaint	01/03/00 - 08/03/09	1-7
2	The Family Healthcare Center	11/17/05 - 01/04/06	8-14
3	Physicians Health & Rehab	12/27/05- 05/18/06	15-16
4	Carolina Neurosurgery & Spine Center	01/30/06	17-26
5	Self Regional Healthcare (Radiology)	02/27/06 - 07/09/07	27-31
6	Self Regional Healthcare Medical Record	08/03/06 - 08/03/07	32-39
7	Self Regional Healthcare (Pain Clinic)	02/27/06 - 03/10/08	40-56
8	Carolinas Center for Advanced Management of Pain	06/27/07	57-59
9	Oaktree Medical Centre, P.C.	04/15/08	60-66

By the Fund:

SC Workers' Compensation Decision & Order	03/25/2009	1-4
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STIPULATIONS

The parties stipulated to the following:

1. The South Carolina Workers' Compensation Commission had jurisdiction to hear the case.

2. Venue was proper in Laurens County.
3. Notice was timely and proper.
4. The Commission's file became a part of the record with the exception of self-serving declarations and unstipulated medical reports.

STATEMENT OF THE CASE

This is a claim for partial reimbursement from the South Carolina Second Injury Fund (the "Fund") by American Services, Incorporated, Employer, and Chartis Insurance Company, Carrier (collectively the "Carrier") pursuant to S.C. Code Ann. § 42-9-400. Carrier alleged that they incurred substantially greater liability for compensation and medical benefits when Ben Johnson's (the "Claimant") preexisting anxiety, back pain and hypertension were either aggravated by or combined with his November 15, 2005 work related injury to his back, psyche and right lower extremity. Carrier further alleged that Claimant's preexisting conditions were permanent and serious enough to constitute a hindrance or obstacle to employment. The Fund denied that hypertension and anxiety preexisted, asserted that Claimant's preexisting back problem was not permanent and serious enough to constitute a hindrance or obstacle to employment and denied that this claim qualified for reimbursement as contemplated by S.C. Code Ann. §42-9-400.

EVIDENCE OF THE CASE

On November 15, 2005, Claimant sustained an injury by accident during the course of his employment with American Services, Incorporated. Carrier APA p.67. On January 3, 2000, approximately fifteen (15) years prior to the work injury, Claimant completed a patient information form. Carrier APA p.1. This form contains a social

security number and address but the signature appears to be redacted from the document. Carrier APA p.1. In August 12, 2005, Claimant again obtained prescription medication. Carrier APA pp.2-3. On March 1, 2011, six (6) years after the medication was prescribed, an addendum indicates that it was prescribed for chronic back pain. Carrier APA p.2.

On November 17, 2005, Claimant presented to The Family Healthcare Center complaining of sudden persistent back pain for two (2) days precipitated by a work injury. Carrier APA p.8. This medical narrative notes "no prior [history] of back injury." Carrier APA p.8. Claimant's mental status is noted as "alert," his diagnosis was an unspecified backache and he was instructed to follow up in one (1) week. Carrier APA p.9.

On December 12, 2005, Claimant's follow up visit revealed decreased range of motion of the spine, painful movements, flexion and extensions. Carrier APA pp.10-11. Claimant's treatment plan included medication and a heating pad for thirty (30) minutes once daily. Carrier APA p.11. On December 21, 2005, Claimant returned for follow up and noted severe back pain that radiates into the thighs and into the knee and leg. Carrier APA p.12. Claimant's treatment plan included a two (2) week follow up and an MRI. Carrier APA p.13. On December 27, 2005, Claimant's MRI of the lumbar spine revealed mild spondylotic changes and a paracentral protrusion at L5-S1. Carrier APA p.15.

On January 4, 2006, Claimant was referred to a neurosurgeon for evaluation of his back pain. Carrier APA p.14. On January 30, 2006, Claimant presented to Carolina Neurosurgery and Spine Center for consultation of his back pain. Carrier APA pp.17-18. Dr. Sumeer Lal's treatment plan for Claimant included physical therapy, medication and

an epidural steroid injection. Carrier APA p.18. On February 27, 2006, Claimant presented to Self Regional Healthcare for pain management where he was diagnosed with lumbar radiculopathy, degenerative disc disease, sciatica and nerve root dysfunction. Carrier APA pp.40-41.

On April 17, 2006, Claimant returned to Self Regional Healthcare for pain management where it was noted that conservative treatment had failed and he was referred for neurosurgical consultation. Carrier APA p.42. On May 8, 2006, Dr. Lal ordered a new MRI to determine how to proceed. Carrier APA p.19. On May 18, 2006, Claimant's MRI was essentially the same as the December 2005 MRI, revealing a disc protrusion and mild foraminal narrowing. Carrier APA p.16. Dr. Lal recommended surgery, which was ultimately approved after being initially denied. Carrier APA pp.20-21, 32-33.

On November 8, 2006, Claimant presented to Carolina Neurosurgery and Spine Center for a three (3) month postoperative visit. Carrier APA p.22. Claimant noted pain, a decreased need for medication and he was scheduled to begin a course of work-hardening followed by a functional capacity evaluation. Carrier APA p.22. On December 13, 2006, Claimant followed up with Dr. Lal, and after noting additional problems, his medication was increased and a new MRI was ordered. Carrier APA p.23. Claimant's December 18, 2006 MRI of the lumbar spine revealed post surgical changes without evidence of complication. Carrier APA pp.24 and 29.

On January 29, 2007 after continued complaints of pain, Dr. Lal recommended a trial spinal cord stimulator for Claimant's failed back surgery. Carrier APA p.25. On March 12, 2007, Claimant presented to the Self Regional Healthcare Pain Clinic where it

was noted that he was last seen at this facility approximately one (1) year ago. Carrier APA p.43. Claimant noted continued pain that affected his quality of life, functioning, and required use of a cane. Carrier APA pp.43-44. Claimant's treatment plan included EMG and nerve conduction studies, and therapeutic injections. Carrier APA p.44. On March 26, 2007, Claimant underwent therapeutic injections and was diagnosed with failed back surgery syndrome as well as degenerative disc disease and nerve root dysfunction. Carrier APA pp.45-46. After therapeutic injections yielded no relief, a trial spinal cord stimulator was recommended as a reasonable treatment option. Carrier APA pp.47-48.

On July 5, 2007, Claimant underwent a psychological evaluation by Carolinas Center for Advanced Management of Pain as part of the spinal cord stimulator protocol. Carrier APA pp.57-59. Claimant denied significant psychological problems but admitted mild symptoms of stress, worry and anxiety. Carrier APA p.57. Claimant also denied depression or prior mental health treatment. Carrier APA p.57. Claimant's assessment was chronic low back and right lower extremity pain with failed surgery; mild intensity adjustment with anxiety that was "pretty well controlled and does not appear to be influencing his perception of pain or treatment" and "no psychological contraindications" were observed. Carrier APA pp.58 and 59.

On July 9, 2007, Dr. Lal performed a percutaneous placement of a trial spinal cord stimulator. Carrier APA pp.34-35. On July 17, 2007, Dr. Lal noted that the trial spinal cord stimulator yielded an improvement of Claimant's symptoms, and on August 2, 2007, Claimant underwent implantation of the spinal cord stimulator. Carrier APA pp.26, 36-39. On September 17, 2007, Claimant presented for follow up post

implantation of the spinal cord stimulator. Carrier APA pp.49-50. Claimant's lumbar spine examination revealed almost no range of motion and he was instructed to request an adjustment of his spinal cord stimulator and to follow up in one (1) month. Carrier APA p.50. On October 15, 2007, Claimant followed up with Self Regional Healthcare and noted overall improvement of his symptoms. Carrier APA p.51. Claimant's treatment plan included treatment for hypertension in addition to ongoing medication throughout his life and follow up every three (3) months for maintenance of the spinal cord stimulator. Carrier APA pp.51-52.

On January 14, 2008, Claimant's progress note indicates increased anxiety, continued pain, an aching sensation in his upper extremities, and "almost no range of motion of the lumbar spine." Carrier APA p.53. Claimant's treatment plan included prescription medication, further treatment from his family physician regarding anxiety and a two (2) month follow up. Carrier APA p.54. On March 10, 2008, Claimant returned to Self Regional Healthcare for follow up and his progress note indicates new complaints of left foot and ankle pain with swelling. Carrier APA p.55. Claimant's eyes were noted to be red and jaundiced. Carrier APA p.55. Since Claimant's prescribed medication may affect the kidneys and liver, his treatment plan included an assessment of his renal and liver function. Carrier APA p.56.

On April 15, 2008, Claimant underwent an independent medical evaluation by Dr. David Rogers, of Oaktree Medical Centre. Carrier APA pp.60-66. During this evaluation, Claimant indicated that he was "in a normal state of health until he was involved in a work related lifting injury." Carrier APA p.60. Claimant also denied "any prior significant injuries, motor vehicle accidents, falls or sporting injuries" but indicated

that he pulled a muscle in his low back fifteen (15) years ago and was successfully treated by a chiropractor with "no significant sequelae." Carrier APA p.63. Claimant reported that he "did not have a history of hypertension prior to his work-related injury." Carrier APA p.63. Dr. Rogers also indicated that he had "no medical records to indicate pre-existing hypertension." Carrier APA p.65. Dr. Rogers assigned a forty-two (42%) percent whole person impairment rating and recommended further psychological support. Carrier APA p.66.

On August 19, 2005, Claimant completed a medical questionnaire denying various preexisting conditions, including high blood pressure and prior back injury. Carrier APA pp.68-69. On June 7, 2011, Dr. Sumeer Lal completed a medical questionnaire indicating that Claimant had preexisting chronic back pain that was permanent and serious enough to constitute a hindrance to employment or reemployment and that Claimant's November 15, 2005 work injury either combined with or aggravated Claimant's preexisting chronic back pain. Carrier APA p.70. On June 9, 2011, Dr. C. David Tollison completed a medical questionnaire supporting reimbursement for preexisting anxiety. Carrier APA p.71. On June 17, 2011, Dr. David Rogers completed questionnaires supporting reimbursement based on Claimant's preexisting hypertension and chronic back pain. Carrier APA pp.72-73. On March 25, 2009, Claimant and Carrier settled the underlying claim for Forty-five Thousand (\$45,000.00) Dollars. Fund APA pp.1-4.

FINDINGS OF FACT

Based upon the foregoing, to include review of the Commission's file and all evidence submitted, I make the following findings of fact based upon the preponderance of the reliable, probative, and substantial evidence:

1. On November 15, 2005, Claimant sustained an injury by accident to his back, psyche and right lower extremity during the course of his employment with American Services, Incorporated. This finding is based upon Carrier APA pp.67 and the totality of the medical records in evidence.

2. On January 3, 2000, Claimant completed a patient information form. The signature appears to have been redacted, it does not indicate the purpose for which the form was completed, does not contain any information regarding diagnoses or treatment, and was completed approximately fifteen (15) years prior to this work injury. However, the form does include the Claimant's name, a social security number and an address. This finding is based upon Carrier APA p.1.

3. On August 12, 2005, Claimant was prescribed medication. At the time the prescription was written there is no indication of the purpose for which it was written. However, on March 1, 2011, approximately six (6) years after the prescriptions were written, an addendum indicates that they were prescribed for "chronic back pain." On August 15, 2005, Claimant received another prescription wherein the purpose for the medication is not indicated. None of the prescription pad sheets are accompanied by medical records that outline any treatment or diagnoses. This finding is based upon Carrier APA pp.2-3.

4. Carrier alleges that Claimant had preexisting back pain that was a hindrance or obstacle to Claimant's employment. However, the medical records in evidence, notwithstanding the medical certificates, indicate that if Claimant had preexisting back problems it was not permanent and serious enough to constitute a hindrance or obstacle to his employment. Carrier submitted various prescriptions that purport to support "chronic" back pain. However, the record is completely devoid of any treatment notes or medical narratives substantiating "chronic" back pain. At best, the prescriptions indicate that Claimant had minimal incidents of back pain prior to this work injury.

5. Claimant confirms that he "pulled a muscle" in his low back approximately fifteen (15) years prior to the work injury, which appears to coincide with the January 2000 patient information form. Claimant does not indicate "chronic" back pain but rather a muscle strain that was successfully treated with chiropractic care "with no significant sequelae." The post injury medical narratives also note that "the patient had a long history of back and lower extremity pain following an apparent work-related injury." The absence of documented complaints of back pain and Claimant's characterization of the prior back incident as a "pulled muscle" rather than "chronic" back pain, confirm that Claimant's prior back pain was not permanent and serious enough to constitute a hindrance or obstacle to employment as contemplated by S.C. Code Ann. §42-9-400. This finding is based on the totality of the evidence in the record, especially Carrier APA pp.1-3, 34, 63.

6. Carrier also alleged that Claimant had preexisting hypertension that was permanent and serious enough to constitute a hindrance or obstacle to his employment. I

find that Claimant did not have preexisting hypertension. While Dr. David Rogers completed a questionnaire supporting reimbursement six (6) years after Claimant's work injury and three (3) years after his first and only evaluation of Claimant, his own medical records indicate the contrary that Claimant did not have preexisting hypertension. On April 15, 2008, Dr. Rogers conducted an independent medical evaluation of Claimant and noted that Claimant "reports no prior history of hypertension before his work related injury" and that he (Dr. Rogers) had "no medical records to indicate pre-existing hypertension." However, approximately three (3) years later with no new information, Dr. Rogers changes his position and indicates that Claimant did in fact have preexisting hypertension. I find Dr. Rogers' 2008 medical report more convincing on the issue of whether Claimant's hypertension preexisted and I find that it did not preexist. This finding is based upon Carrier APA pp.63, 65, and 72

7. Carrier asserts that Claimant had preexisting anxiety. However, the totality of the medical evidence in the record proves otherwise. The post injury medical narratives do not indicate Claimant's mental status to be problematic. In fact, though Claimant admits to mild symptoms of stress, worry and anxiety, he denies psychological problems of significant intensity. An assessment of Claimant's mental status revealed mild anxiety that was "pretty well controlled," "does not appear to be influencing his perception of pain or treatment" and "no psychological contraindications" were observed. While Dr. C. David Tollison completed a medical questionnaire supporting reimbursement based on preexisting anxiety, I give much greater weight to the other compelling medical evidence indicating that Claimant did not have preexisting anxiety,

and if he did, it was not serious enough to constitute a hindrance or obstacle to his employment. This finding is based upon Carrier APA pp.10, 24, 57-59, 71.

8. Carrier failed to prove the requisite elements to support its claim for reimbursement pursuant to S.C. Code Ann. § 42-9-400. Accordingly, Carrier is not entitled to reimbursement from the South Carolina Second Injury Fund.

CONCLUSIONS OF LAW

Based upon the foregoing and applicable statutory and case law, I conclude as a matter of law:

1. Reimbursement from the South Carolina Second Injury Fund is governed by S.C. Code Ann. § 42-9-400.

2. The right of Carrier to receive reimbursement from the South Carolina Second Injury Fund depends upon complete compliance with the requirements for recovery. South Carolina Second Injury Fund v. American Yard Products, 496 S.E.2d 862 (S.C. 1998).

3. To qualify for reimbursement, Carrier had the burden to prove that Claimant had preexisting conditions. Here, the medical evidence proves that Claimant did not have preexisting anxiety and hypertension; and, therefore, Carrier failed to meet all requirements for reimbursement pursuant to S.C. Code Ann. § 42-9-400.

4. To qualify for reimbursement, Carrier had to prove that Claimant's alleged preexisting anxiety, hypertension were serious enough to constitute a hindrance or obstacle to Claimant's employment. Even if anxiety and hypertension preexisted, Carrier did not prove that these conditions were serious enough to constitute a hindrance or

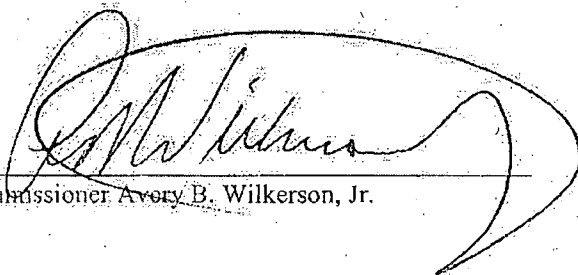
obstacle to Claimant's employment; and, therefore, Carrier failed to meet all requirements for reimbursement pursuant to S.C. Code Ann. § 42-9-400.

5. To qualify for reimbursement, Carrier had to prove that Claimant's preexisting back pain was permanent and serious enough to constitute a hindrance or obstacle to his employment. Carrier failed to prove that Claimant's preexisting back pain was permanent and serious enough to constitute a hindrance or obstacle to his employment; and, as such, Carrier failed to meet all requirements for reimbursement pursuant to S.C. Code Ann. § 42-9-400.

6. Carrier did not meet all requirements for reimbursement pursuant to S.C. Code Ann. § 42-9-400 and it is not entitled to reimbursement from the South Carolina Second Injury Fund.

AWARD

Based upon the foregoing Findings of Fact and Conclusions of Law, IT IS SO ORDERED that Carrier's claim for reimbursement pursuant to S.C. Code Ann. § 42-9-400 is DENIED and DISMISSED with prejudice subject to its statutory right to appeal.



Commissioner Avery B. Wilkerson, Jr.

CERTIFICATE OF SERVICE

This is to certify the undersigned has this date served this order in the above entitled action upon all parties to this cause by sending an electronic copy hereof by electronic

mail addressed to the attorney or attorneys for said parties or by depositing a copy hereof, postage paid, in the United States certified mail addressed to any unrepresented party.

October 12, 2011

By: Elaine Boyd, Administrative Assistant to Commissioner Wilkerson

APPELLATE PANEL
DECISION AND ORDER
OF THE
SOUTH CAROLINA WORKERS' COMPENSATION COMMISSION
W.C.C. FILE NO. 0520310

CHARTIS INSURANCE COMPANY, ... CARRIER/APPELLANT,

- v -

SECOND INJURY FUND, ... DEFENDANT/RESPONDENT.

[In Re: Ben Johnson v. American Services and Chartis Insurance Company]

Appellate Panel Review held in Columbia,
South Carolina on March 19, 2012 per notices
timely and properly served on all parties.

Appellate Panel Decision and Order filed
5/22, 2012.

APPEARANCES: Carrier/Appellant represented by Robert C. Rogers, Esquire
Gallivan White & Boyd, of Greenville, South Carolina.

Defendant/Respondent represented by Latonya Dilligard Edwards,
Esquire, Dilligard Edwards, LLC, of Columbia, South Carolina.

STATEMENT OF CASE

On August 24, 2011, Commissioner Avery B. Wilkerson, Jr., held a hearing on this matter in Clinton, South Carolina and issued the following Order:

"Based upon the foregoing Findings of Fact and Conclusions of Law, IT IS SO ORDERED that Carrier's claim for reimbursement pursuant to S.C. Code Ann. § 42-9-400 is DENIED and DISMISSED with prejudice subject to Carrier's statutory right to appeal."

Within the statutory period, counsel for the Employer and Carrier filed a Request for Commission Review setting forth seventeen (17) grounds for appeal with copies furnished to all interested parties prior to being presented to the Appellate Panel on March 19, 2012. All proffered testimony has been taken and together with all documentary evidence has been delivered to the individual members of the Full Commission and has since been under advisement and consideration.

In accordance with S.C. Code Ann. § 42-17-50, the Appellate Panel shall review the award, and if good and proper grounds are shown, may reconsider evidence, receive further evidence, rehear the parties and amend the award. Furthermore, the Appellate Panel may make its own findings of fact and conclusions of law. Lowe v. Am-Can Transport Services, Inc., 283 S.C. 534, 324 S.E.2d 87 (S.C.App. 1984). After careful review in the instant case, the Commission has determined that all of the Hearing Commissioner's Findings of Fact and Conclusions of Law are correct as stated. Accordingly, they shall become the law of the case, and are sustained in their entirety.

FINDINGS OF FACT

After hearing argument of the parties and reviewing the evidence, the following findings of fact are made:

1. On November 15, 2005, Claimant sustained an injury by accident to his back, psyche and right lower extremity during the course of his employment with American Services, Incorporated.

2. On January 3, 2000, Claimant completed a patient information form. The signature appeared to have been redacted, it did not indicate the purpose for which the form was completed, did not contain any information regarding diagnoses or treatment, and was completed approximately fifteen (15) years prior to this work injury. However, the form did include the Claimant's name, a social security number and an address.

3. On August 12, 2005, Claimant was prescribed medication. At the time the prescription was written, there was no indication of the purpose for which it was written. However, on March 1, 2011, approximately six (6) years after the prescriptions were written, an addendum indicated that they were prescribed for "chronic back pain." On August 15, 2005, Claimant received another prescription, wherein the purpose for the medication was not indicated. None of the prescription pad sheets are accompanied by medical records that outline any treatment or diagnoses.

4. Carrier alleged that Claimant had preexisting back pain that was a hindrance or obstacle to Claimant's employment. However, the medical records in evidence, notwithstanding the medical certificates, indicated that if Claimant had preexisting back problems it was not permanent and serious enough to constitute a hindrance or obstacle to his employment. Carrier submitted various prescriptions that purport to support "chronic" back pain. However, the record was completely devoid of any treatment notes or medical narratives substantiating "chronic" back pain. At best, the prescriptions indicated that Claimant had minimal incidents of back pain prior to this work injury.

5. Claimant confirmed that he "pulled a muscle" in his low back approximately fifteen (15) years prior to the work injury, which appeared to coincide with the January 2000 patient information form. Claimant did not indicate "chronic" back pain, but rather a muscle strain that was successfully treated with chiropractic care "with no significant sequelae." The post injury medical narratives also noted that "the patient had a long history of back and lower extremity pain following an apparent work-related injury." The absence of documented complaints of back pain and Claimant's characterization of the prior back incident as a "pulled muscle" rather than "chronic" back pain, confirmed that Claimant's prior back pain was not permanent and serious enough to constitute a hindrance or obstacle to employment as contemplated by S.C. Code Ann. §42-9-400.

6. Carrier also alleged that Claimant had preexisting hypertension that was permanent and serious enough to constitute a hindrance or obstacle to his employment. We find that Claimant did not have preexisting hypertension. While Dr. David Rogers completed a questionnaire supporting reimbursement six (6) years after Claimant's work injury and three (3) years after his first and only evaluation of Claimant, his own medical records indicated that Claimant did not have preexisting hypertension. On April 15, 2008, Dr. Rogers conducted an independent medical evaluation of Claimant and noted that Claimant "reports no prior history of hypertension before his work related injury" and that he (Dr. Rogers) had "no medical records to indicate pre-existing hypertension." However, approximately three (3) years later with no new information, Dr. Rogers changed his position and indicated that Claimant did in fact have preexisting hypertension. We find Dr. Rogers' 2008 medical report more convincing on the issue of whether Claimant's hypertension preexisted and find that it did not preexist.

7. Carrier argued that Claimant had preexisting anxiety. However, the totality of the medical evidence in the record proved otherwise. The post injury medical narratives did not indicate Claimant's mental status to be problematic. In fact, though Claimant admitted to mild symptoms of stress, worry and anxiety, he denied psychological problems of significant intensity. An assessment of Claimant's mental status revealed mild anxiety that was "pretty well controlled," "does not appear to be influencing his perception of pain or treatment" and "no psychological contraindications" were observed. While Dr. C. David Tollison completed a medical questionnaire supporting reimbursement based on preexisting anxiety, we give much greater weight to the other compelling medical evidence indicating that Claimant did not have preexisting anxiety, and if he did, it was not serious enough to constitute a hindrance or obstacle to his employment.

8. Carrier failed to prove the requisite elements to support its claim for reimbursement pursuant to S.C. Code Ann. § 42-9-400. Accordingly, Carrier is not entitled to reimbursement from the South Carolina Second Injury Fund.

CONCLUSIONS OF LAW

Based upon the oral arguments and relevant case law, We conclude as a matter of law:

1. Reimbursement from the South Carolina Second Injury Fund is governed by S.C. Code Ann. § 42-9-400.
2. The right of Carrier to receive reimbursement from the South Carolina Second Injury Fund depends upon complete compliance with the requirements for recovery. South Carolina Second Injury Fund v. American Yard Products, 496 S.E.2d 862 (S.C. 1998).
3. To qualify for reimbursement, Carrier had the burden to prove that Claimant had preexisting conditions. Here, the medical evidence proved that Claimant did not have

preexisting anxiety and hypertension; and, therefore, Carrier failed to meet all requirements for reimbursement pursuant to S.C. Code Ann. § 42-9-400.

4. To qualify for reimbursement, Carrier had to prove that Claimant's alleged preexisting anxiety, hypertension were serious enough to constitute a hindrance or obstacle to Claimant's employment. Even if anxiety and hypertension preexisted, Carrier did not prove that these conditions were serious enough to constitute a hindrance or obstacle to Claimant's employment; and, therefore, Carrier failed to meet all requirements for reimbursement pursuant to S.C. Code Ann. § 42-9-400.

5. To qualify for reimbursement, Carrier had to prove that Claimant's preexisting back pain was permanent and serious enough to constitute a hindrance or obstacle to his employment. Carrier failed to prove that Claimant's preexisting back pain was permanent and serious enough to constitute a hindrance or obstacle to his employment; and, as such, Carrier failed to meet all requirements for reimbursement pursuant to S.C. Code Ann. § 42-9-400.

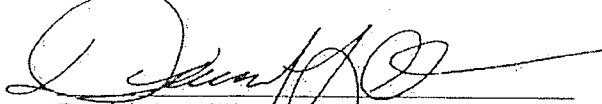
6. Carrier did not meet all requirements for reimbursement pursuant to S.C. Code Ann. § 42-9-400 and it is not entitled to reimbursement from the South Carolina Second Injury Fund.

ORDER

IT IS THEREFORE ORDERED that the Order of the Single Commissioner filed on March 19, 2012, is hereby affirmed by the Appellate Panel, and constitutes the Decision and Order of the Full Commission.

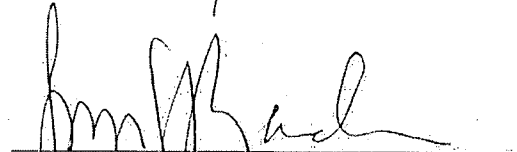
IT IS FURTHER ORDERED that Carrier's claim for reimbursement pursuant to S.C. Code Ann. § 42-9-400 is DENIED and DISMISSED with prejudice subject to Carrier's statutory right to appeal.

S.C. WORKERS' COMPENSATION COMMISSION


Derrick L. Williams, Commissioner

FULL AFFIRMATION

CONCUR:


Susan S. Barden, Commissioner

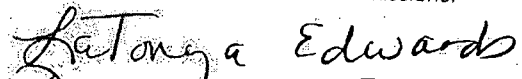
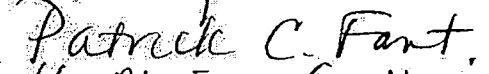
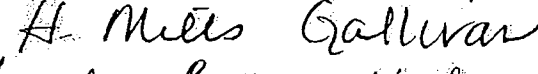
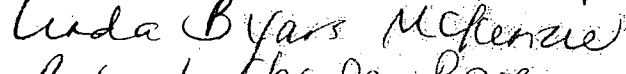
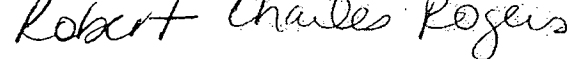

Gene McCaskill, Commissioner

CERTIFICATE OF SERVICE

This is to certify that the undersigned has this date served this order in the above entitled action upon all parties to this cause by depositing a copy hereof, postage paid, in the United State mail addressed to the attorney or attorneys for said parties.

This 22 day of May 2012
By Valerie D. Decker

Administrative Assistant to the Commissioner

Deller, Valerie

From: Crocker, Virginia
Sent: Thursday, May 17, 2012 4:49 PM
To: WCC Appeals,
Subject: RE: WCC#0520310 Ben Johnson v. American Services

Valerie

Please bring me the file.

Ginger

Virginia L. Crocker
Judicial Director
South Carolina Workers' Compensation Commission
803.737.5739 Voice
803.239.7935 Cell
803.737.1281 Electronic Fax

From: WCC Appeals,
Sent: Thursday, May 17, 2012 11:12 AM
To: Crocker, Virginia
Subject: FW: WCC#0520310 Ben Johnson v. American Services

Are you going to address this email? Or do you just want me to print these out and attach to the Orders when they arrive?

From: Rocky Rogers [<mailto:rrogers@gwblawfirm.com>]
Sent: Wednesday, May 16, 2012 4:58 PM
To: Lindler, Kellie; Crocker, Virginia; Latonya Edwards; Erica Samuel; WCC Appeals,
Cc: Mills Gallivan
Subject: RE: WCC#0520310 Ben Johnson v. American Services

Commissioner McCaskill:

Appellants respectfully ask that the Full Commission address all arguments and legal contentions raised in our Appellate Brief and before the Full Commission at oral argument. It is Appellants' understanding that any material issue raised to the Commission shall be addressed in the Decision and Order related thereto. Upon review of the Second Injury Fund's proposed Decision and Order in the above-referenced action, Appellants are concerned that it does not accurately address the pertinent legal issues raised in our appeal. Specifically, the proposed Decision and Order does not address our contention that we satisfied each and every element of reimbursement under S.C. Code 42-9-400, including preexisting condition, employer knowledge, hindrance and the presumption of hindrance, aggravation, and increased liability. Perhaps more importantly, the proposed Decision and Order in this action makes no mention of Appellant's contention that uncontroverted medical opinions should be given conclusive effect or the legal authorities Appellants relied upon in arguing this point of law. We raised these concerns to the attorney for the Second Injury Fund, but as the emails below reveal, the Fund does not intend to revise the proposed Decision and Order unless so ordered by the Commission.

Appellants are currently assessing the option of appealing from the Full Commission, and therefore are concerned that all issues raised to the Full Commission be preserved in the Full Commission Decision and Order for the purposes of appeal. Should Appellants decide to appeal the Full Commission Decision and Order

to the circuit court, without a full adjudication of all issues presented, we believe the circuit court would simply remand the case to the Full Commission to make specific findings of fact on each and every aspect of the appeal. As you can see, this would be a waste of the Court's time under the circumstances of the instant action. Accordingly, we ask that the Full Commission Decision and Order address all legal and factual contentions raised by Appellants in our Appellate Brief and/or at oral argument before the Full Commission.

Thank you for your prompt attention to this matter. Please contact me should you have any questions regarding this request.

Best Regards,

Rocky Rogers
Associate
rrogers@gwblawfirm.com

Gallivan, White & Boyd, P.A.
Office 55 Beattie Place | Suite 1200 | Greenville SC 29601
864 241 7000 Direct | 864 271 9580 Main | 864 271 7502 Fax
Mailing Post Office Box 10589 | Greenville SC 29603
vCard | Bio URL | Website

This message is from the law firm Gallivan, White & Boyd, PA and may be a confidential and privileged legal communication to the named recipient(s). If you receive this message in error or are not the named recipient(s), please notify the sender and delete this email. Thank you.

From: Latonya Edwards [<mailto:latonya@dilligardedwards.com>]
Sent: Wednesday, May 16, 2012 3:39 PM
To: Rocky Rogers; 'Erica Samuel'; appeals@wcc.sc.gov
Cc: Mills; Gallivan
Subject: RE: WCC#0520310 Ben Johnson v. American Services

Rocky:

Please direct your concerns to the workers' compensation commission's judicial department. I do not intend to make amendments to the proposed Full Commission Order unless they instruct me to do so.

I am copying them on your e-mail.

Latonya

Latonya Dilligard Edwards, Esquire
Dilligard Edwards, LLC
3790 Fernandina Road Suite 103
Columbia, South Carolina 29210
(803) 750-2214 phone
(803) 750-2377 fax
www.dilligardedwards.com
latonya@dilligardedwards.com

Unless otherwise indicated or obvious from the nature of the above communication, the information contained herein may be attorney-client privileged or may contain confidential information or work product. This communication is intended solely for the use of the individual or individuals to whom it is directed. If you have received this e-mail transmission and you are not the intended recipient, you are hereby notified that any dissemination, distribution or copying of this communication is strictly prohibited.

If you have received this communication in error and are unsure whether it contains privileged or confidential information, please delete the e-mail and immediately destroy any copies that you may have of this communication.

From: Rocky Rogers [mailto:rrogers@gwblawfirm.com]
Sent: Wednesday, May 16, 2012 3:30 PM
To: Erica Samuel; appeals@wcc.sc.gov
Cc: Mills Gallivan; Latonya
Subject: RE: WCC#0520310 Ben Johnson v. American Services

Latonya:

Upon review of the proposed Full Commission Decision and Order, I find that the Order does not address arguments raised in our Appellate Brief and/or presented to the Full Commission during oral argument. If a material fact is contested, the Decision and Order must make contain a specific, express finding on the issue. See *Aristizabal v. I.J. Woodside-Division of Dan River, Inc.*, 268 S.C. 366, 371, 234 S.E.2d 21, 23 (1977) (citing *Mize v. Sangamo Electric Co.*, 246 S.C. 307, 143 S.E.2d 590 (1965)). Accordingly, we ask that the Full Commission Decision and Order be amended to address our contention that Appellants satisfied each and every element of reimbursement under S.C. Code 42-9-400, including preexisting condition, employer knowledge, hindrance, presumption of hindrance under any listed ground, combination and/or aggravation, and increased liability. Further, we specifically ask that the Full Commission Decision and Order address the legal authorities which we contend hold that uncontroverted medical evidence should be given conclusive effect. Without these revisions, we do not feel that the proposed Full Commission Decision and Order accurately reflects the issues raised in our appeal. Please contact me should you have any questions regarding our request to amend.

Best Regards,

Rocky Rogers
Associate
rrogers@gwblawfirm.com

Gallivan, White & Boyd, P.A.
Office 55 Beattie Place | Suite 1200 | Greenville SC 29601
864 241 7000 Direct | 864 271 9580 Main | 864 271 7502 Fax
Mailing Post Office Box 10589 | Greenville SC 29603
vCard | Bio URL | Website

This message is from the law firm Gallivan, White & Boyd, PA and may be a

ON REMAND
APPELLATE PANEL
DECISION AND ORDER
OF THE
SOUTH CAROLINA WORKERS' COMPENSATION COMMISSION
W.C.C. FILE NO. 0520310

AMERICAN HOME ASSURANCE COMPANY.....CARRIER/APPELLANT.

- v -

SECOND INJURY FUND,.....DEFENDANT/RESPONDENT.

[In Re: Ben Johnson v. American Services, Inc. and American Home Assurance Company]

Appellate Panel Review held in Columbia,
South Carolina on March 19, 2012, per notices
timely and properly served on all parties.

Appellate Panel Decision and Order filed
6/14 2013.

APPEARANCES: Carrier/Appellant represented by Rocky Rogers, Esquire, of
Gallivan White & Boyd, of Greenville, South Carolina.

Defendant/Respondent represented by Latonya Dilligard Edwards,
Esquire, of Dilligard Edwards, LLC, of Columbia, South Carolina.

STATEMENT OF CASE

On August 24, 2011, Commissioner Avery B. Wilkerson, Jr., held a hearing on this matter in Clinton, South Carolina and issued the following Order:

"Based upon the foregoing Findings of Fact and Conclusions of Law, IT IS SO ORDERED that Carrier's claim for reimbursement pursuant to S.C. Code Ann. § 42-9-400 is DENIED and DISMISSED with prejudice subject to Carrier's statutory right to appeal."

Within the statutory period, counsel for the Employer and Carrier filed a Request for Commission Review setting forth seventeen (17) grounds for appeal with copies furnished to all interested parties prior to being presented to the Appellate Panel on March 19, 2012. All proffered testimony has been taken and together with all documentary evidence has been delivered to the individual members of the Full Commission and has since been under advisement and consideration. This case is being considered on a remand from the Circuit Court to determine whether this decision is consistent with the South Carolina Court of Appeals' recent decisions in Carolinas Recycling Group v. S.C. Second Injury Fund, 398 S.C. 480, 730 S.E.2d 324 (Ct. App. 2012) and Burnette v. City of Greenville, 401 S.C. 417, 737 S.E.2d 2000 (Ct. App. 2012).

In accordance with S.C. Code Ann. § 42-17-50, the Appellate Panel shall review the award, and if good and proper grounds are shown, may reconsider evidence, receive further evidence, rehear the parties and amend the award. Furthermore, the Appellate Panel may make its own findings of fact and conclusions of law. Lowe v. Am-Can Transp. Servs., Inc., 283 S.C. 534, 324 S.E.2d 87 (Ct. App. 1984). After careful review in the instant case, the Commission has determined that all of the Hearing Commissioner's Findings of Fact and Conclusions of Law are correct as stated. Accordingly, they shall become the law of the case, and are sustained in their entirety.

FINDINGS OF FACT

After hearing argument of the parties and reviewing the evidence, the following findings of fact are made:

1. On November 15, 2005, Claimant sustained an injury by accident to his back, psyche and right lower extremity during the course of his employment with American Services, Incorporated.

2. On January 3, 2000, Claimant completed a patient information form. The signature appears to have been redacted, it does not indicate the purpose for which the form was completed, does not contain any information regarding diagnoses or treatment, and was completed approximately fifteen (15) years prior to this work injury. However, the form does include the Claimant's name, a social security number and an address.

3. On August 12, 2005, Claimant was prescribed medication. At the time the prescription was written there is no indication of the purpose for which it was written. However, on March 1, 2011, approximately six (6) years after the prescriptions were written, an addendum indicates that they were prescribed for "chronic back pain." On August 15, 2005, Claimant received another prescription wherein the purpose for the medication is not indicated. None of the prescription pad sheets are accompanied by medical records that outline any treatment or diagnoses.

4. Carrier alleged that Claimant had preexisting back pain that was a hindrance or obstacle to Claimant's employment. However, the medical records in evidence, notwithstanding the medical certificates, indicate that if Claimant had preexisting back problems it was not permanent and serious enough to constitute a hindrance or obstacle to his employment. Carrier submitted various prescriptions that purport to support "chronic" back pain. However, the record

is completely devoid of any treatment notes or medical narratives substantiating "chronic" back pain. At best, the prescriptions indicate that Claimant had minimal incidents of back pain prior to this work injury.

5. Claimant confirmed that he "pulled a muscle" in his low back approximately fifteen (15) years prior to the work injury, which appears to coincide with the January 2000 patient information form. Claimant did not indicate "chronic" back pain but rather a muscle strain that was successfully treated with chiropractic care "with no significant sequelae." The post injury medical narratives also note that "the patient had a long history of back and lower extremity pain following an apparent work-related injury." The absence of documented complaints of back pain and Claimant's characterization of the prior back incident as a "pulled muscle" rather than "chronic" back pain, confirm that Claimant's prior back pain was not permanent and serious enough to constitute a hindrance or obstacle to employment as contemplated by S.C. Code Ann. § 42-9-400.

6. Carrier also alleged that Claimant had preexisting hypertension that was permanent and serious enough to constitute a hindrance or obstacle to his employment. We find that Claimant did not have preexisting hypertension. While Dr. David Rogers completed a questionnaire supporting reimbursement six (6) years after Claimant's work injury and three (3) years after his first and only evaluation of Claimant, his own medical records indicate the contrary, that Claimant did not have preexisting hypertension. On April 15, 2008, Dr. Rogers conducted an independent medical evaluation of Claimant and noted that Claimant "reports no prior history of hypertension before his work related injury" and that he (Dr. Rogers) had "no medical records to indicate pre-existing hypertension." However, approximately three (3) years later with no new information, Dr. Rogers changed his position and indicated that Claimant did

in fact have preexisting hypertension. We find Dr. Rogers' 2008 medical report more convincing than his questionnaire on the issue of whether Claimant's hypertension preexisted and we find that it did not preexist.

7. Carrier asserted that Claimant had preexisting anxiety. However, the totality of the medical evidence in the record proves otherwise. The post injury medical narratives do not indicate Claimant's mental status to be problematic. In fact, though Claimant admitted to mild symptoms of stress, worry and anxiety, he denied psychological problems of significant intensity. An assessment of Claimant's mental status revealed mild anxiety that was "pretty well controlled," "does not appear to be influencing his perception of pain or treatment" and "no psychological contraindications" were observed. While Dr. C. David Tollison completed a medical questionnaire supporting reimbursement based on preexisting anxiety, we give much greater weight to the other compelling medical evidence indicating that Claimant did not have preexisting anxiety, and if he did, it was not serious enough to constitute a hindrance or obstacle to his employment.

8. Our decision in this case is consistent with S.C. Court of Appeals decisions in Carolinas Recycling Group and Burnette, which were referenced in the Circuit Court remand.

9. In Carolinas Recycling Group, the Court of Appeals reversed the Commission's decision because it was based on an evaluation by a non-treating physician who only met with Claimant on one occasion. 398 S.C. 480, 485, 730 S.E.2d 324, 327. On the contrary, our decision in this case is based on the medical records of the treating physicians, which clearly established that Claimant did not have preexisting hypertension, that his prior back strain was successfully treated "with no significant sequelae"; that Claimant's anxiety was mild, well

controlled, did not influence his pain or treatment and did not result in any psychological contraindications.

10. In Burnette, the South Carolina Court of Appeals reversed and remanded because the Commission's decision was based on a single commissioner's interpretation of medical data. 401 S.C. 417, 737 S.E.2d 2000 (Ct. App. 2012). Here, our decision is based on the treating physicians' own interpretations of the medical data, which clearly does not support reimbursement. Furthermore, while Carrier submitted medical questionnaires supporting reimbursement, case law instructs that the Commission may disregard medical evidence in favor of other competent evidence. Potter v. Spartanburg Sch. Dist., 395 S.C. 17, 23, 716 S.E.2d 123, 126 (Ct. App. 2011). Here, we disregarded the medical questionnaire in favor of the medical narratives and reports, which provided more detailed and competent medical evidence on the issues involved in this case.

11. Carrier failed to prove the requisite elements to support its claim for reimbursement pursuant to S.C. Code Ann. § 42-9-400. Accordingly, Carrier is not entitled to reimbursement from the South Carolina Second Injury Fund.

CONCLUSIONS OF LAW

Based upon the oral arguments and relevant case law, We conclude as a matter of law:

1. Reimbursement from the South Carolina Second Injury Fund is governed by S.C. Code Ann. § 42-9-400.
2. The right of Carrier to receive reimbursement from the South Carolina Second Injury Fund depends upon complete compliance with the requirements for recovery. S.C. Second Injury Fund v. Am. Yard Prods., 330 S.C. 20, 496 S.E.2d 862 (S.C. 1998).

3. To qualify for reimbursement, Carrier had the burden to prove that Claimant had preexisting conditions. Here, the medical evidence proves that Claimant did not have preexisting anxiety and hypertension; and, therefore, Carrier failed to meet all requirements for reimbursement pursuant to S.C. Code Ann. § 42-9-400.

4. To qualify for reimbursement, Carrier had to prove that Claimant's alleged preexisting anxiety and hypertension were serious enough to constitute a hindrance or obstacle to Claimant's employment. Even if anxiety and hypertension preexisted, Carrier did not prove that these conditions were serious enough to constitute a hindrance or obstacle to Claimant's employment; and, therefore, Carrier failed to meet all requirements for reimbursement pursuant to S.C. Code Ann. § 42-9-400.

5. To qualify for reimbursement, Carrier had to prove that Claimant's preexisting back pain was permanent and serious enough to constitute a hindrance or obstacle to his employment. Carrier failed to prove that Claimant's preexisting back pain was permanent and serious enough to constitute a hindrance or obstacle to his employment; and, as such, Carrier failed to meet all requirements for reimbursement pursuant to S.C. Code Ann. § 42-9-400.

6. Carrier did not meet all requirements for reimbursement pursuant to S.C. Code Ann. § 42-9-400 and it is not entitled to reimbursement from the South Carolina Second Injury Fund.

ORDER

IT IS THEREFORE ORDERED that the Order of the Single Commissioner filed on October 12, 2011, is hereby Affirmed by the Appellate Panel, and constitutes the Decision and Order of the Full Commission.

IT IS FURTHER ORDERED that Carrier's claim for reimbursement pursuant to S.C. Code Ann. § 42-9-400 is DENIED and DISMISSED with prejudice subject to Carrier's statutory right to appeal.

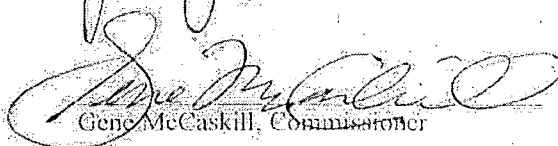
S.C. WORKERS' COMPENSATION COMMISSION


Melody L. James, Commissioner

FULL AFFIRMATION

CONCUR:


Susan S. Barden, Commissioner


Gene McCaskill, 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 mail addressed to any unrepresented party.

By Valerie Deller on June 14, 2013

STATE OF SOUTH CAROLINA
COUNTY OF LAURENS
IN THE COURT OF COMMON PLEAS

FORM 4

JUDGMENT IN A CIVIL CASE

CASE NO. 2012 CP-30-497

American Home Assurance Co., et al.

S.C. Second Injury Fund

PLAINTIFF(S)

DEFENDANT(S)

Submitted by: Court

Attorney for: ☐ Plaintiff ☐ Defendant
or
☐ Self-Represented Litigant

DISPOSITION TYPE (CHECK ONE)

- ☐ **JURY VERDICT.** This action came before the court for a trial by jury. The issues have been tried and a verdict rendered.
- ☐ **DECISION BY THE COURT.** This action came to trial or hearing before the court. The issues have been tried or heard and a decision rendered.
- ☐ **ACTION DISMISSED (CHECK REASON):** ☐ Rule 12(b), SCRCP; ☐ Rule 41(a), SCRCP (Vol. Nonsuit); ☐ Rule 43(k), SCRCP (Settled); ☐ Other
- ☐ **ACTION STRICKEN (CHECK REASON):** ☒ Rule 40(j), SCRCP; ☐ Bankruptcy; ☐ Binding arbitration; subject to right to restore to confirm, vacate or modify arbitration award; ☐ Other

- ☒ **DISPOSITION OF APPEAL TO THE CIRCUIT COURT (CHECK APPLICABLE BOX):**
☐ Affirmed; ☐ Reversed; ☒ Remanded; ☐ Other

NOTE: ATTORNEYS ARE RESPONSIBLE FOR NOTIFYING LOWER COURT, TRIBUNAL, OR ADMINISTRATIVE AGENCY OF THE CIRCUIT COURT RULING IN THIS APPEAL.

IT IS ORDERED AND ADJUDGED: ☐ See attached order (formal order to follow) ☒ Statement of Judgment by the Court: This matter is **REMANDED** to the Workers Compensation Commission so that the Appellate Panel may consider the evidence in light of the Court of Appeal's opinions in *Carolinas Recycling Group v. S.C. Second Injury Fund*, 398 S.C. 480, 730 S.E.2d 324 (Ct. App. 2012), and *Burnette v. City of Greenville*, No. 5059, 2012 WL 6028904 (S.C. Ct. App. Dec. 5, 2012).

ORDER INFORMATION

This order ☒ ends ☐ does not end the case.
Additional Information for the Clerk:

INFORMATION FOR THE JUDGMENT INDEX

Complete this section below when the judgment affects title to real or personal property or if any amount should be enrolled. If there is no judgment information, indicate "N/A" in one of the boxes below.

Judgment in Favor of (List name(s) below)	Judgment Against (List name(s) below)	Judgment Amount To be Enrolled (List amount(s) below)
		\$
		\$
		\$

If applicable, describe the property, including tax map information and address, referenced in the order:

The judgment information above has been provided by the submitting party. Disputes concerning the amounts contained in this form may be addressed by way of motion pursuant to the SC Rules of Civil Procedure. Amounts to be computed such as interest

or additional taxable costs not available at the time the form and final order are submitted to the judge may be provided to the clerk. Note: Title abstractors and researchers should refer to the official court order for judgment details.

Latonya D. Edwards
Circuit/Court Judge

2159

Judge Code

2/21/13
~~5/15/2012~~
Date

For Clerk of Court Office Use Only

This judgment was entered on the _____ day of _____, 20____ and a copy mailed first class or placed in the appropriate attorney's box on this _____ day of _____, 20____ to attorneys of record or to parties (when appearing pro se) as follows:

Robert C. Rogers

Latonya D. Edwards

ATTORNEY(S) FOR THE PLAINTIFF(S)

ATTORNEY(S) FOR THE DEFENDANT(S)

CLERK OF COURT

Court Reporter: Joy Holston

A TRUE COPY OF ORIGINAL

Lynn W. Lancaster
Lynn W. Lancaster
Laurens County CCCP & GS

FORM 4

STATE OF SOUTH CAROLINA
COUNTY OF LAURENS
IN THE COURT OF COMMON PLEAS

JUDGMENT IN A CIVIL CASE

CASE NO. ²⁰¹³~~2012~~ CP 30-00506

American Home Assurance Co. LYNN W. LANCASTER South Carolina Second Injury Fund

2014 JUN -9 P 3: 35

PLAINTIFF/APPELLANT

DEFENDANT/RESPONDENT

Submitted by: Defendant

LAURENS COUNTY
CLERK OF COURTAttorney for : Plaintiff X Defendant
or☐ Self-Represented Litigant

DISPOSITION TYPE (CHECK ONE)

- ☐ **JURY VERDICT.** This action came before the court for a trial by jury. The issues have been tried and a verdict rendered.
- ☐ **DECISION BY THE COURT.** This action came to trial or hearing before the court. The issues have been tried or heard and a decision rendered.
- ☐ **ACTION DISMISSED (CHECK REASON):** ☐ Rule 12(b), SCRPC; ☐ Rule 41(a), SCRPC (Vol. Nonsuit); ☐ Rule 43(k), SCRPC (Settled); ☐ Other
- ☐ **ACTION STRICKEN (CHECK REASON):** ☐ Rule 40(j), SCRPC; ☐ Bankruptcy; ☐ Binding arbitration, subject to right to restore to confirm, vacate or modify arbitration award; ☐ Other
- ☐ **DISPOSITION OF APPEAL TO THE CIRCUIT COURT (CHECK APPLICABLE BOX):**
☐ Affirmed; ☐ Reversed; ☐ Remanded; ☐ Other

NOTE: ATTORNEYS ARE RESPONSIBLE FOR NOTIFYING LOWER COURT, TRIBUNAL, OR ADMINISTRATIVE AGENCY OF THE CIRCUIT COURT RULING IN THIS APPEAL.

IT IS ORDERED AND ADJUDGED: ☒ See attached order (formal order to follow) ☐ Statement of Judgment by the Court:

ORDER INFORMATION

This order ☒ ends ☐ does not end the case.

Additional Information for the Clerk:

INFORMATION FOR THE PUBLIC INDEX

Complete this section below when the judgment affects title to real or personal property or if any amount should be enrolled. If there is no judgment information, indicate "N/A" in one of the boxes below.

Judgment in Favor of (List name(s) below)	Judgment Against (List name(s) below)	Judgment Amount To be Enrolled (List amount(s) below)
		\$
		\$
		\$

If applicable, describe the property, including tax map information and address, referenced in the order:

The judgment information above has been provided by the submitting party. Disputes concerning the amounts contained in this form may be addressed by way of motion pursuant to the SC Rules of Civil Procedure. Amounts to be computed such as interest or additional taxable costs not available at the time the form and final order are submitted to the judge may be provided to the clerk. Note: Title abstractors and researchers should refer to the official court order for judgment details.

Circuit Court Judge

2154

Judge Code

6/4/2014

Date

For Clerk of Court Office Use Only

This judgment was entered on the _____ day of _____, 20____ and a copy mailed first class or placed in the appropriate attorney's box on this _____ day of _____, 20____ to attorneys of record or to parties (when appearing pro se) as follows:

Charles Rogers.

Latonya Edwards

ATTORNEY(S) FOR THE PLAINTIFF(S)

ATTORNEY(S) FOR THE DEFENDANT(S)

Lynn Lancaster

CLERK OF COURT

Court Reporter:

STATE OF SOUTH CAROLINA)
LYNN W. LANCASTER)
COUNTY OF LAURENS) IN THE COURT OF COMMON PLEAS
2014 JUN 19 P 3:35)

American Home Assurance Co.,)

Carrier/Appellant)
LAURENS COUNTY)

CLERK OF COURT)
2013
2012-CP-30-506)

v.)

South Carolina Second Injury)
Fund,)

Respondent,)

[In Re: Ben Johnson,)

Employee/Claimant,)

ORDER

v.)

American Services, Inc.)

Employer.])

STATEMENT OF THE CASE

This is a claim for reimbursement from the South Carolina Second Injury Fund (the "Fund") by American Services, Incorporated, Employer, and American Home Assurance (collectively the "Carrier"), pursuant to S.C. Code Ann. § 42-9-400. Carrier alleged that they incurred substantially greater liability for compensation and medical benefits when Ben Johnson's ("Claimant") preexisting anxiety, back pain and hypertension were either aggravated by or combined with his November 15, 2005 work related injury to his back, psyche and right lower extremity. Carrier further alleged that Claimant's preexisting conditions were permanent and serious enough to constitute a hindrance or obstacle to employment. The Fund denied that hypertension and anxiety preexisted, asserted that Claimant's preexisting back problem was not

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permanent and serious enough to constitute a hindrance or obstacle to employment and denied that this claim qualified for reimbursement as contemplated by S.C. Code Ann. § 42-9-400.

The Single Commissioner denied Carrier's reimbursement request pursuant to S.C. Code Ann. § 42-9-400. The Full Commission affirmed that denial and Carrier appealed to the Circuit Court. The Circuit Court remanded for reconsideration in light of the recently decided cases of Carolinas Recycling Group v. S.C. Second Injury Fund, 398 S.C. 480, 730 S.E.2d 324 (Ct. App. 2012) and Burnette v. City of Greenville, 401 S.C. 417, 737 S.E.2d 2000 (Ct. App. 2012). The Full Commission affirmed on remand and Carrier appealed.

STANDARD OF REVIEW

The standard of review for decisions of the Workers' Compensation Commission is established in the Administrative Procedures Act. South Carolina Second Injury Fund v. Liberty Mutual Insurance Co., 353 S.C. 117, 576 S.E.2d 199 (Ct. App. 2003). A reviewing court must not disturb the Workers' Compensation Commission's findings if those findings are supported by substantial evidence in the record. Pearson v. JPS Converter & Indus. Corp., 327 S.C. 393, 489 S.E.2d 219 (Ct. App. 1997). The fact that reasonable minds may differ or that there is the possibility of drawing inconsistent conclusions does not prevent an agency's findings from being supported by substantial evidence. Grant v. South Carolina Coastal Council, 319 S.C. 348, 461 S.E. 2d 388 (1995).

DISCUSSION

After reviewing the evidence and hearing the arguments of the parties, I affirm the Decision of the South Carolina Workers' Compensation Commission. Appellant asserts that the Commission's Decision was not supported by substantial evidence in the record. I disagree.

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Carrier asserts that Claimant had preexisting back pain and produced August 2005 prescriptions to support this assertion. APA pp.2-3. However, the 2005 prescriptions do not indicate the purpose for which they were written. APA pp.2-3. One prescription indicates that Claimant should take the medication "prn" or as needed. APA p.3. The remaining prescriptions in evidence reference back pain that Claimant sustained as a result of the work injury and they do not address preexisting back pain. APA pp.3-7.

Carrier also produced an addendum to the August 2005 prescriptions, which is dated March 1, 2011, approximately six (6) years after the initial prescriptions were written, indicating that the August 2005 prescriptions were prescribed for "chronic back pain." APA p.2. None of the pre-injury prescriptions outline any diagnoses or treatment. APA pp.2-3. If Claimant had preexisting back pain, the evidence in the record indicates that it was not permanent and serious enough to constitute a hindrance or obstacle to his employment. At best, the pre-injury prescriptions indicate that Claimant had sporadic incidents of back pain prior to this work injury, which do not rise to the level of being permanent and serious enough to constitute a hindrance to his employment.

Claimant also indicated that he "pulled a muscle" in his low back approximately fifteen (15) years prior to the work injury, which was successfully treated chiropractically "with no significant sequelae." APA p.63. The post injury medical narratives also note that Claimant "had a long history of back and lower extremity pain following an apparent work-related injury." APA p.34. Thus, the medical evidence does not substantiate Carrier's claim of preexisting chronic back pain but rather, the record reveals that Claimant's chronic low back pain resulted from the work injury and did not preexist. Claimant's prior back pain was not permanent and

serious enough to constitute a hindrance or obstacle to employment and the Commission's decision to deny this claim was appropriate.

Carrier also alleges that Claimant had preexisting hypertension. However, the medical records contradict this assertion. On April 15, 2008, Dr. David Rogers noted that Claimant "reports no prior history of hypertension before his work related injury" and that there were "no medical records to indicate pre-existing hypertension." APA p.65. While Carrier presented a questionnaire supporting reimbursement, the Commission is not required to give conclusive effect to a questionnaire to the exclusion of other more compelling medical evidence in the record. APA p.70; See, Ballenger v. Southern Worsted Corporation, 209 S.C. 463, 467, 40 S.E.2d 681, 682-83 (1946). In this case, Dr. Rogers completed a medical questionnaire approximately three (3) years after his last treatment of Claimant in 2008 and his questionnaire is not supported by his own medical records or any of the other medical records in evidence. APA pp.60-66 and 72. Thus, the Commission's finding that Claimant did not have preexisting hypertension was also supported by substantial evidence.

Carrier also asserted that Claimant had preexisting anxiety that was permanent and serious enough to constitute a hindrance or obstacle to employment. The evidence indicates the contrary. Claimant admitted to mild symptoms of stress, worry and anxiety, and denied psychological problems of significant intensity. APA p.57. An assessment of Claimant's mental status revealed mild anxiety that was "pretty well controlled," "does not appear to be influencing his perception of pain or treatment" and "no psychological contraindications" were observed. APA pp.58-59. The substantial evidence supported the Commission's determination that Claimant's anxiety, if it preexisted, was not permanent and serious enough to constitute a

hindrance or obstacle to employment because it was well controlled, had no impact on Claimant's pain and resulted in no contraindications.

Carrier also asserts that the Commission's decision is not consistent with more recent case law on the issue, namely Carolinas Recycling Group v. S.C. Second Injury Fund, 398 S.C. 480, 485, 730 S.E.2d 324, 327 (Ct. App. 2012) and Burnette v. City of Greenville, 401 S.C. 417, 737 S.E.2d 2000 (Ct. App. 2012). This case was initially remanded to the Commission to allow an opportunity to review this case in light of the Carolinas Recycling and Burnette decisions. The Commission affirmed the case after a thorough review of these cases and I also affirm.

In Carolinas Recycling Group v. S.C. Second Injury Fund, the Court of Appeals reversed the Commission's decision because it was based on an evaluation by a non-treating physician who only met with Claimant on one occasion. 398 S.C. at 485, 730 S.E.2d at 327 (Ct. App. 2012). In this case, the Commission's decision was based on the medical records of the treating physicians, which clearly established that Claimant did not have preexisting hypertension; that his prior back strain was successfully treated "with no significant sequelae"; that Claimant's anxiety was mild, well controlled, did not influence his pain or treatment and did not result in any psychological contraindications.

In Burnette v. City of Greenville, the South Carolina Court of Appeals reversed and remanded because the Commission's decision was based on a single commissioner's interpretation of medical data. 401 S.C. 417, 737 S.E.2d 2000 (Ct. App. 2012). Here, the Commission's decision is based on the treating physicians' own interpretations of the medical data, which clearly does not support reimbursement. Furthermore, while Carrier submitted medical questionnaires supporting reimbursement, case law instructs that the Commission may disregard medical evidence in favor of other competent evidence. Potter v. Spartanburg Sch.

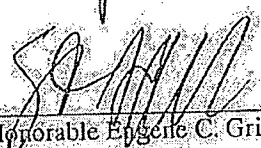
SCA

Dist. 7, 395 S.C. 17, 23, 716 S.E.2d 123, 126 (Ct. App. 2011). Here, the Commission gave greater weight to the medical narratives and reports, which provided more detailed and competent medical evidence on the issues involved in this case rather than relying solely on medical questionnaires, which are not supported by the totality of the evidence.

ORDER

IT IS HEREBY ORDERED, ADJUDGED, AND DECREED that the Order of the South Carolina Workers' Compensation Commission denying Carrier's claim for reimbursement from the South Carolina Second Injury Fund pursuant to S.C. Code Ann. § 42-9-400 was supported by substantial evidence and is AFFIRMED.

AND IT IS SO ORDERED this 4th day of June 2014.


Honorable Eugene C. Griffith, Jr.,
Presiding Circuit Court Judge

ATTEST: CLAYTON ORION

Lynn W. Lincicker
Laurens County CCEP & GS

5 

T. J. Hadley
A member of the South Carolina Bar
Direct 864.271.5382
THadley@GWBlawfirm.com



Gallivan, White & Boyd, P.A.
ATTORNEYS AT LAW

55 Beattie Place, Suite 1200
Post Office Box 10589 (29603)
Greenville, South Carolina 29601
Telephone 864.271.9580
Facsimile 864.271.7502
www.GWBlawfirm.com

October 26, 2011

CERTIFIED MAIL
RETURN RECEIPT REQUESTED

Ms. Virginia L. Crocker
Judicial Director
South Carolina Workers' Compensation Commission
Post Office Box 1715
Columbia, SC 29202-1715

Re: Ben Johnson v. American Services, Inc.
Claim No.: 709-252373
Document Label: LEGAL – APPEAL
W.C.C. File No.: 0520310
Date of Injury: 11/15/2005
Our File No.: 6676-32

Dear Ginger:

Enclosed are the original and four (4) copies of the defendants' Form 30, Request for Commission Review as well as three (3) copies of the Decision and Order. Also enclosed is our firm's check in the amount of \$150.00 to cover the filing costs for this appeal.

By copy of this letter, sent certified mail, return receipt requested, I am serving the Latonya Edwards, Esq., attorney for the S.C. Second Injury Fund, with a copy of our Request for Commission Review.

Please advise me when this case will be scheduled for an oral argument.

With kind regards,

Yours very truly,

GALLIVAN, WHITE & BOYD, P.A.

for TJH
T. J. Hadley
Direct Dial: (864) 271-5382
E-mail: thadley@gwblawfirm.com

SCWCC

OCT 27 2011

JUDICIAL

10/31

TJH:mc

Enclosures

cc: Latonya Edwards, Esq. Attorney for S.C. Second Injury Fund, (Certified Mail) (w/encl.)

ROA -048

South Carolina Workers' Compensation Commission
1333 Main Street, Suite 500
P.O. BOX 1715
Columbia, SC 29202-1715
803-737-5675



WCC File #: 0520310
Carrier File #: 709-252373
Carrier Code #: 170
Employer FEIN #: 570621442

Claimant's Name: Ben Lucius Johnson SSN: 248-41-6693 Employer's Name: American Services, Inc.
Address: 805 E. Florida St. Address: 1300 Rutherford Rd.
City: Clinton State: SC Zip: 29325 City: Greenville State: SC Zip: 29609
Home Phone: _____ Work Phone: () Insurance Carrier: Chartis Insurance Company
Preparer's Name: T. J. Hadley Law Firm: Gallivan, White, & Boyd, P.A. Preparer's Phone #: (864) 271-5382

REQUEST FOR COMMISSION REVIEW

Request for Commission Review by ☐ claimant ☒ carrier (check one) Date of injury: 11/15/2005 (m/d/yyyy)

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

SEE ATTACHED EXCEPTIONS.

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

I certify that I have served this document pursuant to R.67-211 by delivering a copy to:

Latonya Edwards, Esq. Attorney for the S.C. Second Injury Fund, Boykin & Davis, P. O. Box 11844, Columbia, SC 29611

on the 26th day of October, 2011 by ☐ first class mail ☐ personal service ☒ certified mail.

Preparer's Signature T. J. Hadley

Attorney at Law
Title

October 26, 2011
Date

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

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

EXCEPTIONS

1. The Hearing Commissioner erred in finding as a fact (Finding of Fact No. 3) that on August 12, 2005, Claimant was prescribed medication. At the time the prescription was written there is no indication of the purpose for which it was written. However, on March 1, 2011, approximately six (6) years after the prescriptions were written, an addendum indicates that they were prescribed for "chronic back pain." On August 12, 2005, Claimant received another prescription wherein the purpose for the medication is not indicated. None of the prescription pad sheets are accompanied by medical records that outline any treatment or diagnosis, the error being that reliable, probative, and substantial evidence of the case does not support such a finding.
2. The Hearing Commissioner erred in finding as a fact (Finding of Fact No. 4) that Carrier alleges that Claimant had preexisting back pain that was a hindrance or obstacle to Claimant's employment. However, the medical records in evidence, notwithstanding the medical certificates, indicate that if Claimant had preexisting back problems, it was not permanent and serious enough to constitute a hindrance or obstacle to his employment. Carrier submitted various prescriptions that purport to support "chronic" back pain. However, the record is completely devoid of any treatment notes of medical narratives substantiating "chronic" back pain. At best, the prescriptions indicate that Claimant had minimal incidents of back pain prior to this work injury, the error being that reliable, probative, and substantial evidence of the case does not support such a finding.
3. The Hearing Commissioner erred in finding as a fact (Finding of Fact No. 5) that Claimant confirms that he "pulled a muscle" in his low back approximately fifteen (15) years prior to the work injury, which appears to coincide with the January 2000 patient information form. Claimant does not indicate "chronic" back pain but rather a muscle strain that was successfully treated with chiropractic care "with no significant sequelae." The post injury medical narratives also note that "the patient had a long history of back and lower extremity pain following an apparent work-related injury." The absence of documented complaints of back pain and Claimant's characterization of the prior back incident as a "pulled muscle" rather than "chronic" back pain, confirm that Claimant's prior back pain was not permanent and serious enough to constitute a hindrance or obstacle to employment as contemplated by S.C. Code Ann. § 42-9-400. This finding is based on the totality of the evidence in the record, especially carrier APA pp. 1-3, 34, 63, the error being that the reliable, probative, and substantial evidence of the case does not support such a finding.
4. The Hearing Commissioner erred in finding as a fact (Finding of Fact No. 6) that Carrier also alleged that Claimant had preexisting hypertension that was permanent and serious enough to constitute a hindrance or obstacle to his employment in finding that Claimant did not have preexisting hypertension. While Dr. David Rogers completed a questionnaire supporting reimbursement six (6) years after Claimant's work injury and three (3) years after his first and only evaluation of Claimant, his own medical records indicate the contrary, that Claimant did not have preexisting hypertension. On April 15,

2008, Dr. Rogers conducted an independent medical evaluation of Claimant and noted that Claimant "reports no prior history of hypertension before his work related injury" and that he (Dr. Rogers) had "no medical records to indicate pre-existing hypertension." However, approximately three (3) years later with no new information, Dr. Rogers changes his position and indicates that Claimant did in fact have preexisting hypertension. The Hearing Commissioner erred in finding Dr. Rogers' 2008 medical report more convincing on the issue of whether Claimant's hypertension preexisted, and in finding that it did not preexist. This finding is based upon Carrier APA pp. 63, 65, and 72, the error being that the reliable, probative, and substantial evidence of the case does not support such a finding.

5. The Hearing Commissioner erred in finding as a fact (Finding of Fact No. 7) that Carrier asserts that Claimant had preexisting anxiety. However, the totality of the medical evidence on the record proves otherwise. The post injury medical narratives do not indicate Claimant's mental status to be problematic. In fact, though Claimant admits to mild symptoms of stress, worry and anxiety, he denies psychological problems of significant intensity. An assessment of Claimant's mental status revealed mild anxiety that was "pretty well controlled," "does not appear to be influencing his perception of pain or treatment" and "no psychological contraindications" were observed. While Dr. C. David Tollison completed a medical questionnaire supporting reimbursement based on preexisting anxiety, greater weight was given to the other compelling medical evidence indicating that Claimant did not have preexisting anxiety and if he did, it was not serious enough to constitute a hindrance or obstacle to his employment. This finding is based upon Carrier APA pp. 10, 24, 57-59, 71, the error being that the reliable, probative, and substantial evidence of the case does not support such a finding.

6. The Hearing Commissioner erred in finding as a fact (Finding of Fact No. 8) that Carrier failed to prove the requisite elements to support its claim for reimbursement pursuant to S.C. Code Ann. § 42-9-400. Accordingly, Carrier is not entitled to reimbursement from the South Carolina Second Injury Fund, the error being that the reliable, probative, and substantial evidence of the case does not support such a finding.

7. The Hearing Commissioner erred in concluding as a matter of law that the Carrier did not establish that Claimant had preexisting conditions. Here, the medical evidence proves that Claimant did not have preexisting anxiety and hypertension; and, therefore, Carrier failed to meet all requirements pursuant to S.C. Code Ann. § 42-9-400, when the reliable, probative, and substantial evidence of the case does not support such a conclusion.

8. The Hearing Commissioner erred in concluding as a matter of law that Carrier did not prove that these conditions were serious enough to constitute a hindrance or obstacle to Claimant's employment; and, therefore, carrier failed to meet all requirements for reimbursement pursuant to S.C. Code Ann. § 42-9-400, when the reliable, probative, and substantial evidence of the case does not support such a conclusion.

9. The Hearing Commissioner erred in concluding as a matter of law that Carrier failed to prove that Claimant's preexisting back pain was permanent and serious enough to

constitute a hindrance or obstacle to his employment; and as such, Carrier failed to meet all requirements for reimbursement, when the reliable, probative, and substantial evidence of the case does not support such a conclusion.

10. The Hearing Commissioner erred in concluding as a matter of law that Carrier failed to meet all requirements for reimbursement pursuant to S.C. Code Ann. § 42-9-400 and is not entitled to reimbursement from the South Carolina Second Injury Fund, when the reliable, probative, and substantial evidence of the case does not support such a conclusion.

11. The Hearing Commissioner erred in ordering that the Carrier's claim for reimbursement pursuant to S.C. Code Ann. § 42-9-400 is denied and dismissed with prejudice subject to its statutory right to appeal, when the reliable, probative, and substantial evidence of the case supports an order that the Carrier is entitled to reimbursement from the South Carolina Second Injury Fund.

12. The Hearing Commissioner erred in failing to find as a fact that the prior hypertension, anxiety and back pain preexisted the November 15, 2005 injury when the reliable, probative and substantial evidence would support such a finding.

13. The Hearing Commissioner erred in failing to find as a fact that the Second Injury Fund failed to present any evidence that the Claimant's anxiety, hypertension and back pain were not permanent conditions of such seriousness to constitute a hindrance or obstacle to employment or re-employment, the error being that the reliable, probative, and substantial evidence of the case supports such a finding.

14. The Hearing Commissioner erred failing to find as a fact that the Second Injury Fund failed to present any evidence that the Claimant's prior anxiety, hypertension and back pain did not combine with or were not aggravated by his November 15, 2005 injury and did not substantially increase the overall liability of the employer and Carrier, the error being that the reliable, probative, and substantial evidence of the case supports such a finding.

15. The Hearing Commissioner erred in failing to find as a fact that the evidence in the medical record supports the Carrier's claim for Second Injury Fund recovery, the error being that the reliable, probative, and substantial evidence of the case supports such a finding.

16. The Hearing Commissioner erred in not concluding as a matter of law under S.C. Code Ann. § 42-9-400(c) that the employer established knowledge of the prior impairments prior to the November 15, 2005 work injury, the error being that the reliable, probative, and substantial evidence of the case supports such a conclusion.

17. The Hearing Commissioner erred in failing to order reimbursement from the South Carolina Second Injury Fund to the Carrier for claimant's November 15, 2005 injury, the error being that the reliable, probative, and substantial evidence of the case supports such a conclusion.

Henry Mills Gallivan
A member of the South Carolina Bar
Certified Mediator
Certified Arbitrator
Direct 864.271.3341
mgallivan@gwbllawfirm.com



Gallivan, White & Boyd, P.A.
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Greenville, South Carolina 29601
Telephone 864.271.9580
Facsimile 864.271.7502
www.gwbllawfirm.com

June 21, 2012
CERTIFIED MAIL
RETURN RECEIPT REQUESTED

6/21/12
WDD

The Honorable Lynn Lancaster
Laurens County Clerk of Court
P.O. Box 287
Laurens, SC 29360

Re: SIF - Ben Lucius Johnson v. American Services, Inc.
Claim No: 709-252373
Document Label - LEGAL - DEFENSE ATTY CORRESP
W.C.C. File No.: 0520310
SIF No.: 131817
Date of Injury: 11/15/2005
Our File No.: 6676-32

Dear The Honorable Lynn Lancaster:

Enclosed are the original and three (3) copies of Appellants, American Services, Inc. and American Home Assurance Company's Notice of Appeal and Petition for Judicial Review, Civil Action Coversheet and a Certificate of Service in the above-referenced matter. Also enclosed is our firm's check in the amount of \$150.00 for the filing fee.

We would appreciate your clocking and filing the original Notice and Certificate of Service, clocking the copies thereof and returning them to us in the self-addressed, enclosed envelope.

With kind regards,

Yours very truly,

GALLIVAN, WHITE & BOYD, P.A.

H. Mills Gallivan

HMG/acm
Enclosures

cc: Ms. Latonya D. Edwards (via certified mail, w/encl.)
Ms. Virginia L. Crocker (via certified mail, w/encl.)

SCWCC

JUN 26 2012

JUDICIAL

ROA -054

STATE OF SOUTH CAROLINA)

COUNTY OF LAURENS)

IN THE COURT OF COMMON PLEAS

American Home Assurance, Carrier and American
Services, Inc., Employer

2012 JUN 25 A 11:02
Plaintiff(s))

CIVIL ACTION COVERSHEET

2012 -CP30-497
-CP-
(WCC# 0520310)

vs.

LAURENS COUNTY
CLERK OF COURT

South Carolina Second Injury Fund (In Re: Ben)
Johnson v. American Home Services, Inc.)

Defendant(s))

Submitted By: H. Mills Gallivan
Address: Gallivan, White & Boyd, P.A.
P.O. Box 10589
Greenville, SC 29603

SC Bar #: 2295
Telephone #: (864) 271-5341
Fax #: (864) 271-7502
Other:
E-mail: mgallivan@gwblawfirm.com

NOTE: The coversheet and information contained herein neither replaces nor supplements the filing and service of pleadings or other papers as required by law. This form is required for the use of the Clerk of Court for the purpose of docketing. It must be filled out completely, signed, and dated. A copy of this coversheet must be served on the defendant(s) along with the Summons and Complaint.

DOCKETING INFORMATION (Check all that apply)

*If Action is Judgment/Settlement do not complete

- ☐ JURY TRIAL demanded in complaint. ☐ NON-JURY TRIAL demanded in complaint.
☐ This case is subject to ARBITRATION pursuant to the Court Annexed Alternative Dispute Resolution Rules.
☐ This case is subject to MEDIATION pursuant to the Court Annexed Alternative Dispute Resolution Rules.
☐ This case is exempt from ADR. (Proof of ADR/Exemption Attached)

NATURE OF ACTION (Check One Box Below)

- | | | | |
|--|--|---|---|
| Contracts
☐ Constructions (100)
☐ Debt Collection (110)
☐ Employment (120)
☐ General (130)
☐ Breach of Contract (140)
☐ Other (199) | Torts - Professional Malpractice
☐ Dental Malpractice (200)
☐ Legal Malpractice (210)
☐ Medical Malpractice (220)
Previous Notice of Intent Case #
20 -CP-
☐ Notice/ File Med Mal (230)
☐ Other (299) | Torts - Personal Injury
☐ Assault/Slander/Libel (300)
☐ Conversion (310)
☐ Motor Vehicle Accident (320)
☐ Premises Liability (330)
☐ Products Liability (340)
☐ Personal Injury (350)
☐ Wrongful Death (360)
☐ Other (399) | Real Property
☐ Claim & Delivery (400)
☐ Condemnation (410)
☐ Foreclosure (420)
☐ Mechanic's Lien (430)
☐ Partition (440)
☐ Possession (450)
☐ Building Code Violation (460)
☐ Other (499) |
| Inmate Petitions
☐ PCR (500)
☐ Mandamus (520)
☐ Habeas Corpus (530)
☐ Other (599) | Administrative Law/Relief
☐ Reinstate Drv. License (800)
☐ Judicial Review (810)
☐ Relief (820)
☐ Permanent Injunction (830)
☐ Forfeiture-Petition (840)
☐ Forfeiture-Consent Order (850)
☐ Other (899) | Judgments/Settlements
☐ Death Settlement (700)
☐ Foreign Judgment (710)
☐ Magistrate's Judgment (720)
☐ Minor Settlement (730)
☐ Transcript Judgment (740)
☐ Lis Pendens (750)
☐ Transfer of Structured Settlement Payment Rights Application (760)
☐ Confession of Judgment (770)
☐ Petition for Workers Compensation Settlement Approval (780)
☐ Other (799) | Appeals
☐ Arbitration (900)
☐ Magistrate-Civil (910)
☐ Magistrate-Criminal (920)
☐ Municipal (930)
☐ Probate Court (940)
☐ SCDOT (950)
☒ Worker's Comp (960)
☐ Zoning Board (970)
☐ Public Service Comm. (990)
☐ Employment Security Comm (991)
☐ Other (999) |
| Special/Complex /Other
☐ Environmental (600)
☐ Automobile Arb. (610)
☐ Medical (620)
☐ Other (699) | ☐ Pharmaceuticals (630)
☐ Unfair Trade Practices (640)
☐ Out-of State Depositions (650)
☐ Motion to Quash Subpoena in an Out-of-County Action (660)
☐ Sexual Predator (510) | | |

Submitting Party Signature: 

Date: June 21, 2012

Note: Frivolous civil proceedings may be subject to sanctions pursuant to SCRPC, Rule 11, and the South Carolina Frivolous Civil Proceedings Sanctions Act, S.C. Code Ann. §15-36-10 et. seq.

LYNN W. LANCASTER

STATE OF SOUTH CAROLINA

COUNTY OF LAURENS

American Home Assurance,
Carrier,

And

American Services, Inc.,
Employer,

vs.

South Carolina Second Injury Fund,
Defendants.

(In Re: Ben Johnson v. American
Services, Inc.)

2012 JUN 25 A 11:02

IN THE COURT OF COMMON PLEAS

LAURENS COUNTY
CLERK OF COURT

**NOTICE OF APPEAL AND PETITION
FOR JUDICIAL REVIEW**

W.C.C. FILE NO. 0520310

C.A. No.: 2012 -CP30- 499

**TO: LYNN LANCASTER, CLERK OF COURT, LAURENS COUNTY, SOUTH
CAROLINA; MS. VIRGINIA L. CROCKER, JUDICIAL DIRECTOR, SOUTH
CAROLINA WORKERS' COMPENSATION COMMISSION AND MS.
LATONYA EDWARDS, ATTORNEY FOR THE SECOND INJURY FUND.**

YOU WILL PLEASE TAKE NOTICE that American Services, Inc. and American Home Assurance [hereinafter "Appellants"], pursuant to § 42-17-60 (as applied to injuries before July 1, 2007) and § 1-23-380 (1976), of the Code of Laws of the State of South Carolina (1976) as amended, and Pee Dee Regional Transp. v. S.C. Second Injury Fund, 650 S.E.2d 464, 375 S.C. 60 (S.C. 2007) (holding that jurisdiction for appeals concerning injuries before July 1, 2007 lies in the Court of Common Pleas), by and through their undersigned attorneys, do appeal from the Order of the South Carolina Workers' Compensation Commission filed and received by Appellant on May 22, 2012 and petition this Court for an Order reversing the Findings of Fact, Conclusions of Law, and Order of the Appellate Panel of the South Carolina Workers' Compensation Commission upon the following grounds and exceptions:

Exceptions

1. The Appellate Panel of the South Carolina Workers' Compensation Commission erred as a matter of law in finding as a fact (Finding of Fact No. 4) that Claimant's preexisting back problems were not permanent and serious enough to constitute a hindrance or obstacle to his employment, the error being that the reliable, probative, and substantial evidence of the case does not support such a finding.
2. The Appellate Panel of the South Carolina Workers' Compensation Commission erred as a matter of law in finding as a fact (Finding of Fact No. 4) that Claimant's preexisting back problems were not permanent and serious enough to constitute a hindrance or obstacle to his employment, the error being that the finding was arbitrary or capricious or characterized by abuse of discretion or a clearly unwarranted exercise of discretion given that the expert medical evidence did not support such a finding.
3. The Appellate Panel of the South Carolina Workers' Compensation Commission erred as a matter of law in finding as a fact (Finding of Fact No. 4) that Claimant's preexisting back problems were not permanent and serious enough to constitute a hindrance or obstacle to his employment, the error being that the finding was affected by other error of law given that the expert medical evidence did not support such a finding.
4. The Appellate Panel of the South Carolina Workers' Compensation Commission erred as a matter of law in finding as a fact (Finding of Fact No. 5) that Claimant's preexisting back pain was not permanent and serious enough to constitute a hindrance or obstacle to his employment, the error being that the reliable, probative, and substantial evidence of the case does not support such a finding.
5. The Appellate Panel of the South Carolina Workers' Compensation Commission erred as a matter of law in finding as a fact (Finding of Fact No. 5) that Claimant's preexisting back pain was not permanent and serious enough to constitute a hindrance or obstacle to his employment, the error being that the finding was arbitrary or capricious or characterized by abuse of discretion or a clearly unwarranted exercise of discretion given that the expert medical evidence did not support such a finding.
6. The Appellate Panel of the South Carolina Workers' Compensation Commission erred as a matter of law in finding as a fact (Finding of Fact No. 5) that Claimant's preexisting back pain was not permanent and serious enough to constitute a hindrance or obstacle to his employment, the error being that the finding was affected by other error of law given that the expert medical evidence did not support such a finding.
7. The Appellate Panel of the South Carolina Workers' Compensation Commission erred as a matter of law in finding as a fact (Finding of Fact No. 6) that Claimant did not have preexisting hypertension, the error being that the reliable, probative, and substantial evidence of the case does not support such a finding.
8. The Appellate Panel of the South Carolina Workers' Compensation Commission erred as a matter of law in finding as a fact (Finding of Fact No. 6) that Claimant did not have preexisting hypertension, the error being that the finding was arbitrary or capricious or characterized by abuse of discretion or a clearly unwarranted exercise of discretion given that the expert medical evidence did not support such a finding.
9. The Appellate Panel of the South Carolina Workers' Compensation Commission erred as a matter of law in finding as a fact (Finding of Fact No. 6) that Claimant did not have preexisting hypertension, the error being that the finding was affected by other error of law given that the expert medical evidence did not support such a finding.
10. The Appellate Panel of the South Carolina Workers' Compensation Commission erred as a matter of law in finding as a fact (Finding of Fact No. 7) that Claimant did not have

preexisting anxiety, but if he did, it was not serious enough to constitute a hindrance or obstacle to his employment, the error being that the reliable, probative, and substantial evidence of the case does not support such a finding.

11. The Appellate Panel of the South Carolina Workers' Compensation Commission erred as a matter of law in finding as a fact (Finding of Fact No. 7) that Claimant did not have preexisting anxiety, but if he did, it was not serious enough to constitute a hindrance or obstacle to his employment, the error being that the finding was arbitrary or capricious or characterized by abuse of discretion or a clearly unwarranted exercise of discretion given that the expert medical evidence did not support such a finding.
12. The Appellate Panel of the South Carolina Workers' Compensation Commission erred as a matter of law in finding as a fact (Finding of Fact No. 7) that Claimant did not have preexisting anxiety, but if he did, it was not serious enough to constitute a hindrance or obstacle to his employment, the error being that the finding was affected by other error of law given that the expert medical evidence did not support such a finding.
13. The Appellate Panel of the South Carolina Workers' Compensation Commission erred as a matter of law in finding as a fact (Finding of Fact No. 8) that Appellants failed to prove the requisite elements to support their claim for reimbursement pursuant to S.C. Code § 42-9-400, and accordingly are not entitled to reimbursement from the South Carolina Second Injury Fund, the error being that the reliable, probative, and substantial evidence of the case does not support such a finding.
14. The Appellate Panel of the South Carolina Workers' Compensation Commission erred as a matter of law in finding as a fact (Finding of Fact No. 8) that Appellants failed to prove the requisite elements to support their claim for reimbursement pursuant to S.C. Code § 42-9-400, and accordingly are not entitled to reimbursement from the South Carolina Second Injury Fund, the error being that the finding was arbitrary or capricious or characterized by abuse of discretion or a clearly unwarranted exercise of discretion given that the expert medical evidence did not support such a finding.
15. The Appellate Panel of the South Carolina Workers' Compensation Commission erred as a matter of law in finding as a fact (Finding of Fact No. 8) that Appellants failed to prove the requisite elements to support their claim for reimbursement pursuant to S.C. Code § 42-9-400, and accordingly are not entitled to reimbursement from the South Carolina Second Injury Fund, the error being that the finding was affected by other error of law given that the expert medical evidence did not support such a finding.
16. The Appellate Panel of the South Carolina Workers' Compensation Commission erred as a matter of law in concluding as a matter of law (Conclusion of Law No. 3) that Claimant did not have preexisting anxiety or hypertension, and therefore Appellants were not entitled to reimbursement pursuant to S.C. Code § 42-9-400 from the South Carolina Second Injury Fund, the error being that the reliable, probative, and substantial evidence of the case does not support such a conclusion.
17. The Appellate Panel of the South Carolina Workers' Compensation Commission erred as a matter of law in concluding as a matter of law (Conclusion of Law No. 3) that Claimant did not have preexisting anxiety or hypertension, and therefore Appellants were not entitled to reimbursement pursuant to S.C. Code § 42-9-400 from the South Carolina Second Injury Fund, the error being that the conclusion was arbitrary or capricious or characterized by abuse of discretion or a clearly unwarranted exercise of discretion given that the expert medical evidence did not support such a conclusion.
18. The Appellate Panel of the South Carolina Workers' Compensation Commission erred as a matter of law in concluding as a matter of law (Conclusion of Law No. 3) that Claimant did not have preexisting anxiety or hypertension, and therefore Appellants were

- not entitled to reimbursement pursuant to S.C. Code § 42-9-400 from the South Carolina Second Injury Fund, the error being that the conclusion was affected by other error of law given that the expert medical evidence did not support such a conclusion.
19. The Appellate Panel of the South Carolina Workers' Compensation Commission erred as a matter of law in concluding as a matter of law (Conclusion of Law No. 4) that even if Claimant had preexisting anxiety and hypertension, neither condition was serious enough to constitute a hindrance or obstacle to Claimant's employment, and therefore Appellants were not entitled to reimbursement pursuant to S.C. Code § 42-9-400 from the South Carolina Second Injury Fund, the error being that the reliable, probative, and substantial evidence of the case does not support such a conclusion.
 20. The Appellate Panel of the South Carolina Workers' Compensation Commission erred as a matter of law in concluding as a matter of law (Conclusion of Law No. 4) that even if Claimant had preexisting anxiety and hypertension, neither condition was serious enough to constitute a hindrance or obstacle to Claimant's employment, and therefore Appellants were not entitled to reimbursement pursuant to S.C. Code § 42-9-400 from the South Carolina Second Injury Fund, the error being that the conclusion was arbitrary or capricious or characterized by abuse of discretion or a clearly unwarranted exercise of discretion given that the expert medical evidence did not support such a conclusion.
 21. The Appellate Panel of the South Carolina Workers' Compensation Commission erred as a matter of law in concluding as a matter of law (Conclusion of Law No. 4) that even if Claimant had preexisting anxiety and hypertension, neither condition was serious enough to constitute a hindrance or obstacle to Claimant's employment, and therefore Appellants were not entitled to reimbursement pursuant to S.C. Code § 42-9-400 from the South Carolina Second Injury Fund, the error being that the conclusion was affected by other error of law given that the expert medical evidence did not support such a conclusion.
 22. The Appellate Panel of the South Carolina Workers' Compensation Commission erred as a matter of law in concluding as a matter of law (Conclusion of Law No. 5) that Claimant's preexisting back pain was not permanent and serious enough to constitute a hindrance or obstacle to his employment, and therefore Appellants were not entitled to reimbursement pursuant to S.C. Code § 42-9-400 from the South Carolina Second Injury Fund, the error being that the reliable, probative, and substantial evidence of the case does not support such a conclusion.
 23. The Appellate Panel of the South Carolina Workers' Compensation Commission erred as a matter of law in concluding as a matter of law (Conclusion of Law No. 5) that Claimant's preexisting back pain was not permanent and serious enough to constitute a hindrance or obstacle to his employment, and therefore Appellants were not entitled to reimbursement pursuant to S.C. Code § 42-9-400 from the South Carolina Second Injury Fund, the error being that the conclusion was arbitrary or capricious or characterized by abuse of discretion or a clearly unwarranted exercise of discretion given that the expert medical evidence did not support such a conclusion.
 24. The Appellate Panel of the South Carolina Workers' Compensation Commission erred as a matter of law in concluding as a matter of law (Conclusion of Law No. 5) that Claimant's preexisting back pain was not permanent and serious enough to constitute a hindrance or obstacle to his employment, and therefore Appellants were not entitled to reimbursement pursuant to S.C. Code § 42-9-400 from the South Carolina Second Injury Fund, the error being that the conclusion was affected by other error of law given that the expert medical evidence did not support such a conclusion.
 25. The Appellate Panel of the South Carolina Workers' Compensation Commission erred as a matter of law in concluding as a matter of law (Conclusion of Law No. 6) that

Appellants did not meet all requirements for reimbursement pursuant to S.C. Code § 42-9-400 and therefore are not entitled to reimbursement from the South Carolina Second Injury Fund, the error being that the reliable, probative, and substantial evidence of the case does not support such a conclusion.

26. The Appellate Panel of the South Carolina Workers' Compensation Commission erred as a matter of law in concluding as a matter of law (Conclusion of Law No. 6) that Appellants did not meet all requirements for reimbursement pursuant to S.C. Code § 42-9-400 and therefore are not entitled to reimbursement from the South Carolina Second Injury Fund, the error being that the conclusion was arbitrary or capricious or characterized by abuse of discretion or a clearly unwarranted exercise of discretion given that the expert medical evidence did not support such a conclusion.
27. The Appellate Panel of the South Carolina Workers' Compensation Commission erred as a matter of law in concluding as a matter of law (Conclusion of Law No. 6) that Appellants did not meet all requirements for reimbursement pursuant to S.C. Code § 42-9-400 and therefore are not entitled to reimbursement from the South Carolina Second Injury Fund, the error being that the conclusion was affected by other error of law given that the expert medical evidence did not support such a conclusion.
28. The Appellate Panel of the South Carolina Workers' Compensation Commission erred as a matter of law in failing to find as a fact that Appellant's uncontroverted expert medical testimony supporting reimbursement from the South Carolina Second Injury Fund should be determinative of the issue, where the South Carolina Second Injury Fund failed to present any contrary expert testimony to discredit the overwhelming medical testimony and evidence presented by the Appellants, the error being that the failure to find as a fact is in contravention of recent law on the issue; see Carolinas Recycling Group v. South Carolina Second Injury Fund, No. 4987 (S.C. Ct. App. June 13, 2012), and accordingly is not supported by the reliable, probative, and substantial evidence of the case.
29. The Appellate Panel of the South Carolina Workers' Compensation Commission erred as a matter of law in failing to find as a fact that Appellant's uncontroverted expert medical testimony supporting reimbursement from the South Carolina Second Injury Fund should be determinative of the issue, where the South Carolina Second Injury Fund failed to present any contrary expert testimony to discredit the overwhelming medical testimony and evidence presented by the Appellants, the error being that the failure to find as a fact is in contravention of recent law on the issue; see Carolinas Recycling Group v. South Carolina Second Injury Fund, No. 4987 (S.C. Ct. App. June 13, 2012), and accordingly is arbitrary or capricious or characterized by abuse of discretion or a clearly unwarranted exercise of discretion.
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31. The Appellate Panel of the South Carolina Workers' Compensation Commission erred as a matter of law in failing to find as a fact that the instant action is a medically complex

- case, the error being that the evidence as a whole, including reliable, probative, and substantial evidence of the case supports a finding that this is a medically complex case.
32. The Appellate Panel of the South Carolina Workers' Compensation Commission erred as a matter of law in failing to find as a fact that the instant action is a medically complex case, the error being that the failure to find this as fact was arbitrary or capricious or characterized by abuse of discretion or a clearly unwarranted exercise of discretion given that the evidence as a whole supports a finding that this is a medically complex case.
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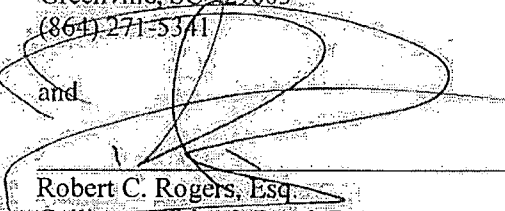
[SIGNATURE ON FOLLOWING PAGE]

Respectfully Submitted,



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Attorneys for Appellants

June 21, 2012

Greenville, SC

STATE OF SOUTH CAROLINA

COUNTY OF LAURENS

American Home Assurance, Carrier
And American Services, Inc., Employer

LAURENS COUNTY
Plaintiff(s), CLERK OF COURT

v.

South Carolina Second Injury Fund (In Re:
Ben Johnson v. American Services, Inc.)

Defendant.

LYNN W. LANCASTER
IN THE COURT OF COMMON PLEAS

2012 JUN 25 A 11:02

CERTIFICATE OF SERVICE

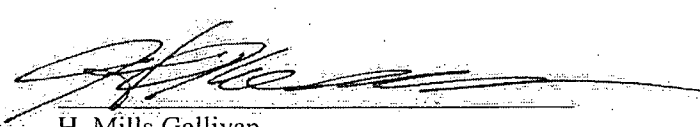
C.A. NO. 2012 -CP30- 497

(WCC# 0520310)

The undersigned H. Mills Gallivan, attorney for the plaintiffs, hereby certifies that on the 21st day of June, 2012, he served a NOTICE OF APPEAL AND PETITION FOR JUDICIAL REVIEW upon the The Honorable Lynn Lancaster, via certified mail delivery, with due and property postage affixed thereto, a copy of the same sent via certified mail addressed to:

Ms. Virginia L. Crocker
Judicial Director
S.C. Workers' Compensation Commission
P.O. Box 1715
Columbia, SC 29202-1715

Ms. Latonya D. Edwards
Dilligard Edwards, LLC
3790 Fernandina Road, Suite 103
Columbia, SC 29210


H. Mills Gallivan

June 21, 2012

ROA -066

Robert C. Rogers
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July 2, 2013

CERTIFIED MAIL
RETURN RECEIPT REQUESTED

The Honorable Lynn Lancaster
Laurens County Clerk of Court
P.O. Box 287
Laurens, SC 29360

Re: **American Home Assurance Company and American Services, Inc. v.
S. C. Second Injury Fund**
(IN RE: Ben Lucius Johnson v. American Services, Inc.)
Claim No: 709-252373
Document Label - LEGAL - DEFENSE ATTY CORRESP
W.C.C. File No.: 0520310
SIF No.: 131817
Date of Injury: 11/15/2005
Our File No.: 6676-32

Dear Ms. Lancaster:

We represent the Plaintiffs/Appellants, American Home Assurance Company and American Services, Inc., in the above-referenced matter. Please find enclosed the original and three (3) copies of the Appellants' Notice of Appeal and Petition for Judicial Review, Civil Action Coversheet, a Certificate of Service, and our firm's check in the amount of \$150.00 for the filing fee.

We would appreciate you clocking and filing the original set of documents, and then clocking the copies and returning them to us in the enclosed self-addressed envelope.

Yours very truly,

GALLIVAN, WHITE & BOYD, P.A.

Robert C. Rogers
Direct Dial: (864) 241-7000
Email: rrogers@gwbllawfirm.com

RCR/khp
Enclosures

cc: Latonya D. Edwards, Esq. (via certified mail; w/encl.)
Virginia L. Crocker (via certified mail; w/encl.)

ROA -067

STATE OF SOUTH CAROLINA

COUNTY OF LAURENS

American Home Assurance Co. and American
Services, Inc.,

Plaintiff(s)

vs.

S. C. Second Injury Fund,

Defendant(s)

IN THE COURT OF COMMON PLEAS

CIVIL ACTION COVERSHEET

2013 JUL -3 A 11: 03
2013-CP-300506

(SCWCC # 0520310)

Submitted By: Robert C. Rogers, Esq.

Address: Gallivan, White & Boyd, P.A.
P. O. Box 10589
Greenville, SC 29603

SC Bar #: 100225
Telephone #: (864) 241-7000
Fax #: (864) 271-7502
Other:
E-mail: rrogers@gwblawfirm.com

NOTE: The coversheet and information contained herein neither replaces nor supplements the filing and service of pleadings or other papers as required by law. This form is required for the use of the Clerk of Court for the purpose of docketing. It must be filled out completely, signed, and dated. A copy of this coversheet must be served on the defendant(s) along with the Summons and Complaint.

DOCKETING INFORMATION (Check all that apply)

*If Action is Judgment/Settlement do not complete

- ☐ JURY TRIAL demanded in complaint. ☐ NON-JURY TRIAL demanded in complaint.
☐ This case is subject to ARBITRATION pursuant to the Court Annexed Alternative Dispute Resolution Rules.
☐ This case is subject to MEDIATION pursuant to the Court Annexed Alternative Dispute Resolution Rules.
☒ This case is exempt from ADR. (Proof of ADR/Exemption Attached)

NATURE OF ACTION (Check One Box Below)

- Contracts**
☐ Constructions (100)
☐ Debt Collection (110)
☐ Employment (120)
☐ General (130)
☐ Breach of Contract (140)
☐ Other (199)

- Torts - Professional Malpractice**
☐ Dental Malpractice (200)
☐ Legal Malpractice (210)
☐ Medical Malpractice (220)
Previous Notice of Intent Case #
20 -CP-
☐ Notice/ File Med Mal (230)
☐ Other (299)

- Torts - Personal Injury**
☐ Assault/Slander/Libel (300)
☐ Conversion (310)
☐ Motor Vehicle Accident (320)
☐ Premises Liability (330)
☐ Products Liability (340)
☐ Personal Injury (350)
☐ Wrongful Death (360)
☐ Other (399)

- Real Property**
☐ Claim & Delivery (400)
☐ Condemnation (410)
☐ Foreclosure (420)
☐ Mechanic's Lien (430)
☐ Partition (440)
☐ Possession (450)
☐ Building Code Violation (460)
☐ Other (499)

- Inmate Petitions**
☐ PCR (500)
☐ Mandamus (520)
☐ Habeas Corpus (530)
☐ Other (599)

- Administrative Law/Relief**
☐ Reinstate Drv. License (800)
☐ Judicial Review (810)
☐ Relief (820)
☐ Permanent Injunction (830)
☐ Forfeiture-Petition (840)
☐ Forfeiture-Consent Order (850)
☐ Other (899)

- Judgments/Settlements**
☐ Death Settlement (700)
☐ Foreign Judgment (710)
☐ Magistrate's Judgment (720)
☐ Minor Settlement (730)
☐ Transcript Judgment (740)
☐ Lis Pendens (750)
☐ Transfer of Structured Settlement Payment Rights Application (760)

- Appeals**
☐ Arbitration (900)
☐ Magistrate-Civil (910)
☐ Magistrate-Criminal (920)
☐ Municipal (930)
☐ Probate Court (940)
☐ SCDOT (950)
☒ Worker's Comp (960)
☐ Zoning Board (970)
☐ Public Service Comm. (990)

- Special/Complex /Other**
☐ Environmental (600)
☐ Automobile Arb. (610)
☐ Medical (620)
☐ Other (699)

- ☐ Pharmaceuticals (630)
☐ Unfair Trade Practices (640)
☐ Out-of State Depositions (650)
☐ Motion to Quash Subpoena in an Out-of-County Action (660)
☐ Sexual Predator (510)

- ☐ Confession of Judgment (770)
☐ Petition for Workers Compensation Settlement Approval (780)
☐ Other (799)

- ☐ Employment Security Comm (991)
☐ Other (999)

Submitting Party Signature:

Robert C. Rogers

Date: July 2, 2013

Note: Frivolous civil proceedings may be subject to sanctions pursuant to SCRCP, Rule 11, and the South Carolina Frivolous Civil Proceedings Sanctions Act, S.C. Code Ann. §15-36-10 et. seq.

STATE OF SOUTH CAROLINA)

COUNTY OF LAURENS)

American Home Assurance,
Carrier,)

And)

American Services, Inc.,
Employer,)

vs.)

South Carolina Second Injury Fund,
Defendants.)

(In Re: Ben Johnson v. American
Services, Inc.))

LYNN W. LANCASTER
IN THE COURT OF COMMON PLEAS

2013 JUL -3 A 11:03

**NOTICE OF APPEAL AND PETITION
FOR JUDICIAL REVIEW**

W.C.C. FILE NO. 0520310

C.A. No.: 2013CP 3000506

**TO: LYNN LANCASTER, CLERK OF COURT, LAURENS COUNTY, SOUTH
CAROLINA; MS. VIRGINIA L. CROCKER, JUDICIAL DIRECTOR,
SOUTH CAROLINA WORKERS' COMPENSATION COMMISSION AND
MS. LATONYA EDWARDS, ATTORNEY FOR THE SECOND INJURY
FUND.**

YOU WILL PLEASE TAKE NOTICE that American Services, Inc. and American Home Assurance [hereinafter "Appellants"], pursuant to § 42-17-60 (as applied to injuries before July 1, 2007) and § 1-23-380 (1976), of the Code of Laws of the State of South Carolina (1976) as amended, and *Pee Dee Regional Transp. v. S.C. Second Injury Fund*, 650 S.E.2d 464, 375 S.C. 60 (S.C. 2007) (holding that jurisdiction for appeals concerning injuries before July 1, 2007 lies in the Court of Common Pleas), by and through their undersigned attorneys, do appeal from the Order of the South Carolina Workers' Compensation Commission filed and received by Appellant on June 14, 2013, and petition this Court for an Order reversing the Findings of Fact, Conclusions of Law, and Order of the

Appellate Panel of the South Carolina Workers' Compensation Commission upon the following grounds and exceptions:

Exceptions

1. Finding of Fact No. 11, wherein the Appellate Panel of the Workers' Compensation Commission finds that Appellants failed to prove the requisite elements of reimbursement pursuant to S.C. Code § 42-9-400 and accordingly are not entitled to reimbursement is:
 - a. Clearly erroneous in view of the reliable, probative, and substantial evidence on the whole record insofar as the medical evidence, including uncontroverted expert opinions, supports reimbursement in favor of Appellants in this instance;
 - b. In excess of the statutory authority of the agency insofar as the decision of the Appellate Panel to deny reimbursement is based upon its own interpretation of isolated medical records in contravention of expert opinions, which the Appellate Panel is not authorized to do under the controlling authorities;
 - c. Affected by other error of law insofar as the Appellate Panel has failed to properly apply the controlling authorities to the facts of this instant action;
 - d. Arbitrary or capricious or characterized by abuse of discretion or clearly unwarranted exercise of discretion insofar as the Appellate Panel exceeded the discretion granted to it as fact-finder when it rendered a decision against the uncontroverted evidence in the record.
2. Finding of Fact No. 8, wherein the Appellate Panel finds its decision is consistent with *Carolinas Recycling Group v. South Carolina Second Injury Fund*, 398 S.C. 480, 483, 730 S.E.2d 324, 326 (Ct. App. 2012) and *Burnette v. City of Greenville*, 401 S.C. 417, 737 S.E.2d 200 (Ct. App. 2012), is:
 - a. Affected by other error of law insofar as the Appellate Panel misinterprets and misapplies the foregoing authorities to the facts of this case in finding that Appellants are not entitled to reimbursement;
 - b. Clearly erroneous in view of the reliable, probative, and substantial evidence on the whole record insofar as the holdings of these authorities when applied to the facts of this case support reimbursement for Appellants.
3. Finding of Fact No. 9, wherein the Appellate Panel finds that the South Carolina Court of Appeals in *Carolinas Recycling Group v. South Carolina Second Injury*

Fund., 398 S.C. 480, 483, 730 S.E.2d 324, 326 (Ct. App. 2012), reversed the Commission's decision because it was based on an evaluation of a non-treating physician who only met with Claimant on one occasion is:

- a. Affected by other error of law insofar as the Appellate Panel mischaracterizes the holding of that case.
4. Finding of Fact No. 9, wherein the Appellate Panel finds that its decision denying reimbursement for Appellants is supported by the medical evidence in the record is:
- a. Clearly erroneous in view of the reliable, probative, and substantial evidence on the whole record insofar as the medical evidence, including uncontroverted expert opinions, supports reimbursement in favor of Appellants in this instance;
 - b. In excess of the statutory authority of the agency insofar as the finding is based upon the Appellate Panel's own interpretation of isolated medical records in contravention of expert opinions, which is prohibited under the controlling authorities;
 - c. Affected by other error of law insofar as the Appellate Panel has failed to properly apply the controlling authorities to the facts of this instant action;
 - d. Arbitrary or capricious or characterized by abuse of discretion or clearly unwarranted exercise of discretion insofar as the Appellate Panel exceeded the discretion granted to it as fact-finder when it rendered a decision against the uncontroverted evidence in the record.
5. Finding of Fact No. 10, wherein the Appellate Panel finds that its decision is based upon the physicians' own interpretation of the medical data which does not support reimbursement is:
- a. Clearly erroneous in view of the reliable, probative, and substantial evidence on the whole record insofar as the medical evidence, including uncontroverted expert opinions, supports reimbursement in favor of Appellants in this instance;
 - b. In excess of the statutory authority of the agency insofar as the finding is based upon the Appellate Panel's own interpretation of isolated medical records in contravention of expert opinions, which is prohibited under the controlling authorities;
 - c. Affected by other error of law insofar as the Appellate Panel has failed to properly apply the controlling authorities to the facts of this instant action;

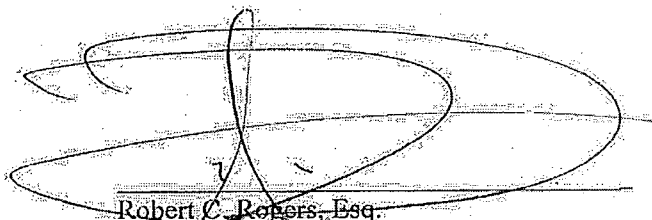
- d. Arbitrary or capricious or characterized by abuse of discretion or clearly unwarranted exercise of discretion insofar as the Appellate Panel exceeded the discretion granted to it as fact-finder when it rendered a decision against the uncontroverted evidence in the record.
6. Finding of Fact No. 10, wherein the Appellate Panel finds it has disregarded the expert medical questionnaires in favor of "other competent evidence" is:
- a. Clearly erroneous in view of the reliable, probative, and substantial evidence on the whole record insofar as there is no "other competent evidence" as defined by *Potter v. Spartanburg School. Dist. No. 7*, 395 S.C. 17, 716 S.E.2d 123 (Ct. App. 2011); *Tiller v. National Health Care Center*, 334 S.C. 333, 513 S.E.2d 843 (1999); *Ballenger v. Southern Worsted Corp.*, 209 S.C. 463, 40 S.E.2d 681 (1946); *Poston v. Southeastern Construction Co.*, 208 S.C. 35, 36 S.E.2d 858 (1946); and *Baker v. Graniteville Co.*, 197 S.C. 21, 14 S.E.2d 367 (1941), which would support denial of reimbursement in this instance;
 - b. Affected by other error of law insofar as it mischaracterizes what constitutes "other competent evidence" under *Potter v. Spartanburg School. Dist. No. 7*, 395 S.C. 17, 716 S.E.2d 123 (Ct. App. 2011); *Tiller v. National Health Care Center*, 334 S.C. 333, 513 S.E.2d 843 (1999); *Ballenger v. Southern Worsted Corp.*, 209 S.C. 463, 40 S.E.2d 681 (1946); *Poston v. Southeastern Construction Co.*, 208 S.C. 35, 36 S.E.2d 858 (1946); and *Baker v. Graniteville Co.*, 197 S.C. 21, 14 S.E.2d 367 (1941);
 - c. In excess of the statutory authority of the agency insofar as the finding is based upon the Appellate Panel's own interpretation of isolated medical records in contravention of expert opinions, not "other competent evidence" as defined by *Potter v. Spartanburg School. Dist. No. 7*, 395 S.C. 17, 716 S.E.2d 123 (Ct. App. 2011); *Tiller v. National Health Care Center*, 334 S.C. 333, 513 S.E.2d 843 (1999); *Ballenger v. Southern Worsted Corp.*, 209 S.C. 463, 40 S.E.2d 681 (1946); *Poston v. Southeastern Construction Co.*, 208 S.C. 35, 36 S.E.2d 858 (1946); and *Baker v. Graniteville Co.*, 197 S.C. 21, 14 S.E.2d 367 (1941);
 - d. Arbitrary or capricious or characterized by abuse of discretion or clearly unwarranted exercise of discretion insofar as the Appellate Panel exceeded the discretion granted to it as fact-finder when it rendered a decision against the uncontroverted evidence in the record and where there is no "other competent evidence" as defined by *Potter v. Spartanburg School. Dist. No. 7*, 395 S.C. 17, 716 S.E.2d 123 (Ct. App. 2011); *Tiller v. National Health Care Center*, 334 S.C. 333, 513 S.E.2d 843 (1999); *Ballenger v. Southern Worsted Corp.*, 209 S.C. 463, 40 S.E.2d 681 (1946); *Poston v. Southeastern Construction Co.*, 208 S.C. 35, 36 S.E.2d 858

(1946); and *Baker v. Graniteville Co.*, 197 S.C. 21, 14 S.E.2d 367 (1941), which would support denial of reimbursement in this instance;

7. Conclusion of Law No. 6, wherein the Appellate Panel finds as a matter of law that Appellants failed to prove the requisite elements of reimbursement pursuant to S.C. Code § 42-9-400 and accordingly are not entitled to reimbursement is:
 - a. Clearly erroneous in view of the reliable, probative, and substantial evidence on the whole record insofar as the medical evidence, including uncontroverted expert opinions, supports reimbursement in favor of Appellants in this instance;
 - b. In excess of the statutory authority of the agency insofar as the decision of the Appellate Panel to deny reimbursement is based upon its own interpretation of isolated medical records in contravention of expert opinions; which is prohibited under the controlling authorities;
 - c. Affected by other error of law insofar as the Appellate Panel has failed to properly apply the controlling authorities to the facts of this instant action;
 - d. Arbitrary or capricious or characterized by abuse of discretion or clearly unwarranted exercise of discretion insofar as the Appellate Panel exceeded the discretion granted to it as fact-finder when it rendered a decision against the uncontroverted evidence in the record.
8. The Appellate Panel refused a remand hearing to allow the parties to present arguments on *Carolinas Recycling Group v. South Carolina Second Injury Fund*, 398 S.C. 480, 483, 730 S.E.2d 324, 326 (Ct. App. 2012) and *Burnette v. City of Greenville*, 401 S.C. 417, 737 S.E.2d 200 (Ct. App. 2012) as those authorities relate the instant action. In addition, the Appellate Panel only gave cursory treatment to the aforementioned authorities as reflected in Findings of Fact Nos. 8 through 10. Accordingly, the Appellate Panel has failed to fulfill its duties as set forth in the Form 4 Remand Order entered by the Honorable Judge Addy on February 22, 2013 and its Decision and Order on Remand is:
 - a. Made upon unlawful procedure;
 - b. In violation of constitutional or statutory provisions;
 - c. Affected by other error of law;
 - d. Arbitrary or capricious or characterized by abuse of discretion or clearly unwarranted exercise of discretion.

Based upon the foregoing, Appellants' substantial rights have been prejudiced. Accordingly, Appellants file Notice of Appeal and Request for Judicial Review by this Court pursuant to S.C. Code 1-23-380 asking that the Court reverse or modify the decision of the Appellate Panel insofar as it denies Appellants full Second Injury Fund reimbursement pursuant to S.C. Code § 42-9-400.

Respectfully Submitted,

A large, stylized handwritten signature in black ink, appearing to read 'R. Rogers', is written over the printed name and address.

Robert C. Rogers, Esq.
Gallivan, White & Boyd, P.A.
P. O. Box 10589
Greenville, SC 29603
(864) 241-7000

Attorney for Appellants

July 2, 2013

Greenville, SC

STATE OF SOUTH CAROLINA)
)
COUNTY OF LAURENS)
)
American Home Assurance Company, Carrier,)
)
and)
)
American Services, Inc., Employer,)
)
Plaintiffs,)
)
v.)
)
South Carolina Second Injury Fund,)
)
Defendant.)
)
(IN RE: Ben Johnson v. American Services,)
Inc.))

IN THE COURT OF COMMON PLEAS
LYNN W. LANCASTER

2013 JUL -3 A 11:03

LAURENS COUNTY
CLERK OF COURT
CERTIFICATE OF SERVICE

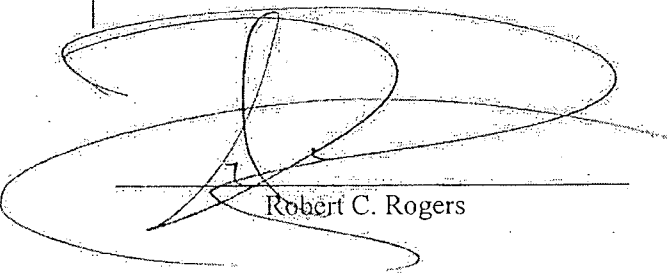
C.A. NO. 2013 CP 000506

(WCC# 0520310)

The undersigned, Robert C. Rogers, attorney for the Plaintiffs / Appellants, hereby certifies that on the 2nd day of July, 2013, he served a NOTICE OF APPEAL AND PETITION FOR JUDICIAL REVIEW upon The Honorable Lynn Lancaster, Clerk of Court for Laurens County, South Carolina, via certified mail delivery, a copy of the same addressed to:

Virginia L. Crocker
Judicial Director
S.C. Workers' Compensation Commission
P.O. Box 1715
Columbia, SC 29202-1715

Latonya D. Edwards, Esq.
Dilligard Edwards, LLC
3790 Fernandina Road, Suite 103
Columbia, SC 29210


Robert C. Rogers

July 2, 2013

ROA -075

SOUTH CAROLINA WORKERS' COMPENSATION COMMISSION
W.C.C. FILE #0520310

AMERICAN SERVICES/ CARRIER	)	SC WORKERS' COMPENSATION COMMISSION
PLAINTIFF	)	HEARING OF
VS.	)	AMERICAN SERVICES/CARRIER
SC SECOND INJURY FUND	)	VS
DEFENDANT	)	SOUTH CAROLINA SECOND INJURY FUND
IN RE:	)	IN RE: BEN JOHNSON VS. AMERICAN
BEN JOHNSON VS. AMERICAN SERVICES	)	SERVICES, INC.

This is the Transcript of the South Carolina workers' Compensation Hearing of American Services/Carrier versus South Carolina Second Injury Fund, In Re: Ben Johnson versus American Services, Incorporated, taken before Gloria Davis, a Court Reporter and Notary Public in and for the State of South Carolina, commencing at the hour of 2:47 P.M., Wednesday, August 24, 2011, at Clinton City Hall-Public Safety, 404 North Broad Street, Clinton,, South Carolina.

COPY

REPORTED

BY

GLORIA DAVIS

PALMETTO COURT REPORTING
321 Mac Circle Lexington, SC 29073
(803) 358-0515
www.PalmettoCourtReporting.com

APPEARANCES

FOR THE PLAINTIFF:

Tanisha J. Hadley, Esquire
Gallivan, White & Boyd, PA
One Liberty Square
55 Beattie Place, Suite 1200
P.O. Box 10589
Greenville, SC 29603

FOR THE DEFENDANT:

Latonya D. Edwards, Esquire
Boykin & Davis, LLC
220 Stoneridge Drive, Suite 100
P.O. Box 11844
Columbia, SC 29211

ALSO PRESENT:

*Reporter's Note: -- Indicates incomplete thought or sentence, trailing off or interruption by speakers.

**This is an Official Transcript governed by 25A S.C. Code ANN. Regs 67-615 D (Supp. 2000). The unauthorized copying of this document is deemed to be conversion of an asset belonging to the Court Reporter.

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I N D E X

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Response from the Plaintiff by Ms. Hadley	14:10
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Certificate	19

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STIPULATIONS

1
2 Commissioner Wilkerson: Today's date is the 24th
3 day of August, 2011. We're here in reference to
4 Workers' Comp File Number 0520310. The Claimant
5 in this case is Ben Johnson. The Employer is
6 American Services, Incorporated. We're here today
7 on a Form 54/55 and by operation of R67-605.
8 Representing the Employer and the Carrier is T. J.
9 Hadley. Representing the Second Injury Fund today
10 is Latonya Edwards. And we're here on a date of
11 accident of 11/15/2005. Ms. Hadley, tell me why
12 you should be reimbursed from the Second Injury
13 Fund in reference to this case. Thank you, ma'am.

ARGUMENT FOR THE PLAINTIFF

14
15 By Ms. Hadley:

16 Yes, Commissioner. We are seeking reimbursement
17 from the South Carolina Second Injury Fund on behalf of
18 the Employer and the Carrier. We have met the
19 statutory requirement for employer knowledge,
20 pre-existing permanent impairment, hindrance and/or
21 obstacle to employment or re-employment, and increased
22 liability for medical costs, disability and
23 compensation. This case law qualifies both under
24 listed condition, 34 B, ratings equal to seventy-eight
25 (78) weeks or more, as well as under Section 42-9-400

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1 (A) of the South Carolina Workers' Compensation Act.
2 Prior to the date of the injury Mr. Johnson had
3 pre-existing anxiety and chronic back pain, which then
4 was aggravated and combined with the subsequent injury
5 to make him worse off and increase the Carrier's
6 liability. The Employer knowledge requirement is based
7 on the Second Injury Fund questionnaire that is
8 submitted; that's APA Exhibit B, pages 68 through 69.
9 He does indicate that he has a prior injury but he
10 conceals that he has prior anxiety, hypertension and
11 back problems. The medical records predating the
12 injury indicate that he's getting treatment from Dr.
13 Toussaint, which is APA 1, pages 1 through 7, for both
14 his anxiety and his back problems as well as
15 hypertension. It clearly shows that he was continually
16 getting pain medicine for his chronic back problems.
17 As for the pre-existing permanent impairment, according
18 to 42-9-400 (A) the impairment can be from any cause or
19 origin, and in addition the permanent physical
20 impairment is further defined under Section 49-9-400
21 (D) as any permanent condition whether congenital due
22 to injury or disease. Mr. Johnson clearly had anxiety
23 prior to his taking medication and then it is
24 aggravated due to the pain following the injury.
25 Doctor -- Dr. David Tollison, on Exhibit D, page 71,

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1 indicates that his anxiety pre-existed; it was a
2 permanent condition, which was enough to be a hindrance
3 or obstacle to employment and then has subsequently
4 combined with his injury and aggravated by the injury
5 as well. The -- his -- his chronic back pain is then
6 also kind of creates a cycle with the anxiety causing
7 it to be a -- be a problem. In addition, his treating
8 physician, Dr. Rogers, in Exhibit E, indicates that
9 both his hypertension and his chronic back pain are
10 aggravated by the injury. And -- and in addition the
11 medical records from Dr. Lau, which is APA 4, pages 17
12 through 26, indicate that he had to have continuing
13 treatment for his back problems, as well as APA Number
14 7, which is from Dr. Cochise an -- a neuro -- Watkins,
15 indicates that he had to have pain management due to
16 the chronic pain that continued after the accident. As
17 for hindrance, Mr. Johnson's pre-existing impairments
18 were hindrances or obstacles to his employment or
19 re-employment were he to become unemployed as evidenced
20 by the presumption offered under the statute, under
21 Section 42-9-400 (D) 34 (b) ratings equal to
22 seventy-eight (78) weeks or more. His impairment
23 ratings were twenty-eight (28) -- twenty-five percent
24 (25%) to the whole person based on the lumbar spine and
25 fifteen percent (15%) based on emotional behavior,

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1 dysfunction, as well as a ten percent (10%) impairment
2 for his hypertension which clearly add up to weeks
3 greater than seventy-eight (78). Even without the --

4 Commissioner Wilkerson: Where is the fifteen (15)
5 and ten (10) covered underneath the Act?

6 Ms. Hadley: -- his -- now, those are just how his
7 Doctor feels prior to the accident and then after the
8 accident. His -- the aggravation, I guess, based on
9 his chronic back pain and that he has to have
10 continuing pain --

11 Commissioner Wilkerson: Yes, but what --

12 Ms. Hadley: -- pain management because of it.

13 Commissioner Wilkerson: -- but -- but what --
14 what I'm trying to figure out, where those
15 disabilities are covered underneath the Workers'
16 Compensation --

17 Ms. Hadley: Well, they're --

18 Commissioner Wilkerson: -- Act?

19 Ms. Hadley: -- they're whole person impairment
20 ratings. I'm not sure -- I'm -- they're not
21 specifically --

22 Commissioner Wilkerson: But is the twenty-five
23 percent (25%), that -- that includes the fifteen
24 (15) and ten (10)?

25 Ms. Hadley: -- no, they're individual -- the

1 twenty-five (25) percent is based on the lumbar spine.

2 Commissioner Wilkerson: Okay, lumbar. I wrote
3 that down. Okay. And then what's the fifteen
4 (15) based on?

5 Ms. Hadley: He -- they assigned a fifteen percent
6 (15%) whole person impairment rating and they base it
7 on his emotional anxiety, dysfunction, even though it's
8 not -- I know it's not specifically listed in the --

9 Commissioner Wilkerson: So, is that fifteen (15)
10 and ten (10) to equal to the twenty-five (25) or
11 no it's in addition to?

12 Ms. Hadley: No, in addition to.

13 Commissioner Wilkerson: I guess my question is if
14 -- if -- but for the Workers' Comp Act the Second
15 Injury Fund Act would not exist; so, where is
16 fifteen (15) and ten (10) coming underneath the
17 Act?

18 Ms. Hadley: They're not specifically listed in
19 the Act.

20 Commissioner Wilkerson: Yes, I can't -- I can't
21 find it. Okay, that's fine.

22 Ms. Hadley: Right. They give him a forty-two
23 percent (42%) total to the whole person. But, I guess,
24 it goes to show that the pre-existing conditions were
25 aggravated by --

1 Commissioner Wilkerson: Okay.

2 Ms. Hadley: -- the subsequent injury. The
3 greater weight of the evidence supports that the
4 Carrier incurred substantially greater liability for
5 compensation, medical costs and disability by reason
6 both have combined effects and aggravation of the
7 pre-existing impairments. The -- in Section 42-9-400
8 (A) and the signed medical questionnaire support this
9 position. The treating physician felt that Mr.
10 Johnson, had he not had the pre-existing conditions he
11 would not have the medical costs and the lost time out
12 of work and a permanent disability would not have been
13 greater due to him not having the conditions and the
14 Carrier wouldn't qualify under 42-9-400 for
15 reimbursement. We ask that you enter in an order
16 granting the Carrier reimbursement based off of
17 42-9-400 pursuant to the statute.

18 Commissioner Wilkerson: Okay. Thank you.

19 Ms. Edwards: Yes, Commissioner.

20 Commissioner Wilkerson: Latonya.

21 ARGUMENT FOR THE DEFENDANT

22 By Ms. Edwards:

23 The Second Injury Fund denied this claim because
24 we deny that the Claimant had a pre-existing condition
25 that was a hindrance to employment and I want to

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1 address them separately; let me start with the
2 hypertension first. First, we deny the hypertension
3 pre-existed. Carrier APA, page 72, this is Dr. Rogers'
4 questionnaire supporting hypertension as a valid basis
5 for reimbursement. However, Dr. Rogers' medical
6 narratives at Carrier APA, page 63, indicates that
7 Claimant denied a prior history of hypertension before
8 this injury. At Carrier APA, page 65, under medical
9 assessment, the second (2nd) sentence, and I quote,
10 "Mr. Johnson reports no prior history of hypertension
11 before his work related lifting injury. I have no
12 medical records to indicate pre-existing hypertension".
13 So, he fills out a questionnaire saying that there is
14 but then the medical report that he did before the
15 questionnaire clearly indicates that Mr. Johnson
16 reported no history of hypertension and he didn't have
17 any medical records to prove the Claimant had
18 hypertension before that date. So, three (3) years
19 later he signs the questionnaire at, I think, Carrier
20 APA page 70 -- just give me a second here -- Carrier
21 APA, page 72, saying the Claimant had pre-existing
22 hypertension three (3) years later with no new
23 evidence, no new treatment. In fact, the medical
24 records don't even indicate that he treated the
25 Claimant after this April 15th, 2008 report where he

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1 says there are no medical records to indicate
2 pre-existing hypertension and Mr. Johnson had no --
3 reported no hypertension before then. So, certainly,
4 we would request that you give greater weight to the
5 medical reports rather than that questionnaire that he
6 filed out three (3) years later with no new
7 information. Based on the prior back, we deny that the
8 prior back pain was a hindrance to employment. Once
9 again, Carrier APA, page 63, claimant indicated that he
10 pulled a muscle in his back fifteen (15) years prior to
11 this work injury. That he was successfully treated
12 with a chiropractor with no significant sequela or
13 symptoms. Carrier APA, page 1, is a medical report
14 from 2000 that essentially doesn't really say anything.
15 It appears to be a patient information form from
16 January 3rd of 2000, but it looks like the patient --
17 patient's -- patient's signature is not on there. It
18 looks like it was on there but maybe something --
19 something covered it; so -- because you see some
20 partial letters there. And it does contain the
21 patient's name and address -- I mean name, address and
22 Social Security Number. Carrier APA, page 2, this is
23 August 12th, 2005, and on the bottom is March 1st,
24 2011, where Claimant -- it notes that Claimant had been
25 given a prescription for low back pain. APA -- Carrier

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1 APA, page 8, two (2) days post injury on November 17th,
2 2005. Claimant presented to the Family Healthcare
3 Center complaining of low back pain since his work
4 injury from two (2) days prior, notes no prior history
5 of back injury; this is under review of the symptoms.
6 Also, Carrier APA, page 34, notes Claimant's long
7 history of low back pain following -- following his
8 work injury. Carrier APA, page 40, this is a record
9 from February 27th, 2006, several months post injury
10 where Claimant indicates onset of symptoms. As it
11 relates to anxiety, Carrier APA, page 10, mental status
12 is noted to be alert and oriented approximately one (1)
13 month post injury. Carrier APA, page 24, December
14 20th, 2006, approximately one (1) month post -- post
15 injury, it's noted that he is being treated with some
16 Cymbalta. Carrier APA, page 57, the Claimant denies
17 psychological problems of significant intensity but
18 does admit mild symptoms of stress, worry, and anxiety.
19 Notes no prior mental health treatment and is noted to
20 be oriented and alert. Carrier APA, page 58, under
21 assessment it notes some mild anxiety but pretty well
22 controlled and does not appear to be influencing his
23 perception of pain or treatment. Carrier APA, page 59
24 -- 59, no psychological contraindication observed.
25 Carrier APA, page 71, this is Dr. Tollison's report --

1 I mean, medical questionnaire supporting reimbursement
2 based on the anxiety but I think that the APA's that
3 I've cited we believe it establishes that the anxiety
4 was not a hindrance to employment. Fund APA, page 1
5 through 4, is the clincher agreement. Normally, this
6 doesn't come up in our cases but Carrier did settle the
7 claim, didn't admit any liability but stated that the
8 matter was a bonafide dispute. And so, based on our
9 arguments that the pre-existing hypertension did not
10 pre-exist, the prior back pain was not a hindrance to
11 employment and the prior anxiety was not a hindrance to
12 employment, based on the cited APA's we'd request
13 denial.

14 Commissioner Wilkerson: Tell me about the
15 clincher, being a disputed clincher?

16 Ms. Edwards: It says -- it says in dispute.

17 Commissioner Wilkerson: Yes. It doesn't say it's
18 --

19 Ms. Edwards: And so --

20 Commissioner Wilkerson: -- doubtful and disputed;
21 it just says --

22 Ms. Edwards: -- it does not say -- that's right.
23 That's right.

24 Commissioner Wilkerson: -- it -- it just disputes
25 the disability.

1 Ms. Edwards: It disputes --

2 Commissioner Wilkerson: Okay. That's fine.

3 Ms. Edwards: -- right.

4 Commissioner Wilkerson: I'm fine with that. Yes.

5 Ms. Edwards: All right.

6 Commissioner Wilkerson: Okay. Yes. It just --
7 but it's not doubtful and disputed, okay, fine.

8 Ms. Hadley: Briefly, if I may?

9 RESPONSE FROM THE PLAINTIFF

10 By Ms. Hadley:

11 As to the hypertension he was -- he was treated -- he
12 was taking Lopressor for his hypertension, that's APA
13 page 2; his family physician was treating -- treating
14 him for this. Clearly, the Claimant has a
15 predisposition to not necessarily admit everything to
16 his physicians based off of the -- him completing his
17 Second Injury Fund medical questionnaire that his
18 employer gives her -- gives him and he does not include
19 all of the information where he's clearly getting
20 Klonopin to treat his anxiety, and he's also getting
21 pain medication to treat his chronic back pain, which
22 then he subsequently has a back injury and all of these
23 things are then aggravated by it. Now, as to Dr.
24 Rogers' questionnaire, the Doctor when completing this
25 had a complete set of medical records. The Fund could

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1 have deposed the doctor to ask him where he makes his
2 determination from; they chose not to do that. And so,
3 the only thing you have to go by is the signed
4 statement in which the doctor indicates that the
5 hypertension pre-existed and he has no reason to say
6 that it would not have pre-existed if it did not, and
7 he clearly was treated for it as cited by the APA page
8 2. Now, as to the pulled muscle in his back prior to
9 -- thirteen (13) years prior to, he -- he was still
10 treating for a chronic back condition as he gets pain
11 medication up until the date of the injury from his
12 family -- family physician. And his -- as to anxiety,
13 his treating physician, Dr. Tollison, indicates that it
14 does pre-exist; he's getting treatment for it prior to
15 the accident and he's getting Klonopin for it and --
16 and then he goes to Dr. Tollison following the accident
17 due to chronic back pain and then the anxiety and
18 having a psychological overlay from the injury. We'd
19 argue that all of these things are clear hindrances or
20 obstacles to his employment because he has to have
21 treatment for it and has potential to obscure his
22 ability to get a job. The fact that the Claimant does
23 not disclose these conditions clearly shows that the
24 employer doesn't get to make a rational decision about
25 whether or not he can do this job or whether or not he

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1 needs to be placed in another position. The Wellman --
2 the Wellman decision made by the Court of Appeals
3 clearly indicates that the employer relies heavily on
4 the medical questionnaires when decided on job
5 descriptions and job duties and in this case -- and
6 when the employee does not truthfully fill that out the
7 employer can only rely on that and so, clearly, it's a
8 hindrance to his employment otherwise he would have
9 disclosed the information.

10 Commissioner Wilkerson: Tell me what American
11 Services, Incorporated does?

12 Ms. Hadley: I think it's a -- he was moving -- a
13 packing company or a moving company. I'm not exactly
14 sure.

15 Commissioner Wilkerson: It's not a security
16 company is it?

17 Ms. Hadley: I do not believe so, no.

18 Commissioner Wilkerson: And that -- and let me
19 ask you another question. Underneath the -- the
20 agreement, they're continuing to pay medical on
21 this; is that correct?

22 Ms. Hadley: The -- the medicals were --

23 Commissioner Wilkerson: Open?

24 Ms. Hadley: -- remained opened based on the
25 agreement. I didn't -- I did not draft --

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1 Commissioner Wilkerson: No, I understand.

2 Ms. Hadley: -- the agreement. And so, I was not
3 there.

4 Commissioner Wilkerson: But it's an open ended
5 medical at this point in time if it's related to
6 the 2000 -- November 15th, 2005 injury, I think.

7 Ms. Hadley: Right.

8 Commissioner Wilkerson: Okay. Anything else,
9 Latonya?

10 MS. Edwards: Yes.

11 RESPONSE FROM THE DEFENDANT

12 By MS. Edwards:

13 I just want to say something on the, we could have
14 deposed issue. Well, you know, the APA -- we don't
15 have to depose. I -- clearly, I think the Doctor based
16 his decision, not on anything that's in the record
17 because he clearly says at Carrier APA, page 25, that
18 he had no medical records to indicate pre-existing
19 hypertension. So, if the answer is already in the
20 medical records we don't have to depose the doctor.
21 And so, clearly his change in position was based on
22 something other than what's in the medical reports
23 because he clearly indicates that he did not have
24 pre-existing -- no medical records indicating he had
25 pre-existing diabetes. And so, I would just simply,

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1 you know, request the Commissioner review the APA's
2 that I have cited and, that's it.

3 Commissioner Wilkerson: Okay. Anything else?
4 Thank you all. I appreciate it.

5 Ms. Hadley: Thank you.

6 Ms. Edwards: Thank you. I appreciate it.

7 Commissioner Wilkerson: You all have a good
8 afternoon. This concludes this hearing.

9 (THERE BEING NO FURTHER ARGUMENTS, THE HEARING CONCLUDED AT
10 3:04 P.M.)
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STATE OF SOUTH CAROLINA)
COUNTY OF LAURENS)

CERTIFICATE

Be it known that I took the foregoing South Carolina Workers' Compensation Commission Hearing of American Services, Inc/Carrier, vs. South Carolina Second Injury Fund, In Re: Ben Johnson vs. American Services, Incorporated;

That I was then and there a Notary Public in and for the State of South Carolina-At-Large;

That by virtue thereof I was duly authorized to administer an oath;

That the witness was first duly sworn to testify the truth, the whole truth, and nothing but the truth, concerning the matter in controversy aforesaid;

The foregoing transcript of 18 typewritten pages represents a true, accurate and complete transcription of the testimony so given at the time and place aforesaid to the best of my skill and ability;

That I am not related to nor an employee of any of the parties hereto, nor a relative or employee of any attorney or counsel employed by the parties hereto, nor interested in the outcome of this action;

Witness my hand and seal this 23rd Day of September, 2011.



Gloria Davis
Notary Public for South Carolina
My Commission Expires 1/22/12

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State of South Carolina)

County of Laurens)

) Court of Common Pleas
) 2012-CP-30-00497

American Home Assurance)
vs.)

) South Carolina Second Injury)
) Fund)

) DEFENDANT)

Transcript of Record

February 21, 2013
Laurens, South Carolina

B E F O R E:

Honorable Frank R. Addy, Jr., Judge

A P P E A R A N C E S:

Robert C. Rogers, Esq.
Attorney for the Plaintiff

Latonya D. Edwards, Esq.
Attorney for the Defendant

Joy E. Holston
Official Court Reporter

1 THE COURT: Will go ahead and go on the record.
2 American Home Assurance Company versus the Second Injury
3 Fund. This case is 2012-CP-30-497. This is, of course, a
4 Workers' Compensation appeal. I believe that, if I am
5 correct, American Home, you are the moving party, you may
6 proceed.

7 MR. ROGERS: That is correct, Your Honor.

8 THE COURT: You may proceed.

9 MR. ROGERS: May it please the Court, Your Honor.
10 Robert Rogers here on behalf of American Services, Inc.
11 and American Home Assurance, the Carrier of the Second
12 Injury Fund. We are appealing the decision of the
13 Appellate Panel's Workers' Compensation Commission wherein
14 it denied reimbursement of our Second Injury Fund claim.
15 In order for the Commission to be reversed with decisions
16 affected by an error of law or is not supported by
17 substantial evidence in the record. Substantial evidence
18 is evidence that when viewed in light of a full record
19 would lead reasonable minds to a conclusion. The South
20 Carolina Court of Appeals in a recent set of cases has
21 elaborated on what constitutes substantial evidence.
22 Carolinas Recycling case which I must note is a Second
23 Injury Fund case. It establishes that when any parties
24 submits expert medical evidence in supporting medical
25 records the burden then shifts to the opposing party to

1 contradict that with expert evidence of it's own. When
2 the opposing party does then Appellate Panel relies upon
3 the interpretation of the medical records and such a
4 decision of a Panel is not supported by substantial
5 evidence. More recently the Court of Appeals in the case
6 of Burnette looked at what a substantial evidence more
7 generally in a Workers' Compensation system. It
8 specifically, Burnette holds that the Appellate Panel is
9 not entitled to render medical decisions of its own when
10 based upon controverted expert medical evidence. And even
11 more recently than Burnette, just this month the Court of
12 Appeals issued yet another decision, Brown case, and we
13 haven't referred to that in any of our briefs because it
14 literally just came out just a few weeks ago which is
15 entirely consistent with the other two cases. So
16 regarding the matter at hand we are the only party that
17 has submitted any expert medical evidence satisfying all
18 of the elements of reimbursement. Therefore in these
19 recent cases the decision of the Appellate Panel is not
20 supported by substantial evidence and should be reversed
21 to the extent that it denies the Carrier and for my client
22 for reimbursement under 42-9-400.

23 Before we go into the, sort of the Second Injury Fund
24 aspect in this claim I think it is beneficial to have a
25 little bit of background on the underlying claim. On

1 November the 15th of 2005 Mr. Johnson bent over to pick up
2 a box of socks and he suffered an injury. He was
3 subsequently diagnosed with injuries to his back, side and
4 his right extremity which is lumbar radiculopathy which
5 stem from that factor. Following this he undergoes an
6 L-5, S-1 fusion, L-5 laminectomy. Those surgeries are
7 unsuccessful. He has a spinal cord stimulator implanted
8 and has life time medicals as a result. He was also
9 receiving work accident, he is receiving counseling for
10 his psychological issue. He was found to sustain
11 forty-two percent whole person impairment. That is on
12 record on appeal on page 65 and 66. And I think it is
13 important to know what goes into that forty-two percent
14 whole person impairment. That consists of his back,
15 hypertension and anxiety. And as I will discuss here
16 today, substantial evidence in the record will show that
17 Mr. Johnson, post-accident condition resulting in that
18 forty-two percent whole person impairment was a result of
19 a preexisting condition, a preexisting impairment being
20 aggravated by the November 15th work accident. All we are
21 seeking is Second Injury Fund reimbursement. Nothing is
22 decided whatsoever in regard to the Second Injury Fund
23 claim would in any way affect Mr. Johnson's right to get
24 medical treatment for compensation benefits. My client
25 has continued to offer treatment for Mr. Johnson and will

1 continue to do that in the future. I would like for you
2 to please keep in mind that this is a system that my
3 client has paid into, when the elements of reimbursements
4 are met as provided for by the statute, 42-9-400, they are
5 entitled to recoup some of the cost that he is spending on
6 the underlying claim. The situation represents precisely
7 why the Second Injury Fund, hiring employees with
8 preexisting conditions. How do they do that. Well, they
9 do that by allowing those employers to recoup some of the
10 cost expended when a subsequent accident aggravates a
11 preexisting condition to result in regular liability than
12 would have from that subsequent accident. Mr. Johnson had
13 seemingly insignificant injury, bending over to pick up a
14 box of socks. But because of his work accident aggravated
15 those preexisting conditions his medical treatment became
16 more complicated and more expensive and he was assigned
17 significantly higher impairment than he would had from
18 that work accident. Denial of reimbursement in this
19 instance would seemingly defeat the statute.

20 So now that we have a little bit of background on the
21 underlying claim what are the elements of Second Injury
22 Fund reimbursement. Well, that is set forth in 42-9-400
23 and it shows five things to be entitled to reimbursement.
24 It shows those five things pursuant to the statute
25 reimbursement should occur. Must show a preexisting

1 impairment, you must show that the preexisting impairment
2 was a hindrance or obstacle to either employment or
3 reemployment. When preexisting impairment combined with
4 was aggravated by the subsequent work accident then as a
5 result of the combination or aggravation there was
6 substantially greater liability. Lastly you have to show
7 important knowledge of either of the actual knowledge or
8 through concealment. As I indicated that all of those
9 elements are met with regard to any one condition then
10 reimbursement should be granted. Here we presented three
11 theories, preexisting back impairment, preexisting
12 hypertension and preexisting anxiety. With regard to the
13 first element of reimbursement, preexisting impairment.
14 As it pertains to Mr. Johnson's back the Appellate Panel
15 found that he had a preexisting back injury and the Fund
16 did not appeal that. Therefore we feel that is the law on
17 the case and is not on appeal. However, assuming that it
18 is there is still substantial evidence in the record to
19 support that Mr. Johnson had a preexisting back
20 impairment. What is that evidence. Dr. Toussaint
21 indicated going three months prior to the November 15th
22 accident, he saw Mr. Johnson in relation to chronic back
23 pain and he prescribed him medication for the condition.
24 That is record on appeal, page two. In addition to that
25 Mr. Johnson self reported a previous back injury to one of

1 his physicians. That is record on appeal, page 63.
2 Additionally Dr. Lal who actually saw Mr. Johnson
3 following his work accident and performed those surgeries
4 that I discussed just a moment ago, after looking at Mr.
5 Johnson, after evaluating him, after performing serving
6 him where he is actually in Mr. Johnson's back and was
7 able to appreciate the level of degenerative condition
8 after that and looking at the medical records wherein it
9 notes prior back pain, prior medication in relation to the
10 back pain. Dr. Lal indicates that Mr. Johnson had a
11 preexisting back impairment. That is record on appeal,
12 page 7.

13 THE COURT: Let's stop right there. That is Sumeer
14 Lal?

15 MR. ROGERS: Yes, Your Honor, Sumeer Lal. And record
16 on appeal, page 7.

17 THE COURT: Sumeer law, S-U-M-E-E-R and the Lal,
18 L-A-L.

19 MR. ROGERS: And lastly, in addition to the foregoing
20 evidence Dr. Rogers who performed in the underlying
21 Workers' Compensation reached the same conclusion as Dr.
22 Lal. After evaluating Mr. Johnson, after looking at his
23 medical records he determined Mr. Johnson indeed had a
24 preexisting back impairment. That is record on appeal,
25 page 7. Having established that Mr. Johnson had a

1 preexisting back impairment, the other conditions. Well,
2 Dr. Toussaint's medical records and his notes indicate
3 that Mr. Johnson was prescribed Klonopin which is used to
4 treating anxiety and Lopressor which is used to treat
5 hypertension. All of that only three months prior to his
6 work accident. Again, that is record on appeal, page 2.
7 David Tollison who treated Mr. Johnson following his work
8 accident for a psychological condition and evaluated and
9 looked at his medical records. He indicated that Mr.
10 Johnson had a preexisting anxiety. That is record on
11 appeal, page 71. And again, Dr. Rogers, the physician
12 from the underlying claim who evaluated Mr. Johnson in
13 person who determined that he had preexisting
14 hypertension. That is record on appeal, page 72. So
15 having established that Mr. Johnson had these preexisting
16 impairments, the second element of reimbursement. Were
17 they a hindrance to his employment. Perhaps most
18 importantly under 42-9-400, subsection (b), (34)(b) we are
19 entitled to a presumption of hindrance for each of those
20 preexisting impairments. And I feel that the presumption
21 is important in this incident because it seems that that
22 has been the reason that the fund is denied reimbursement
23 for this claim. The statute itself provides for a
24 presumption in this instance under (d)(34)(b). However,
25 any additional presumption, Mr. Johnson's providers all

1 completed the medical questionnaires establishing that
2 those preexisting impairments were permanent and a
3 hindrance to his employment or reemployment. Despite the
4 foregoing, without deciding of any evidence of its own the
5 Funds simply contends there was not a hindrance and it
6 does that by according to isolated medical records. It
7 looks at a medical record here and a medical record there
8 and it says that shows that it wasn't a hindrance. For
9 example, they look at the medical records of Dr. Toussaint
10 and they say, at best that shows that there was sporadic
11 incidents, sporadic incidents related to his anxiety and
12 sporadic incidents related to his hypertension. Well,
13 looking at that single medical record on its own and
14 speculating from that that there wasn't an impairment,
15 that's not allowed by the case law. That is purely
16 speculation which is prohibited by the case law. In
17 contrast we relied upon the presumption provided for by
18 the statute itself and the expert questionnaire that
19 support that we have met in the second element of
20 reimbursement. So even if the funds, presumption provided
21 in the statute itself, they failed to present any evidence
22 sufficient to overcome our expert opinions. So having
23 established the first two elements through substantial
24 evidence, the third and fourth, were those preexisting
25 impairments aggravated by Mr. Johnson's work accident to

1 result in a substantial greater liability. Once again,
2 all the medical providers, all of those individuals that
3 actually saw him and evaluated him and had the opportunity
4 to look at all of his medical records they determined that
5 there was an aggravation and as a result of that
6 aggravation or substantial greater liability. The medical
7 evidence itself supports the hindrance of the positions in
8 this instance. Mr. Johnson had a seemingly insignificant
9 injury, bending over to pick up a box of socks and
10 resulted in these complex diagnosis and medical treatment.
11 Again, he had a fusion, a laminectomy, a spinal cord
12 stimulator and lifetime medicals all from this seemingly
13 insignificant act. That shows the substantial medical
14 costs in this instance. In addition he was assigned
15 forty-two percent whole person impairment. I don't want
16 to harp on this but I think it is important to note that
17 that forty-two percent impairment was based upon his back,
18 was based upon anxiety and was based upon hypertension all
19 of which is substantial evidence in the record that shows
20 preexisting and was aggravated by his work accident. So
21 that shows that there is substantially greater Workers'
22 Compensation benefits paid out by my client as a result of
23 the aggravation of those conditions. That is record on
24 appeal on page 65 and 66. So certainly the medical
25 evidence in the record supports the opinions of the

1 physicians and there is greater liability in this
2 instance. As for the last element of reimbursement set
3 forth under the statute. On August 19th of 2005, only
4 three days after seeing Dr. Toussaint and being prescribed
5 medication for those preexisting impairments that we
6 discussed, Mr. Johnson completed an employee health
7 question. And despite the extremely short period of time
8 between seeing Dr. Toussaint and receiving those
9 prescriptions on that question and asked him specifically
10 about preexisting impairments. He didn't list any of
11 those conditions. On that questionnaire it asked him
12 about prescription medications that he was taking. Again
13 did not indicate any of those medications and only three
14 days prior he had been prescribed by Dr. Toussaint.
15 Certainly this instance constitutes concealment as
16 provided for under 42-9-400 (c). So all the foregoing
17 evidence supports Second Injury Fund reimbursement in this
18 instance. As I discussed the recent cases established
19 one, once we presented expert medical evidence supporting
20 the reimbursement the burden then shifts to the clients to
21 rebut that evidence with expert evidence of its own.
22 Secondly, the Appellate Panel is not entitled to render
23 medical opinions on its own, it must rely upon the medical
24 evidence in the record to support its finding. And
25 lastly, Brown, the case that I mentioned, the most recent

1 case that comes out of the Court of Appeals sort of ties
2 together all the case law interpreting substantial
3 evidence and the conclusiveness of medical evidence. That
4 is still the law and nothing that we have argued in any
5 way changes that. That is still good law. But under
6 Brown the Appellate Panel can disregard expert medical
7 evidence only where there is other competent evidence in
8 the record. And other competent evidence includes either
9 expert opinions or testimony from of the claimant or the
10 claimant's relatives. So the question that comes, we have
11 submitted all of this evidence, not only the medical
12 records but the questionnaires of the physicians that
13 actually evaluated Mr. Johnson, tying everything together
14 after being able to appreciate his condition and reading
15 his medical records, not an isolation but in its entirety
16 they tie it all together. We submitted that and all of
17 the evidence supports reimbursement. The question is,
18 what has the Fund done to contradict our evidence. Again,
19 they pointed to isolated medical records and upon that
20 they are trying to get a piece-meal interpretation of what
21 those records mean and they try to submit that as
22 substantial evidence. Under Carolinas Recycling and
23 Burnette, that does not constitute substantial evidence.
24 It is exactly what the Court of Appeals learned against in
25 those cases. And the Funds, interpretation of the medical

1 records, well, that is not expert medical evidence either.
2 And lastly, the Funds interpretation of those records is
3 not other competent evidence as established by the case
4 law. So on the one hand--

5 THE COURT: I need to stop you right there. Looking
6 at the actual order of the Appellate Panel, what they seem
7 to have an issue with is not so much of the, revised
8 diagnosis. Because in several paragraphs the order that
9 they have addressed, the preexisting condition and they
10 seem to indicate that the doctors went back and, Dr.
11 Rogers, approximately three years later and I am quoting
12 from the opinion on page 4, approximately three years
13 later Dr. Rogers changed his condition and indicated the
14 claimant did in fact have preexisting hypertension. We
15 find Dr. Rogers 2008 medical report more convincing on the
16 issue of whether claimant's hypertension preexisted and
17 find that it did not preexist. The same thing that I
18 think we have done for Dr. Toussaint's, I will spell that
19 for the court reporter in a minute as soon as I find his
20 name, they eluded to that as well in the order. Dr. Lal's
21 statement which you referenced also seems to indicate
22 that, notice that his observations about a preexisting
23 condition comes from either self-reporting or from just
24 his general understanding of what was said to him as
25 opposed to a diagnosis. Can you point me to something,

1 again, I am judging this on a substantial evidence
2 standard and I understand the holding of Carolina
3 Recycling, Brown and Burnette. But it would appear that
4 this is not a situation where the Appellate Panel merely
5 glossed over the findings of the doctors. They considered
6 the findings of the doctors but for lack of a better word,
7 at least in regard to two of the doctors, they simply say,
8 well, something fishy is going on here. They went back
9 and then they changed their opinion. I think Toussaint
10 had written prescriptions, and for what is it worth
11 category he does write prescriptions around here. And
12 then he goes back and he changes what those prescriptions
13 are for years after the prescriptions have been in fact
14 written. He has somewhat of a bad habit of maybe doing
15 that from time to time. Dr. Lal on the other hand is
16 about as topnotch as you are going to get. He is probably
17 one of the best neurosurgeons that we have got in this
18 country. His reputation is impeccable. But again he is
19 using the information he got from the patient and from I
20 presume other records. How do you address that. It is
21 not like an attorney was blind to what the doctors were
22 saying. But I think you are actually pursuing, it appears
23 to me to an extent they are doing their job and the
24 conclusions that they have reached to try and figure out,
25 hey, this is their opinion or something funny going on

1 here. Because, with regards to that, what they are
2 basically saying reading between the lines is, something
3 funny is going on.

4 MR. ROGERS: I think first of your questions, I think
5 it is important to remember that at the time of these
6 physicians first were creating these records, especially
7 Dr. Lal. They were treating Mr. Johnson with the
8 underlying claim, there was no indication whatsoever of
9 these issues of whether or not these conditions
10 preexisted, whether they were a hindrance. That was in
11 consideration at that time. So the initial medical
12 records were submitted as far as the medical record, those
13 are from the underlying claims. Those were as he was
14 being treated for the underlying claim. And what we did,
15 when this sort of went into the Second Injury Fund aspect
16 of the claim, what we did is we submitted that the medical
17 records in their entirety, after they review all of the
18 medical records and bearing in mind the issues specific to
19 Second Injury Fund reimbursement whether or not they were
20 preexisting, whether they were a hindrance, those are
21 considerations that were in no way in any of the
22 physicians minds when they were treating him for the
23 underlying claim. But when we moved into the Second
24 Injury Fund aspect of this we submitted all of the medical
25 records and we ask his physician to look at the medical.

1 records as a whole and then indicate their opinion on a
2 specific Second Injury Fund aspects. And with regards to
3 whether or not the conditions preexisted, Mr. Johnson
4 himself reported that he had a prior back injury. That is
5 on page 63. And Dr. Toussaint's medical records stand for
6 the proposition that he was treating Mr. Johnson for these
7 conditions previous. The medication record is there, we
8 got the addendum which Your Honor mentioned stating that
9 he was treating Mr. Johnson for chronic back pain. So
10 when you take all of that and you look at it and you ask
11 the doctors and those physicians, especially Dr. Lal is
12 able to look at his back and understand the general
13 condition. We asked him specifically, was this a
14 preexisting impairment. And after looking at that he was
15 able to determine that yes, indeed, it was a preexisting
16 impairment.

17 THE COURT: Show me his affidavit.

18 MR. ROGERS: It is record on appeal, page 70, is Dr.
19 Lal's medical certificate. And as the medical certificate
20 suggest, it indicates he had chronic back pain prior to
21 the November 15th of 2005, the date of the work accident.
22 And in order for him to be able to reach that he looked
23 back at all of the medical records. We presented him with
24 everything we presented Your Honor with and he was able to
25 look at that and he was able, after being in Mr. Johnson's

1 back and performed those surgeries and appreciating the
2 level of degenerative condition and he sees these prior
3 medical records of Dr. Toussaint he was able to render an
4 opinion to a reasonable degree of medical certainty on the
5 issues specific to Second Injury Fund reimbursement.

6 THE COURT: All right.

7 MR. ROGERS: And additionally, Your Honor, the issues
8 for the underlying claim, stems from the issues of the
9 Second Injury Fund.

10 THE COURT: Right. Ms. Edwards.

11 MS. EDWARDS: Yes, Your Honor. Your Honor, I want to
12 first address some of the issues that Mr. Rogers
13 indicated. The Carrier, they have gone into great detail
14 in the underlying claim and I just want to point out, I
15 want to point out that as he has indicated, the elements
16 on reimbursement are different from what is required in
17 the underlying claim. And, yes, 42-9-400 does allow for
18 reimbursement but they have to meet all of the elements,
19 not just a few of them. Now, the main issue in this case
20 is whether the preexisting conditions were permanent and
21 serious enough to constitute a hindrance. That is
22 42-9-400. Now, the Carrier has, they are characterizing,
23 Mr. Rogers said he has had a seemingly, what did you say,
24 insignificant injury. Okay. And so certainly, I am
25 sorry, I couldn't even read my own writing. He said

1 seemingly insignificant injury. Now, of course, we would
2 assert that that is their characterization. The fact is
3 this seemingly insignificant injury resulted in a
4 forty-two percent impairment rating. The claimant didn't
5 have any impairment ratings or whatever at all. So
6 certainly we would question whether this injury was
7 seemingly insignificant based on that impairment rating.
8 Also, as it relates to the prior back pain, yes, claimant
9 admitted that he had a pulled muscle fifteen years before
10 this accident. Now, the prescriptions and Your Honor has
11 mentioned that so I won't spend a lot of time on it. The
12 few prescriptions before didn't indicate the purpose for
13 which they were written. Also one of the prescriptions at
14 page 3 indicates that claimant is to take that medicine
15 PRN or as needed. And certainly we would deny that if he
16 just was required to take it as needed then certainly the
17 preexisting pain, whatever pain he was having at that time
18 was not permanent and serious enough to be hindrance. The
19 remaining prescriptions at Carrier, APA pages 4 through 7
20 are, yes, 4 through 7, those are post injury prescriptions
21 and we certainly don't deny that he had a lot of back pain
22 after this work injury, it was a back injury. So we are
23 not denying that at all. But those prescriptions don't
24 speak to the preexisting treatment or the preexisting
25 impairment. Now, Your Honor, also noted and Mr. Rogers

1 did as well, the addendum which is at pages 2 and 3. The
2 addendum in March of 2011 when the doctor comes back and
3 says, okay, I have been treating you for chronic back
4 pain. Well, the Commission took issue with that because
5 this was several years later and they had a problem with
6 that. And we would also assert at best that the
7 pre-injury prescriptions indicate back pain that is, Mr.
8 Rogers is correct, that is what I would say, sporadic, not
9 serious, not consistent, not permanent, not a hindrance as
10 contemplated by 42-9-400. Now, at Carrier APA page 63,
11 this is where claimant, claimant's account of the prior
12 pulled muscle that was fifteen years before which was
13 successfully treated by a chiropractor and the doctors
14 says with no significance, that is at page 63. Now, the
15 fact that this doctor says the problem was treated
16 successfully without significant sequelae means it is not
17 a chronic condition. Because typically sequelae is a
18 chronic condition that is complicated that are results
19 from complications from the condition. That is what the
20 term means. So, the doctor said that wasn't the case
21 here. So we believe that also is substantial evidence on
22 the issue of whether the preexisting condition was a
23 hindrance to employment. Now, at page 34, this is also a
24 post-injury medical narrative that indicates that claimant
25 had a long history of back and lower extremity pain

1 following an apparent work related injury, not prior to
2 the work injury, it says following the work related
3 injury. So we believe on that issue with respect to the
4 prior back pain that the issue was hindrance was supported
5 by the substantial evidence that I had cited. And let me
6 just divert the Court a little because it appears that the
7 Carrier is taking issue with the weight of the evidence.
8 They submitted a lot of evidence, the Commission gave
9 greater weight to other evidence and so certainly that is
10 within the discretion of the Commission to determine the
11 weight of the evidence. And that is really what is at
12 issue here. As it relates to the preexisting
13 hypertension. We believe that the decisions below also
14 support that substantial evidence on that issue should
15 support the affirmation of the decision. And I will cite
16 to page 65, April 18th of 2008 Dr. Rogers, who the Carrier
17 has cited also in their argument noted that claimant,
18 "reports no prior history of hypertension before his
19 working here." And there were, "no medical records to
20 indicate preexisting hypertension". I would say, yes,
21 that is one medical record but I would say that is pretty
22 substantial on the issue of whether he had preexisting
23 hypertension. Also, Carrier APA, page 70, I think that is
24 Dr. Lal's questionnaire, they didn't present a
25 questionnaire supporting reimbursement. But I believe

1 that as Your Honor pointed out the Commission noted
2 various exceptions to the questionnaire or issues that may
3 be problematic. First, the doctor whose questionnaire,
4 Dr. Roger's questionnaire, that is the same doctor whose
5 initial reports don't even support preexisting
6 hypertension. Let me just make sure that is page 70.
7 That is not page 70, that is page 72. That is Dr. Roger's
8 question. They do have a questionnaire from Dr. Lal as
9 well. But the first thing that was problematic about,
10 about the questionnaire about hypertension is that the
11 doctor who completed it years later, his medical records
12 that are in evidence do not support that. And I think the
13 Commission took issue with that. The second thing is that
14 he completed that questionnaire three years after he
15 stopped treating. And also I would cite for Your Honor's
16 reference pages 60 through 66 which is the last treatment
17 of Dr. Rogers on April 15th of 2008 of this claimant
18 before he completed this questionnaire. Also, as I have
19 indicated before the Commission, as Your Honor determines
20 the weight of the evidence, and in this particular case
21 the Commission is not required to give, to a questionnaire
22 to the exclusion of more compelling medical evidence. And
23 I believe that I cited some of that medical evidence. And
24 while I am on it, let me just also say the standard is
25 not, you know, the case law instructs that even if two

1 different Commissioners would decide two different ways
2 that doesn't mean the case is not decided by substantial
3 evidence. There may be one, there may be substantial
4 evidence to support both sides. That is not the grounds
5 for reversal and I think that is what Carrier is wanting
6 to hear. And so the Commission did not give as much
7 weight to their interpretation of the evidence. Also, on
8 the issue of claimant's preexisting anxiety. The
9 Commission also found that that was not a hindrance to his
10 employment and I would cite APA page 57 where a claimant
11 had admitted mild symptoms of stress or anxiety and denied
12 psychological problems of significant intensity. Also,
13 pages 58 and 59, an assessment of the claimant's mental
14 status revealed mild anxiety, that was pretty well
15 controlled, that is a quote. "Does not appear to be
16 influencing his perception of pain or treatment." So we
17 think that is pretty substantial on the issue of whether
18 anxiety would be serious enough to be a hindrance of
19 employment. Also, the case law that Carrier relies upon.
20 Certainly I would assert that it is distinguished from
21 this case for various reasons that I have outlined in my
22 brief. But I will just say, Carolina Recycling which I
23 always say, that is the case that I argued and it was
24 reversed. Not this Carrier but Carrier nonetheless. And
25 so the case was reversed and I am quoting, I am quoting

1 what the opinion said. The decision was reversed because
2 of the Appellate Panel, "relied exclusively upon an
3 evaluation by the non-treating physician who only met with
4 claimant on one occasion." The element of hindrance was
5 not at issue in that case. The Commission had already
6 determined that the first few elements were met, hindrance
7 was already met in that case. That case was reversed on
8 what I would interpret as solely a medical issue. And now
9 let me be clear, I don't say that hindrance is only a
10 vocational issue, I think whether a physician is a
11 hindrance to employment can also be a vocational issue
12 because often the Commission takes testimony from a
13 claimant, from an employer, from anybody who will claim
14 and determine whether a condition was affecting his
15 ability to do the job. But in Carolinas Recycling, that
16 decision was decided on what I would interpret and say it
17 is solely a medical issue. Whether the preexisting
18 condition combined with the work injury to meet
19 substantial greater medical cost and permanent disability
20 for the Carrier. Clearly, I think that is clearly a
21 medical question. I think that is clearly a medical
22 question. I could be wrong but that is not a question and
23 certainly that would be a question that you would look to
24 an expert to determine, not, but a vocational question or
25 one that is arguably vocational and medical. No expert

1 testimony is required and often not even used because all
2 of these cases, they have questionnaires. But just
3 because you get a doctor to check, yes, yes, yes,
4 everything on the check list, that does not determine
5 whether you are going to win the case. Because in fact,
6 the doctor doesn't go into work with a claimant, the
7 doctor doesn't know what claimant is going to do on a
8 daily basis. And often the testimony of others will speak
9 louder on the issue of whether the preexisting condition
10 is a hindrance of employment. And we think the other
11 evidence in this case that I have already cited. And
12 also, I think Burnette was another case. And the same
13 thing I would say with Burnette and Carolina Recycling.
14 Burnette was also, it was reversed and remanded to the
15 Commission with instructions to make additional findings
16 or to reconsider or enter findings of fact concerning of
17 claimant's injuries. Because the Court determined that
18 the Commission's decision was based on the medical opinion
19 of a single Commissioner rather than a medical provider.
20 And that is in the Burnette opinion also. And so we think
21 that Burnette is also distinguished because all of the
22 various courts that I have cited and the Commission has
23 cited and their concerns. But all of those are from
24 medical reports that were submitted by a Carrier. So once
25 again I think Carrier is taking issue with the weight of

1 the evidence rather than the actual substance of that
2 evidence.

3 THE COURT: Let me take you off track.

4 MS. EDWARDS: Yes, sir.

5 THE COURT: Carolina Recycling was decided in June of
6 last year.

7 MS. EDWARDS: That's correct.

8 THE COURT: I think the opinion in this case came
9 down, I want to say, this one.

10 MS. EDWARDS: The Full Commission--

11 THE COURT: May 22nd. So the Full Commission didn't
12 have the benefit of Carolina Recycling at the time.

13 MS. EDWARDS: That is probably true.

14 THE COURT: And they didn't have, it is not Brown but
15 it is the one that came out.

16 MS. EDWARDS: The brand spanking new.

17 THE COURT: Burnette.

18 MS. EDWARDS: Yes, Burnette and Burnette is like in
19 December.

20 THE COURT: And I don't disagree with your assessment
21 of the manner in which they, I agree with you, they
22 shouldn't simply take the, the Appellate Panel should not
23 simply take a three sentence, check here, check here,
24 check here and, oh, well, the doctor says it is
25 preexisting. I think that Carolina Recycling were allowed

1 to look behind the curtain and clearly they are not
2 suppose to take that at face value. They had delved into
3 a little bit more of the underlying record that the doctor
4 used to support that final conclusion.

5 MS. EDWARDS: Right.

6 THE COURT: At first blush I would tend to agree that
7 you are correct on the hypertension aspect of those
8 injuries just from what I have seen, read and heard from
9 y'all today. I tend to agree with the Carrier concerning
10 with the back pain issue. It might be six of one and half
11 a dozen of the other for purposes of this particular
12 patient. But concerning the procedural posture of this
13 case and in light of the fact that Carolina Recycling, I
14 think Carolina Recycling changed and if I hear what you
15 are saying about that is distinguishable but at the same
16 time they did seem to indicate that maybe these decisions
17 that the Appellate Panel should place or should give more,
18 substantially more credence to medical testimony as
19 opposed to other evidence, whatever that other evidence
20 is. And through no fault of the Panel they didn't have a
21 chance to do that. Wouldn't the simplest and cleanest
22 thing to do is to simply, instead of sending y'all up then
23 just remanded it down so at least that issue can be
24 flushed out because then you end up talking to three
25 people above me, they are going to take a look at it and

1 they are going to say, well, hold on, we decided Carolina
2 Recycling and Burnette in December and it wouldn't be fair
3 to let these guys take a look at that before we do
4 something else so they end up remanded it. I mean I am
5 thinking, I am just trying to think through procedurally
6 how this case works going forward and it is not that I
7 don't disagree with the assessments but perhaps it would
8 be better to allow the Full Commission to take a look at
9 that. In light of Carolina Recycling you can make those
10 arguments down there and then three guys, three justices,
11 I am trying to be gender.

12 MS. EDWARDS: I understand.

13 THE COURT: Then they can either revisit Carolina
14 Recycle, modify it, stand on it, limit it, however they
15 want to do it. So that is what I am inclined to do if I
16 don't hear too much.

17 MS. EDWARDS: Your Honor, I won't object to that.

18 THE COURT: I think that is only fair and it seems
19 like they did not have the benefit of looking at that. So
20 I am inclined to just remand this down for the purpose of
21 them applying Carolina Recycling and Burnette since those
22 were decided subsequent to their decision. I am going to
23 go ahead and remand it back to them to reconsider the
24 evidence in light of those two cases. They may reach the
25 exact same conclusion and I might be seeing you guys a

1 year from now again. But at least we won't have an issue
2 of it going up and then two years from now the Court of
3 Appeals decides to remand the Full Commission because they
4 didn't consider Carolina Recycling. That is what I am
5 going to do.

6 MS. EDWARDS: I understand, Your Honor. Thank you.

7 MR. ROGERS: Thank you, Your Honor.

8 THE COURT: Thank you.

9 *** END OF REQUESTED TRANSCRIPT OF RECORD ***

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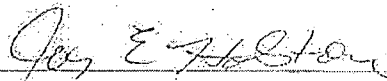
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1 CERTIFICATE

2
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4 State of South Carolina5 County of Newberry
6
7

8 I, Joy E. Holston, Official Court Reporter for the
9 Eighth Judicial Circuit of the State of South Carolina, do
10 hereby certify that the foregoing is a true, accurate and
11 complete transcript of record of the proceedings had and
12 evidence introduced in the trial of the captioned case,
13 relative to appeal, in the County of Laurens, South
14 Carolina on the day of February 21, 2013.

15 I do further certify that I am neither of kin,
16 counsel nor interest to any party hereto.
17

18 July 2, 2013.
1920
21 

22 Joy E. Holston, Court Reporter

23 My Commission expires: March 13, 2016
24
25

1 THE COURT: This is the second case on the roster.
2 2013-CP-30-506, American Home Assurance versus the South
3 Carolina Second Injury Fund. Is that right?

4 MR. ROGERS: Yes, Your Honor.

5 THE COURT: All right, this is your appeal, Mr.
6 Rogers. I will be glad to hear from you.

7 MR. ROGERS: Thank you, Your Honor. Robert Rogers on
8 behalf of American Home assurance. We have appealed the
9 decision of the Workers Comp Commission denying a Second
10 Injury Fund reimbursement on the grounds that we don't
11 think that that decision is supported by substantial
12 evidence in the record. Very briefly by way of
13 background, Mr. Johnson had a work related incident on
14 November 15, 2005. He bent over to pick up a box of socks
15 and he immediately felt back pain. He was diagnosed with
16 injuries to his back, injuries to his psyche and
17 radiculopathy affecting his lower extremities. My client,
18 American Home Assurance admitted the accident and paid Mr.
19 Johnson temporary benefits and provided him with
20 appropriate medical treatment which included a multi-level
21 back infusion with laminectomy. That surgery was deemed
22 unsuccessful. He was eventually diagnosed with a failing
23 back syndrome and had a spinal cord stimulator implanted
24 in his back. All the while he has also received treatment
25 for a psychological condition. Eventually the case

1 settled and paid Mr. Johnson a six-figure settlement on
2 account of his permanent disability. After the underlying
3 Worker's Comp case was settled, my client had paid Mr.
4 Johnson that settlement, we sought Second Injury Fund
5 reimbursement on the basis of Mr. Johnson having a
6 preexisting, a back condition, preexisting anxiety,
7 preexisting hypertension. The Worker's Comp Commission
8 denied our request for reimbursement finding Mr. Johnson's
9 preexisting back condition, they did accept that he had a
10 preexisting back condition but they found that it wasn't
11 severe enough to cause a hinderance or obstacle to his
12 employment. And they found that he did not have
13 preexisting anxiety or preexisting hypertension. And that
14 is the order that we have appealed from. I want to stress
15 to the Court that nothing decided in this case in any way
16 affects Mr. Johnson. All we are seeking is reimbursement
17 from the Second Injury Fund. It is a system that my
18 client has paid into so that when certain conditions are
19 met they can recover a portion of the amount of money that
20 they have expended on the Worker's Comp claim. This case,
21 it is the prime example of, we have got a relatively
22 insignificant event, a gentleman bent over to pick up a
23 box of socks and as a result he has got severe injuries
24 resulting in back fusion surgery, spinal cord stimulator
25 and psychological treatment. Under the version of the

1 statute that we are working under is a 2005 accident. In
2 2007 there were a number of changes made to the, with this
3 particular code section, 42-9-400. But we are under the
4 pre-2007 version and that statute says that if four things
5 are met we are entitled to Second Injury Fund
6 reimbursement. We have got to show one, that the
7 condition was preexisting. Two, that the condition
8 constituted a hinderance or obstacle to the, to
9 employment. Three, we have got to show that the condition
10 was either known by the employer or concealed from the
11 employer. And four, we have got to show through evidence
12 that the subsequent work injury combined with or
13 aggravated the preexisting conditions with result to
14 regular liability to my client, the Carrier, and would
15 have resulted from the work accident alone. If those four
16 conditions are met then per the statute we are entitled to
17 reimbursement. As I mentioned, we are working under
18 substantial evidence standard here on appeal. Really the
19 issue is, and the sole issue before the Court is whether
20 or not there is substantial evidence to support the
21 Commission's decision to deny us reimbursement. And
22 really in order to answer that there are sort of two
23 issues that we see the need to be answered. One, we need
24 to look at the evidence that we have submitted in favor,
25 that favors reimbursement. And assuming that we have met

1 all of those four requirements that I just mentioned which
2 we believe we have through evidence, we then have got to
3 look and turn to see what the Second Injury Fund has done
4 to rebut that evidence. And, Your Honor, I will remind
5 you, I believe you ruled on this issue previously. My
6 colleague, Jared Pretulak argued this exact same legal
7 before you, I guess about a year ago now. And I have
8 reviewed your order in that case and that instance you
9 indicated that the Appellate Panel, under very similar
10 scenarios, facts of course and the legal issue is the
11 same. And Billy knew in looking at your order, I see that
12 you say the Appellate Panel lacks substantial evidence
13 supporting its decision. And we feel this case is
14 identical to Billy, to the legal issue, any evidence
15 presented by the parties. Just like Billy knew and as
16 discussed at length in our brief, we submitted medical
17 evidence in the forms of medical records from Mr.
18 Johnson's medical records all supporting that the
19 conditions of reimbursement are met. And above and beyond
20 just the medical records we have had Mr. Johnson's
21 treating physicians, three of his treating physicians, we
22 have asked them specifically, look at this gentleman's
23 medical records in totality. Were these conditions or
24 reimbursement met and every single one of the physicians
25 we asked, his treating physicians said yes. Based upon

1 their knowledge of Mr. Johnson, their treatment of Mr.
2 Johnson, their review of his medical records in totality
3 and they said, yes, the conditions preexisted. They were
4 serious enough to be a hinderance or obstacle of his
5 employment and they combined with or aggravated by his
6 work accident. And really just the facts of this case
7 seem to suggest all of that. We have got a gentleman,
8 again it is an insignificant event, bent over to pick up a
9 box of socks and the next thing we know we have got
10 multi-level back infusion surgeries, spinal cord
11 stimulator and psychological treatment. I think there is
12 really two major cases that favor our position with regard
13 to the legal issue in this matter. We have got Carolina's
14 Recycling versus the South Carolina Second Injury Fund.
15 And in that case very similar to this we had a Worker's
16 Comp claim who sought benefits for a back injury and the
17 Carrier, just like my client, sought reimbursement from
18 the Second Injury Fund. In that case the Carrier
19 presented opinions and evaluations and medical expert
20 testimony. The physicians who treated the claim in
21 following his work accident as well as medical records
22 supporting the opinions. All of that supported
23 reimbursement. And in that case Carolina's Recycling, the
24 Fund pointed to the medical records and they said that
25 that didn't support reimbursement. They also relied upon

1 an IME or an evaluation that was conducted by a physician
2 predating the work accident at issue. And they relied
3 upon their interpretation and that evaluation denied
4 benefits and denied reimbursement. The Worker's
5 Compensation found that the, based upon the evidence
6 presented to it that the injuries were caused by the work
7 accident alone and denied benefits or denied
8 reimbursement. The Carrier appealed to the Court of
9 Appeals contending that that decision to deny benefits was
10 not supported by substantial evidence. The Court of
11 Appeals, after looking at the evidence submitted by the
12 respective parties agreed with the Carrier and said in
13 fact the decision of the Commission was not supported by
14 substantial evidence. And specifically the Court of
15 Appeals noted that the Fund failed to present any expert
16 testimony from the physician who had evaluated the
17 Claimant after his work accident to discredit the medical
18 evidence put in the record by the Carrier which favored
19 reimbursement. Accordingly they held the decision wasn't
20 supported by substantial evidence, reversed it and ordered
21 the Commission to enter a finding consistent with the
22 evidence and granted reimbursement to the Carrier. So
23 sort of keeping that in mind Carolina's Recycling, what
24 the Court of Appeals held. What we are facing here is a
25 very similar situation, just in Carolina's Recycling. The

1 Second Injury Fund has attempted to point at isolated
2 medical records and argue they are saying for X or Y
3 proposition. But unlike Carolina's Recycling there is no
4 expert opinion testimony whatsoever to favor the Fund's
5 position in this matter. At least in that incident there
6 was a position that rendered an opinion in the matter.
7 The Court of Appeals found that it wasn't relevant but at
8 least they had an expert opinion. In this instance we
9 have nothing more than the Fund's interpretation of these
10 medical records, really in isolation. We can certainly do
11 the same thing. We have gone above and beyond that. We
12 have got the medical records that favor reimbursement. We
13 have met the elements of reimbursement. We have also got
14 this gentleman's treating physicians that have tied that
15 all together. We asked them the specific issues relative
16 to Second Injury Fund reimbursement and when they were
17 presented with that along with the medical records, they
18 all agree. The conditions were preexisting, they were
19 serious enough to cause a hinderance or obstacle to his
20 employment and that they combined with the work accident
21 for a result of greater liability. In looking at the
22 evidence, "evidence that the Fund is presented", the other
23 case really comes into play. Burnette v. City of
24 Greenville. And that case deals specifically with what
25 the Commission as a fact finder can weigh as evidence to

1 support its decision. And Burnette holds that the
2 Appellate Panel, as a finder of facts is not able to
3 render medical decisions based upon its own interpretation
4 of the medical records. In that case both parties
5 submitted the medical and psychological records. The
6 Claimant in Burnette submitted opinions and reports from a
7 treating physician that favored her in being inside of the
8 benefits. In that case though, the Commissioner looked at
9 one piece of medical data, MRI and interpreted it in a way
10 that she found, that didn't support granting benefits.
11 That opinion didn't stem from any physician whatsoever.
12 It was just the Commission looking at the medical
13 evidence, this isolated medical record and saying, I think
14 it means this. While on appeal, before the Court of
15 Appeals they reversed the Commission finding the denial of
16 benefits again was not supported by substantial evidence.
17 There are a number of quotes in Burnette that are
18 particularly relevant here but one in particular, the
19 Court of Appeals and this is their language, said was
20 particularly disturbing that the one interpretation that
21 was used to deny benefits in that instance didn't stem
22 from any physician in the case. All it was is that it was
23 the Commissioner's or the Commissioner looking at one
24 piece of medical evidence and rendering their own medical
25 opinion unsupported by any expert opinion in the case.

1 Accordingly the Court of Appeals reversed finding that the
2 decision to deny benefits in that instance was not
3 supported by substantial evidence. We admit Burnette is
4 not a Second Injury Fund case but the issues are the exact
5 same. It is whether or not the preexisting condition,
6 certainly we would contend that it applies in this
7 instance. Sort of putting this all together, what are we
8 really talking about. Under Carolina's Recycling, once we
9 put the evidence in the record, through the medical
10 records and our expert opinions, Mr. Johnson's treating
11 physicians all of which favors reimbursement, we have met
12 those four elements of the statute. Carolina's Recycling
13 holds that the Fund has to do something to rebut that
14 evidence otherwise we are entitled to reimbursement. We
15 will admit that our expert evidence alone was not
16 conclusive but the Fund has to put up something, some
17 other competent evidence to rebut that. Under Burnette,
18 they have held that their interpretation of isolated
19 medical records doesn't constitute other competent
20 evidence. So at the end of the day we are faced with a
21 situation where under this line of cases the Fund has to
22 present some evidence but the only thing that they have
23 presented isn't sufficient under the holding of Burnette.
24 So we would contend that the only evidence in the record
25 supports granting reimbursement in this instance and that

1 is what we are asking this Court to do is to reverse the
2 decision of the Commission and grant us reimbursement in
3 this instance. Thank you.

4 THE COURT: All right. Ms. Edwards.

5 MS. EDWARDS: Good morning, Your Honor. Let me first
6 start off by saying this case is totally different from
7 the other case Your Honor heard because that case was not
8 decided in light of the Carolina's Recycling and Burnette
9 cases. This case was, this was actually remanded from the
10 Circuit Court so that the Worker's Comp Commission could
11 decide this case in light of the recent cases that were
12 decided after the appeal was filed. And this case is
13 totally different. And I am going to tell you why and I
14 am going to site to the substantial evidence that the
15 Commission relied upon to deny reimbursement in this case.
16 The issues that we are disputing that the Carrier met, one
17 is that the condition was a hinderance or obstacle to
18 employment. We believe that the evidence in the record
19 satisfied, well, establishes that it did not meet the
20 requirement of the preexisting condition being a
21 hinderance or obstacle to employment. And the Carrier,
22 the preexisting condition Carrier is alleging, its
23 preexisting back pain. And at Carrier, APA pages 2 and 3.
24 They present some prescriptions that the Commission found
25 problematic for several reasons. In August of 2005, this

1 is pages 2 and 3 of the record, the prescriptions do not
2 indicate the purpose for which the medication was written.
3 Also one of those prescriptions at page 3 indicates that
4 the Claimant should take the medicine PR and or as needed.
5 And certainly we would deny that a prescription that
6 somebody should just take as needed rises to the level of
7 treating a condition that was permanent and serious enough
8 to be a hinderance or obstacle to employment. Clearly
9 Claimant was taking that medicine as needed, not on a
10 consistent basis. At Carrier, APA pages 4 through 7. The
11 remaining prescriptions presented by the Carrier represent
12 treatment for post-injury injuries and conditions, not
13 preexisting. At APA pages 2 and 3 again, the March 1st
14 there is an addendum to this 2005 prescription that the
15 Commission found problematic because it was secured after
16 the initial prescriptions were written. And there are no
17 documents outlining any diagnosis or treatment at that
18 time, that is at pages 2 and 3. So we assert at best, the
19 pre-injury prescriptions clearly indicate that he had a
20 sporadic back problem, not consistent, not permanent and
21 serious enough to be a hinderance or obstacle to
22 employment within the meaning of 42-9-400. Also, at page
23 63, Claimant indicated that he pulled a muscle in his
24 lower back 15 years prior to this injury that we are
25 discussing today which was, again, successfully treated

1 chiropractically. And the Court, with no significant
2 sequela. That is at Carrier APA, page 63. And so the
3 fact that the doctor indicated that the prior problem was
4 treated successfully and once again, these are their
5 physicians, indicated that the problem was treated
6 successfully without significance sequela. That is, there
7 is not a chronic condition because that is what sequela
8 means. And it is not a chronic condition that is a
9 complication of an acute condition. So the doctor said
10 that wasn't the case. So we believe that that evidence in
11 the case that Claimant's prior back problem was not a
12 hinderance to his employment because it was treated
13 successfully and resolved. Also, the post-injury medical
14 narratives indicate that Claimant had a long history of
15 back and lower extremity pain following an apparent work
16 related injury. This is at page 34. Not prior to the
17 work injury. So all of the physical manifestations that
18 come from the problems, all of that is the result of the
19 work injury, not the preexisting condition. Also the
20 Commission's finding that the preexisting hypertension was
21 not preexisting is also supported by substantial evidence.
22 At page 65, this is in April of 2008 report. Dr. Rogers,
23 I assume is no relation here to Mr. Rogers, but noted that
24 Claimant, "reports no prior history of hypertension before
25 his work related injury." And that there was, "no medical

1 records to indicate preexisting hypertension." So I think
2 that is pretty substantial on the issue of whether
3 hypertension preexisted. That is the Doctor's own medical
4 reports, it is not based on interpretation of a single
5 Commissioner or a full Commissioner, that is the direct
6 quote from the medical narrative. At page 72, Carrier did
7 present a questionnaire supporting reimbursement which was
8 problematic first because the doctor who presented the
9 questionnaire is the same doctor whose own medical reports
10 do not support the issue for which that questionnaire
11 responds affirmatively. Also, the completed medical
12 questionnaire is three years after he stopped treatment of
13 this particular Claimant and that is at pages 60 through
14 66 and 72. I would also, again, point out that the
15 Commission determines the weight of the evidence. And so
16 when Mr. Rogers indicates, you know, it is the Fund's
17 position and the Commission determined what the weight of
18 the evidence is and they determined what weight to place
19 on the medical evidence. It just so happened they agreed
20 with our position as they sometimes do. This time they
21 didn't agree with Carrier's position so it is not that
22 their interpretation is some how not based on the medical
23 reports. I think that Carrier is disputing the weight of
24 the evidence and that is, the Commission is the one that
25 determines the weight of the evidence, Your Honor. And

1 so, and that is pursuant to Ballenger versus Southern
2 Worsted Corporation. And the medical records spoke on
3 that on the questionnaire and the Commission was
4 appropriate in denying reimbursement in this case. Also,
5 the Commission, Claimant's anxiety was not serious enough
6 to constitute a hinderance or obstacle to employment. At
7 page 57, Claimant admitted to mild symptoms of stress,
8 worry and anxiety and denied psychological problems of
9 significant intensities is what that report says. At
10 pages 58 and 59, an assessment of Claimant's medical
11 status revealed mild anxiety that was pretty well
12 controlled. That is a direct quote. "Does not appear to
13 be influencing his perception of pain or treatment." That
14 is also a direct quote. "And there was no psychological
15 indications." That is also a direct quote. And so we
16 believe that the evidence in the record was substantial on
17 all of these issues and even in light of those new cases.
18 Because once again, the case that Your Honor decided did
19 not have the benefit of those two cases. The Commission
20 reevaluated based on those conditions and found that this
21 case still was appropriate for reimbursement. And in
22 Carolina's Recycling, this case, that was a case that I
23 argued and got reversed on. Of course I am not too happy
24 about that but this case is different from Carolina's
25 Recycling. In that case, as Mr. Rogers said, the Court of

1 Appeals reversed because they determined that the, they
2 determined that a non-treating physician who had treated
3 Claimant on one occasion was the basis for the Worker's
4 Comp decision. That is clearly not the case here. The
5 conditions or the assessment of the conditions upon which
6 the Commission's decision was based, are based all on
7 treating physicians, not IME's. In fact, I believe Dr.
8 Lyle who presented, maybe presented a questionnaire, I
9 don't actually think that he treated the Claimant, he just
10 completed a certificate. I think that is accurate. I am
11 sure if I am incorrect Mr. Rogers will correct me. And so
12 once again, that case was totally different. Carolina's
13 Recycling also did not present the issue of whether a
14 preexisting condition was a hinderance or obstacle to
15 employment. That was not an issue in that case because
16 that was already determined by the Commission that that
17 was the case. The issue in that case was whether the
18 medical, Carrier's medical liability was substantially
19 increased. And they found that it was and the case was
20 reversed on that ground. Burnette, as Mr. Rogers, that is
21 not a Second Injury Fund case but that case was remanded
22 back to the Worker's Comp Commission because the Court
23 held that the decision was based on a single
24 Commissioner's medical interpretation, of medical data
25 rather than the treating physician's interpretation. And

1 so, once again, that is not the case here. The Commission
2 based its decision in light of those two cases and direct
3 quotes from the medical narratives. Now the fact that
4 they did not give conclusive effect to the questionnaire,
5 that is not a basis for reversing the case because they
6 don't have to do that if there is other competent evidence
7 in the record. And in this case there was. The actual
8 medical narratives of these treating physicians did not
9 support that questionnaire and so they were appropriate,
10 they were correct in denying the case. And, Your Honor,
11 based on that we would assert that an affirmation is
12 appropriate and that is what we would request. And
13 certainly if Your Honor has any questions of me I will be
14 happy to answer those.

15 THE COURT: The biggest difference in this case and
16 the case that I heard was, this one had already been up
17 and directed back to the Commission to make findings in
18 light of the Recycling case and the other Second Injury
19 Fund case.

20 MS. EDWARDS: That's correct, Your Honor.

21 THE COURT: All right. Anything else, briefly?

22 MR. ROGERS: Briefly, to respond to a few points. I
23 will note that when this was sent back down to remand to
24 the Commission, I think we are actually dealing with two
25 different standards. The Commission will tell anybody

1 that comes in front of them a number of times and say, we
2 are not dealing with substantial evidence. Don't come in
3 here talking to us about that. That is the standard on
4 appeal, that is what this Court looks at, that is what the
5 Court of Appeals looks at. They are not worried about
6 substantial evidence. Certainly they have got, their
7 decision has to be supported by, if it is appealed. But
8 what they are looking at, looking at in terms of a
9 different standard. I don't think going back down and
10 then coming back up has any bearing on what this Court can
11 decide on the issue. And I will note, I noted it in a
12 brief, we weren't allowed to brief our position on remand,
13 we were not allowed to present any new arguments to the
14 appellate panel on remand. They essentially just took and
15 remanded back and issued an order and that is why we are
16 here again before you, Your Honor. They at least
17 mentioned Carolina's Recycling and Burnette in that, in I
18 guess the order coming back up from the remand. But it
19 wasn't any real consideration of that. Responding to the
20 few points that Ms. Edwards made. And, in fact, I have
21 got the order, it cites Carolina's Recycling and it says,
22 under the authority of Carolina's Recycling, once in that
23 case we had submitted expert medical evidence supporting
24 medical records for each of them for reimbursement. The
25 Fund was required to submit some form of reliable,

1 substantial evidence of its own contradicting that. I
2 know Burnette was not up before Your Honor previously.
3 But really all we are using Burnette for is to show what
4 sort of evidence the Fund can present to rebut our
5 evidence. Under Carolina's Recycling they have got to do
6 something to rebut ours. And what we read Burnette to say
7 is that the Fund's interpretation or the Appellate Panel's
8 interpretation of isolated medical records doesn't get you
9 there. It is not sufficient, it is not that other
10 competent reliable probative and substantial evidence
11 sufficient to rebut what we have presented. And just a
12 few other points that Ms. Edwards made. I think it is
13 really important to look at it, these records from the
14 treating physicians that she, I guess she is relying upon
15 to say that they somehow contradict the opinions of the
16 physicians. It is important to note, when they are
17 writing these they have no eye whatsoever toward Second
18 Injury Fund issues. They are just treating the gentleman
19 that came in and it doesn't matter for the purposes of the
20 underlying claim whether or not it was an aggravation or a
21 preexisting condition or whether or not everything was a
22 result of a subsequent work accident. It doesn't matter
23 to them at that point. But several years later, once we
24 see that, hey, this may be a case that entitles
25 reimbursement, we presented the physicians with all of his

1 records. And in particular Dr. Rogers, she mentioned a
2 medical record from him where he says, I see no records of
3 prior hypertension. Well, as soon as we gave him those
4 medical records from Mr. Johnson's primary care physician,
5 Dr. Toussaint showing that he was receiving Lopressor for
6 hypertension, just a few months before the accident and
7 was receiving and some of the other records he is
8 receiving Clonopin for anxiety up to the accident. All of
9 these physicians were able to say, yes, well we didn't
10 have those records before, previously we didn't have
11 access to that and it didn't really matter to us at that
12 point. But, yeah, if you present us with the records in
13 totality and you ask us this specific Second Injury Fund
14 issues, yes, they are certainly evidence supporting this
15 gentleman had preexisting conditions that were severe
16 enough to constitute a hinderance to his employment. One
17 other thing that she mentioned is, that he wasn't taking
18 his prescriptions. I am not aware of anywhere in the
19 evidence where that is, there is no deposition of Mr.
20 Johnson asking him how many times he took his
21 prescriptions. All we have got is the objective evidence
22 showing that he was getting prescriptions relatively
23 regularly leading up to this accident, following it for
24 those conditions, for chronic back pain, hypertension and
25 anxiety. If she had issues with how frequently he was

1 taking it certainly they could have deposed him, she could
2 have deposed any of these physicians if she felt there was
3 internal inconsistencies between the records and the
4 opinions but they didn't do that. If they had done that,
5 Your Honor, we probably would not be here. Because at
6 that point they would have met the threshold to put up
7 other competent evidence but they didn't do any of that.
8 And that is why we are here, we just don't think, it is
9 not an issue of what weight the Commission gave to the
10 evidence. What our argument is, is what was presented to
11 the Commission couldn't be considered. Under Burnette,
12 what the Fund has put forth just simply couldn't be
13 considered by the Commission in order to rebut what we
14 have presented. The objective medical records and the
15 expert opinions, it just doesn't get you there. And that
16 is why we brought the appeal in, we don't think that the
17 Commission had any evidence to support its decision under
18 the line of cases that we have discussed. And just one
19 last mention. All of the questionnaires are from the
20 treating physicians in this instance. And I will be happy
21 to answer any questions that Your Honor has.

22 THE COURT: I have got to read all of your stuff.
23 That is what I need to do. Let me read it and I will let
24 y'all know.

25 *** END OF REQUESTED TRANSCRIPT OF RECORD ***

1 CERTIFICATE OF REPORTER

2

3

4 State of South Carolina)

5 County of Newberry)

6

7

8 I, Joy E. Holston, Official Court Reporter for the
9 Eighth Judicial Circuit of the State of South Carolina, do
10 hereby certify that the foregoing is a true, accurate and
11 complete transcript of record of the proceedings had and
12 evidence introduced in the trial of the captioned case,
13 relative to appeal, in the County of Laurens, South
14 Carolina on the 23rd day of January, 2014.

15 I do further certify that I am neither of kin,
16 counsel nor interest to any party hereto.

17

18

August 12, 2014

19

20

21

22

Joy E. Holston, Court Reporter

23

My Commission expires: March 13, 2016

24

25

Tab 1
Vincent Toussaint, M.D.

PATIENT INFORMATION FORM

Mr. Mrs. Miss Ben L Johnson 36
first middle last age
Name of person legally responsible _____
(if patient is a minor, name of parent, guardian, etc.) Birth Date 11-8-64
Mailing Address 805 Florida Clinton 29325
street city zip
Home Address 805 Florida Clinton 29325 Home Phone: 853-7247
street city zip
Social Security No. 248-41-6693 Occupation: _____
Do you have Medicare? yes ☒ no Medicare number _____
Insurance Company _____ Group or Membership no. _____
Referred by: _____ address _____
full name

READ FORM BEFORE COMPLETING & SIGNING THIS FORM
 PATIENTS OR AUTHORIZED PERSONS SIGNATURE: I authorize the release of any medical or other information necessary to process this claim. I also request payment of government benefits either to myself or to the party who appears as payment below.

DATE 1/3/14

INSURED'S OR AUTHORIZED PERSON'S SIGNATURE:
I authorize payment of medical benefits to the undersigned physician or
supplier for services described below.

SIGNED

DATE 1/3/20

HTN:

CBS

HA

(PSS)

DEA # BT1830351

VINCENT S. TOUGIAANT, M.D.
100 Mississippi Drive
CLAYTON, SC 29025
804-833-6003 FAX: 804-833-6900
SC Reg No. 20-08404

NAME Ben Schmor

ADDRESS _____ Date 8-12-05

Rx (Please Print)

Loprenor 50 mg $\dot{\bar{i}}$ bid (60)

Tylenol 3 $\dot{\bar{i}}$ bid $\dot{\bar{i}}$ (60) (R+2)

Ultracet 0.5 bid (60)

☐ Label

Refill _____ 1560 _____ MIN _____ RPT

Dispense As Written M.D.
12-000000

Substitution Permitted M.D.
170000012-10000000-01-01-0000-000

Addendum 3-1-11

864 2717502

Ts Hadley

This is to ascertain that this patient
was treated on 8-12-05 for
chronic back pain

V. Tougiaant, M.D.

APA-2

DEA # 071628201

VINCENT S. TOUSSAINT, M.D.
103 Mississippi Drive
Durham, NC 27603
804-833-5283 FAX: 804-833-0600
EC Reg No. 20-05484

Name: Ben Latimer
Address: _____ Date: 8-15-05

R (Please Print)

Federal 80 CA
+ 90 (30)

117/10

PRU

CI

☒ L-04

Prescription Only P-01 001

Dispensed As Written

M.D.

Substitution Permitted

M.D.

10-01-05

10-01-05 10-01-05 10-01-05 10-01-05

8/2/08

(1)

CBP

Ben Latimer

HA

on Cortal
Relaxer

① H5N

② CBP
 prior injury
 + panic clinic R

DEA # 871626351

VINCENT S. TOLENTINO, M.D.
 183 PROSSER DRIVE
 CANTON, SC 29035
 844-833-8963 FAX 844-833-5960
 SC REG NO. 20-08461

NAME Ben Yohner
 ADDRESS _____ DATE 1-7-07
 R (Please Print)

Diarrhea
 1500 cc

Triller

P+3

DEPT. OF HEALTH	PLD	PLD
CLINICAL	LABORATORY	PHYSICIAN
SUBSTITUTION PERMITTED		
TYPICAL, EYE, EAR, NOSE, THROAT		

150/90
 po

cc CBP
 H5N on lofeel
 panic

P30

Setting lofeel from panic !!

DEA # 871836331

VINCENT S. TOUSSANT, M.D.
100 MISSISSIPPI DRIVE
CLAYTON, SC 29325
804-833-5953 FAX 804-933-5950

SC REG. # 20-00464

NAME Benjamin
ADDRESS 1247 E. 3rd St.
CITY Charleston STATE SC ZIP 29403

R (Pharmacist)

Controlled Substances

#46

Diazepam 5mg/100mg

#20

Klonopin 5mg/100mg

#63

Lorazepam 2mg/100mg

#15

☐ LAMC

PREPARED BY A TYPE 1 PREPARED BY AM

DISPENSE AS WRITTEN M.D.

SIGNATURE PLANNED M.D.

EXPIRATION DATE 01/01/00

H5N

Chronic Spinal pain Pd 2
low pain face mask

1201

✓

APA-5

$c \in \text{complan of } c \text{ BP.}$

DEA # BT183661

VINCENT S. TOUSSAINT, M.D.
100 MERRIMAN DRIVE
CLINTON, SC 29305
854-833-5963 FAX 854-833-5900
SC REG NO. 27-00461

2 x Bach's swans

NAME Ben Johnson
ADDRESS _____ DATE 5-27-09
R (Please Print)

"Box in hand" "

from pain clinic.

Exernal 3 - Will 60

452

Dannoreb Nooitlidoo

Waltham

Klonopin 45 lid (6)

$P_2 \in P \cap \partial M$.

Leplena 307 6126

Abnormal growth

☐ LABEL

PAGE 1 TIMES PER PAGE

M.D.

DISPENSED AS WRITTEN

RECOMMENDATION PERMITTED
VTC00728 300009100-66 01 64000-000

25 JUL 68

Poster

pt appears quite healthy.

HTN 140/60

BCBP status quo

Spamur

3) SAP

Status quo

back to specialist
every year

DEA # BT1826331

VINCENT E. TOOMBS, M.D.
103 Main Street
CLAYTON, SC 29525
804-833-5003 FAX 804-833-5000
NPI #

SC PRA # 20-00444

Name

Ben Soliman

Address

R (Please Print)

Kopernicus Blvd

Ulfrum SO

T or U (70)

for chow

Bussan 10 i + (70)

Soma 300 i + (70)

☐ A 50

PRER

CONFIRM AS WRITTEN M.D.

DATE PRESENTED M.D.

THREATS, VIOLENCE, OR OTHER ACTS

Pol 38

Tab 2
Scott A. Kellner, M.D.
The Family Healthcare Center, P.A.

ALP DP15 FEB 13 2006

The Family Healthcare Center, PA

23013 Highway 76 East
Clinton, SC 29325
Phone: 864-833-5440 or 864-833-5986
Fax: 864-833-0599
Practice Web Site: www.TheFHC.com

BEN C JOHNSON
11/17/2005 4:44 PM
Location: The Family Healthcare Center, PA
Patient ID: 35534
DOB: 11/08/1964
Unknown/ Language: Undefined/ Ethnicity: Undefined
Male

History of Present Illness (SCOTT A KELLNER MD; 11/17/2005 5:09 PM)
Patient's words: hurt back the other night.

The patient is a 41 year old male who presents for evaluation of back pain. The onset of the pain has been sudden and has been occurring in a persistent pattern for 2 days. The pain is described as moderate to severe. The course has been increasing. The pain is characterized as stabbing. The pain is described as being located in the lower back (right). The pain radiates to the right thigh. The pain has been precipitated by injury at work (boxes). The symptoms are aggravated by exertion, and getting out of bed. The symptoms are relieved by rest. There has been no associated dysuria, fever, incontinence of stool, incontinence of urine, leg weakness, or paresthesias in leg.

Allergies (SCOTT A KELLNER MD; 11/17/2005 5:07 PM)
No Known Allergies

Past Medical History (SCOTT A KELLNER MD; 11/17/2005 5:07 PM)
None

Social History (SCOTT A KELLNER MD; 11/17/2005 5:07 PM)
Tobacco Use. Smokes 1/2 pack of cigarettes per day

Medication History (SCOTT A KELLNER MD; 11/17/2005 5:07 PM)
No Known Medications - Hx Entry.

Review of Systems (SCOTT A KELLNER MD; 11/17/2005 5:09 PM)
General: Present as noted in HPI (No prior h/o back injury).

Vitals (Traci B Lindsey CMA; 11/17/2005 4:44 PM)

11/17/2005 4:49 PM
Weight: 226 lb
Pulse: 60 (Regular)
BP: 150/84 (Sitting, Right Arm, Large)

Physical Exam (SCOTT A KELLNER MD; 11/17/2005 5:15 PM)
The physical exam findings are as follows:

BEN C JOHNSON
35534
(864) 938-1007 x
12/01/2005 1:27:53 PM

Pg. Num.: 1

The Family Healthcare Center, PA

23013 Highway 76 East
Clinton, SC 29325
Phone: 864-833-6440 or 864-833-5986
Fax: 864-833-6599
Practice Web Site: www.TheFHC.com

General

Mental Status - Alert. Orientation - Oriented X4. Posture - Normal posture. Gait - Anzalgic.

Cardiovascular

Auscultation: Rhythm - Regular. Heart Sounds - Normal heart sounds.

Abdomen

Palpation/Percussion: Palpation and Percussion of the abdomen reveal - Non Tender.

Neurologic

Sensory: - Normal.

Motor: - Normal.

Reflexes: 2/2 Normal - Left Achilles (L5-S2), Left Knee (L2-4), Right Achilles (L5-S2) and Right Knee (L2-4).

Musculoskeletal

Spine

Swelling - No Swelling. **Movements** - Range of motion decreased. **Movements painful**, Flexion painful and Extension painful. **Deformities** - No deformities. **Other Characteristics** - Positive paraspinal muscular tenderness. **Crossed straight leg raising** negative and **Tenderness over lumbar vertebra**, no paraspinal muscle spasm. No **Tenderness over thoracic vertebra**, **Tenderness over sacral vertebra** or **Tenderness over sacroiliac region**.

Assessment & Plan (SCOTT A KELLNER MD, 11/17/2005 5:31 PM)
BACKACHE, UNSPECIFIED (724.5)

Plans:

Cyclobenzaprine HCl (10MG Tablet) 1 Tab PO QHS / HS FOR BACK SPASM; #10 Tab, No Refill, 10 days starting 11/17/2005) Ordered, sedation precautions

EC-Naprosyn (500MG Tablet) DR 1 Tab DR PO BID, #30 Tab DR, Ref: 1 #30 Tab DR, 11/17/2005) Ordered.

X-RAY EXAM OF LOWER SPINE (72100) - Routine

Pt Education - Low back pain: discussed with patient and provided information.

Follow up 1 week.

BEN C JOHNSON
35534
(864) 938-1007 x
12/01/2005 1:27:53 PM

Pg. Num.: 2

ALP DP35 JAN 18 2006

The Family Healthcare Center, PA

23013 Highway 76 East
Clinton, SC 29325
Phone: 864-833-5440 or 864-833-5886
Fax: 864-833-0599
Practice Web Site: www.TheFHC.com

BEN C JOHNSON
12/12/2005 11:46 AM
Location: The Family Healthcare Center, PA
Patient ID: 35534
DOB: 11/08/1964
Unknown/ Language: Undefined/ Ethnicity: Undefined
Male

History of Present Illness (SCOTT A KELLNER MD; 12/12/2005 12:01 PM)
Patient's words: followup on back pain

The patient is a 41 year old male who presents for evaluation of back pain. The onset of the pain has been sudden and has been occurring in a persistent pattern for weeks. The pain is described as severe. The course has been constant. The pain is characterized as a dull ache. The pain is described as being located in the lower back. The pain radiates to the right thigh, and left thigh (now hurting on left side to knee). Back pains notes: getting worse, did not keep last apt, pain radiates down entire right leg to foot, no weakness in leg, but it feels numb and they

hurts when he gets up and when he walks, also hurts to lay down

Medication History (SCOTT A KELLNER MD; 12/12/2005 12:01 PM)
EC-Naprosyn (500MG Tablet DR 1 PO BID, Taken 11/17/2005 to 12/12/2005) Discontinued - Hx Entry.
Aleve (220MG Tablet PO) Active - Hx Entry.

Review of Systems (SCOTT A KELLNER MD; 12/12/2005 12:05 PM)
General: Present- as noted in HPI.
Neurological: Present- Paresthesias; Not Present- Incontinence Stool and Incontinence Urine.

Vitals (Traci B Lindsey CMA; 12/12/2005 11:51 AM)
12/12/2005 11:51 AM
Weight: 223 lb
Pulse: 64 (Regular)
BP: 130/92 (Sitting, Right Arm, Large)

Physical Exam (SCOTT A KELLNER MD; 12/12/2005 12:09 PM)
The physical exam findings are as follows:

General
Mental Status - Alert, Orientation - Oriented X4, Gait - Antalgic.

Chest and Lung Exam

BEN C JOHNSON
35534
(864) 938-1007 x
01/10/2006 1:29:29 PM

Pg. Num.: 1

The Family Healthcare Center, PA

23013 Highway 76 East
Clinton, SC 29325
Phone: 864-833-5440 or 864-833-5986
Fax: 864-833-0509
Practice Web Site: www.TheFHC.com

Inspection: Movements - Symmetrical.

Auscultation:

Breath sounds: - Normal.

Cardiovascular

Auscultation: Rhythm - Regular. Heart Sounds - Normal heart sounds.

Abdomen

Palpation/Percussion: Palpation and Percussion of the abdomen reveal - Non Tender.

Neurologic

Sensory: - Normal.

Motor: - Normal.

Reflexes: 2/2 Normal - Left Achilles (L5-S2), Left Knee (L2-4), Right Achilles (L5-S2) and Right Knee (L2-4).

Musculoskeletal

Spine

Swelling - No Swelling. Movements - Range of motion decreased. Movements painful. Flexion painful and Extension painful. Deformities - No deformities. Other Characteristics - Positive paraspinal muscular tenderness (worse on right, jerks in articulation and with palpation). Crossed straight leg raising negative and Tenderness over lumbar vertebra. no paraspinal Muscle spasm. No Tenderness over thoracic vertebra. Tenderness over sacral vertebra or Tenderness over sacroiliac region.

Assessment & Plan (SCOTT A KELLNER MD: 12/12/2005 12:09 PM)
BACKACHE, UNSPECIFIED (724.5)

Plans:

MRI OF LUMBAR SPINE (72148) - Routine

Patient was instructed to follow-up in one week.

Celebram (50MG Tablet 1 (one) Tablet PO BID, #40 Tablet, Ref. 1 #40 Tablet, 12/12/2005) Ordered.

Recommended that patient obtain a "moist heat" heating pad. To be used 30 minutes, at least once a day, applied to affected area.

phy tx

BEN C JOHNSON
35534
(664) 938-1007 x
01/10/2006 1:29:29 PM

Pg. Num.: 2

The Family Healthcare Center, PA

23013 Highway 76 East
Clinton, SC 29325
Phone: 864-833-5440 or 864-833-5988
Fax: 864-833-0599
Practice Web Site: www.TheFHC.com

BEN C JOHNSON
12/21/2005 3:53 PM
Location: The Family Healthcare Center, PA
Patient ID: 35534
DOB: 11/08/1964
Unknown/ Language: Undefined/ Ethnicity: Undefined
Male

History of Present Illness (SCOTT A KELLNER MD: 12/21/2005 4:03 PM)

The patient is a 41 year old male who presents for evaluation of back pain. The onset of the back pains has been sudden and has been occurring in a persistent pattern for weeks. The back pains is described as severe. The course has been constant. The back pains is characterized as a dull ache. The back pains is described as being located in the lower back. The back pains radiates to the right thigh, and left thigh (now hurting on Left side to knee).

Allergies (SCOTT A KELLNER MD: 12/21/2005 4:04 PM)
No Known Allergies

Social History (SCOTT A KELLNER MD: 12/21/2005 4:04 PM)
Tobacco Use: Smokes 1/2 pack of cigarettes per day

Medication History (SCOTT A KELLNER MD: 12/21/2005 4:04 PM)
Cotnam (50MG Tablet 1 (one) PO BID, Taken starting 12/12/2005) Ordered - Hx Entry.

Review of Systems (SCOTT A KELLNER MD: 12/21/2005 4:10 PM)
General: Not Present- Condition improved with current TX.
Musculoskeletal: Present- Backache (radiates down right leg).
Neurological: Present- Paresthesias.

Vitals (Angie T Crisp CMA: 12/21/2005 3:59 PM)
12/21/2005 4:04 PM
Weight: 228 lb
Pulse: 80 (Regular)
BP: 150/86 (Sitting, Right Arm, Large)

Physical Exam (SCOTT A KELLNER MD: 12/21/2005 4:11 PM)
The physical exam findings are as follows:

General
Mental Status - Alert, Orientation - Oriented X4. Gait - Antalgic.

Abdomen
Palpation/Perussion: Palpation and Percussion of the abdomen reveal - Non Tender.

BEN C JOHNSON
35534
(864) 838-1007 x
01/10/2006 1:34:57 PM

Pg. Num.: 1

The Family Healthcare Center, PA

23013 Highway 78 East
Clinton, SC 29326
Phone: 864-833-5440 or 864-833-5986
Fax: 864-833-0599
Practice Web Site: www.TheFHC.com

Neurologic

Sensory: - Normal.

Motor: - Normal.

Reflexes: 2/2 Normal - Left Achilles (L5-S2), Left Knee (L2-4), Right Achilles (L5-S2) and Right Knee (L2-4).

Musculoskeletal

Spine

Swelling: - No Swelling. **Movements:** - Range of motion decreased. Movements painful. Flexion painful and Extension painful. **Deformities:** - No deformities. **Other Characteristics:** - Positive paralumbar muscular tenderness (worse on right, jerks in anticipation and with palpation). Crossed straight leg raising negative and Tenderness over lumbar vertebra. No paraspinous Muscle spasm. No Tenderness over thoracic vertebra. Tenderness over sacral vertebra or Tenderness over sacroileac region.

Assessment & Plan (SCOTT A KELLNER MD: 12/21/2005 4:11 PM)
BACKACHE, UNSPECIFIED (724.5)

Follow up in 2 weeks, again attempt MRI and Phyt.

BEN C JOHNSON
35534
(864) 938-1007 x
01/10/2006 1:34:57 PM

Pg. Num.: 2

The Family Healthcare Center, PA

23013 Highway 76 East
Clinton, SC 29325
Phone: 864-833-5440 or 864-833-5986
Fax: 864-833-0599
Practice Web Site: www.TheFHC.com

BEN C JOHNSON
01/04/2006 10:53 AM
Location: The Family Healthcare Center, PA
Patient ID: 35534
DOB: 11/08/1964
Unknown/ Language: Undefined/ Ethnicity: Undefined
Male

History of Present Illness (SCOTT A KELLNER MD; 01/04/2006 11:06 AM)

The patient is a 41 year old male who presents for evaluation of back pain. The onset of the pain has been sudden and has been occurring in a persistent pattern for weeks. The pain is described as severe. The course has been constant. The pain is characterized as a dull ache. The pain is described as being located in the lower back. The pain radiates to the lateral aspect of left leg (down to foot,). Back pains notes: not getting any better on right although L is better.

Review of Systems (SCOTT A KELLNER MD; 01/04/2006 11:07 AM)

General: Present- as noted in HPI.

Neurological: Not Present- Incontinence Stool and Incontinence Urine.

Vitals (Angie T Crisp CMA; 01/04/2006 10:55 AM)

1/4/2006 10:58 AM

Temp.: 97.5°F (Oral) Pulse: 84 (Regular)

BP: 132/82 (Sitting, Right Arm, Large)

Physical Exam (SCOTT A KELLNER MD; 01/04/2006 11:07 AM)

The physical exam findings are as follows:

Musculoskeletal

Spine:

Swelling - No Swelling. Movements - Flexion painful. Deformities - No deformities. Other Characteristics - Crossed straight leg raising positive (right). Tenderness over lumbar vertebra and Tenderness over sacroiliac region (right). no paraspinous Muscle spasm.

Assessment & Plan (SCOTT A KELLNER MD; 01/04/2006 11:08 AM)

BACKACHE, UNSPECIFIED (T24.5)

Plans:

Referred to Kilburn, Michael MD (Neurological Surgery). Provide referring physician with visit summaries.
Assume management for problem and return to primary caregiver at conclusion of care.

see MRI

BEN C JOHNSON
35534
(864) 938-1007 x
01/10/2006 1:37:34 PM

Pg. Num.: 1

Tab 3
Jason C. Lynn, M.D.
Lawrence R. Lough, M.D.
Physicians Health & Rehab

DEC-28-2005 11:38

P.01/03



Physicians Health and Rehab

105 Physicians Park Dr.
Columbia, SC 29225
Tel. (803) 934-0111
Fax (803) 934-0111

PATIENT NAME: BEN L. JOHNSON
ACCOUNT #: 891405
DATE OF BIRTH: 11/8/64
REFERRING PHYSICIAN: DR. KELLNER
DATE OF EXAMINATION: 12/27/05

MRI OF THE LUMBAR SPINE

COMPARISON: No previous.

HISTORY: Low back pain.

TECHNIQUE: Multiplanar multisequence imaging of the lumbar spine was performed without contrast.

FINDINGS: Lumbar alignment demonstrates mild scoliosis convex left. The conus medullaris is at the L1 level. There is desiccation involving the L5-S1 disc.

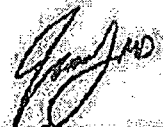
The T11-T12, T12-L1, L1-L2, and L2-L3 levels are unremarkable.

The L3-L4 level demonstrates biforaminal disc bulge without focal protrusion. No central canal stenosis or neuroforaminal stenosis is seen.

The L4-5 level demonstrates diffuse annular disc bulge without focal protrusion. No central canal stenosis or neuroforaminal stenosis is seen.

The L5-S1 level demonstrates a right paracentral prominent shallow broad-based disc protrusion, which contacts the transiting right S1 nerve root. No central canal stenosis results. No neuroforaminal stenosis is seen.

IMPRESSION: Mild multilevel spondylotic change. The dominant finding is a shallow right paracentral protrusion at L5-S1, which does appear to just contact the transiting right S1 nerve root.


Jason C. Lynn, M.D.
Radiologist
PITTS RADIOLOGY

JCL/dag

D/T: 12/27/05

MAY-19-2006 12:33

P-03



Physicians Health and Rehab

103 Physicians Park Dr.
Clemson, SC 29635
Tel: (864) 938-0111
Fax: (864) 938-0311

PATIENT NAME: BEN L. JOHNSON
ACCOUNT #: 248-41-6893
DATE OF BIRTH: 11/8/64
REFERRING PHYSICIAN: DR. LAL
DATE OF EXAMINATION: 05/18/06

MRI OF THE LUMBAR SPINE

TECHNIQUE: Lumbar spine MRI examination was performed with multisequence multiplanar scans through the lumbar spine.

INDICATION: Right leg pain. There is a history of a lifting injury in 2005.

FINDINGS: The lumbar vertebral bodies show anatomic alignment without compression fracture or spondylolisthesis. The conus medullaris terminates at a normal level.

The T12-L1, L1-2, L2-3, and L3-4 discs appear normal. No central canal or foraminal stenosis at those levels.

At L4-5, there is minimal bulging of that disc. No central canal stenosis. There is mild narrowing of the intervertebral foramen from bulging of the disc into the anteroinferior aspect of the foramen.

At L5-S1, there is diffuse broad-based protrusion of that disc, slightly greater posterolaterally on the right. There is mild foraminal narrowing bilaterally at L5-S1.

IMPRESSION: Broad-based disc protrusion at L5-S1 with a little more focal protrusion posterolaterally on the right. There is mild foraminal narrowing bilaterally at that level.

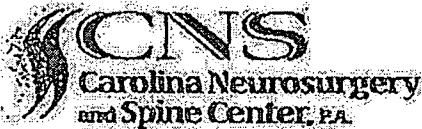
A handwritten signature in cursive script, appearing to read "Lawrence R. Lough".

Lawrence R. Lough, M.D.
Radiologist
PITTS RADIOLOGY

LRL/dag

DT: 05/18/06

Tab 4
Sumeer Lal, M.D.
Carolina Neurosurgery & Spine Center



Michael Kilburn, M.D.^{†*}
Sumeer Lal, M.D.^{†*}

January 30, 2006

Scott Kellner, M.D.
Family Healthcare Center
23013 Hwy 76 E
Clinton SC 29325

RE: Ben Johnson
ID: 248-41-6693

Dear Dr. Kellner,

Thank you for requesting consultation on Ben Johnson.

REASON FOR CONSULTATION: 41-year-old gentleman who injured himself while bending forward in work in November. He has been having a lot of lower back pain. Also right hip and right radicular pain to his ankle and his leg and foot often go numb. Patient's pain is also periodically into his right groin. Also has noticed some difficulty with his left leg but the vast majority of pain appears to be in his right leg. Patient's pain is exacerbated with sitting, standing, walking, bending forward, bending backward, and when he lies down it improved.

PAST SURGICAL HISTORY: Unremarkable

PAST MEDICAL HISTORY: Unremarkable

MEDICATIONS: Naproxen, Cyclobenzaprine, Diclofenac

ALLERGIES: None

PHYSICAL EXAMINATION: Patient appears to be in quite a bit of discomfort and is using a crutch to walk. Patient has limited flexion and extension, has difficulty with movement, is difficult to ascertain if straight leg raising is really truly causing any radicular symptoms because lifting either the left or the right results in pain in the lower back. Patient has no motor deficit that I can see and does not have any sensory deficit and there is no evidence of any upper motor neuron signs.

RADIOGRAPHIC EVALUATION: Demonstrates some disc degeneration, discoloration at L5/S1 and a disc herniation at L5/S1 or disc protrusion to the right at L5/S1.

ASSESSMENT: It is possible that the disc protrusion is causing an S1 radiculopathy and would result in some lower back pain. I think his back pain is a lot

[†] Diplomate of the American Board of Neurological Surgery (Board Certified) ^{*} Fellow of the Royal College of Surgeons of Canada (Board Certified)

Received on 2/1/2006 2:00:51 PM [Eastern Standard Time]

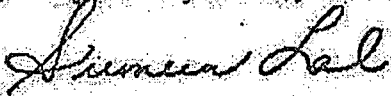
APA - 17

ROA -166

RE: Ben Johnson
ID: 248-41-6693
Page 2

worse than one could account based on his imaging and he is also having some problems in his left side. Therefore, I would recommend physical therapy, I will start him on some Lyrica, and I think that he will also require an epidural steroid injection. If those fail, then we may have to consider other options.

If you have any concerns, please do not hesitate to give me a call.



Sumner Lal, M.D.

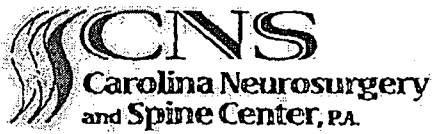
SL/dkh

cc: Pain Management
Vincent Toussaint, M.D.

Received on 2/1/2006 2:00:51 PM [Eastern Standard Time]

APA - 18

ROA -167



ALP DP09 MAY 16 2006

Michael Kilburn, M.D.^{†*}
Sumeer Lal, M.D.^{†*}

May 8, 2006

Scott Kellner, M.D.
Family Healthcare Center
23013 Hwy 76 E
Clinton SC 29325

RE: Ben Johnson
ID: 248-41-6693

Dear Dr. Kellner,

Mr. Johnson has failed all conservative therapy, epidural steroids, Lyrica, physical therapy and we have elected to get a new MRI, because his is greater than six months old. As you know, if the MRI does show some pathology then I think that consideration for surgery is not unreasonable. The old film shows a disc bulge, disc degeneration, though no disc space collapse at L5/S1 to the right.

Once this new film is done, we will make a decision as to how to proceed.

Sumeer Lal, M.D.

SL/dkh

[†]Diplomate of the American Board of Neurological Surgery (Board Certified) ^{*}Fellow of the Royal College of Surgeons of Canada (Board Certified)

303-C West Alexander Avenue • Greenwood, SC 29646 • Phone: (864) 943-1267 • (800) 611-0823 • Fax: (864) 943-1860

ALP DP41 JUN 05 2006

Michael Kilburn, M.D.^{†*}
Sumeer Lal, M.D.^{†*}

May 30, 2006

Scott Kellner, M.D.
Family Healthcare Center
23013 Hwy 76 E
Clinton SC 29325

RE: Ben Johnson
ID: 248-41-6693

Dear Dr. Kellner,

I reviewed Mr. Johnson's films that are new. He does have some disc degeneration at L5/S1 but no disc space collapse. He has a lot of low back pain. He has a right paracentral disc, which may account for his S1 radiculopathy. Because his disc is not significantly collapsed, options include L5 laminectomy decompression, evaluation of the discs at L5/S1, posterolateral fusion and pedicle screw fixation. I did explain to him the risks involved with surgery including bleeding, infection, dural tear, nerve root injury, paralysis, loss of bladder/bowel/sexual function, pseudoarthrosis, hardware failure, but the biggest risks in this particular case is not complete relief of his pain. I find patients that have after an injury and are using a cane and have an inordinate amount of pain in comparison to their imaging studies do not tend to do as well. However, surgery affords them the possibility of getting better. If they do not improve after surgery or they have subsatisfactory results, then referral over to Pain Management for a spinal cord stimulator trial is necessary. I have explained this to him. He is agreeable, and we will be continuing to evaluate him in the near future.

If you have any concerns, please do not hesitate to give me a call.

Thank you,

Sumeer Lal, M.D.

SL/dkh

Cc: Vincent Toussaint, M.D.

[†] Diplomate of the American Board of Neurological Surgery (Board Certified)

^{*} Fellow of the Royal College of Surgeons of Canada (Board Certified)



Michael Kilburn, M.D.*
Sumeer Lal, M.D.*

July 12, 2006

Health Direct, Inc.
PO Box 515724
Dallas, Texas 75251

RE: Ben Johnson
ID: 248-41-6693

To Whom It May Concern:

Mr. Johnson's application for having surgery was denied by Health Direct. The patient has right-sided radiculopathy, disc bulge on the right-hand side, but he also has a lot of low back pain and disc degeneration, desiccation but no disc space collapse at L5/S1. Although there is no instability that I can see on imaging studies, I think that this patient would benefit from a decompression and a pedicle screw fixation, but no interbody grafting. I think that this would potentially give him a chance to improve. Of course, there is the possibility that he will not have complete improvement, because of the high degree of pain that he has, and if he does not then he may need a spinal cord stimulator trial. Other options are to allow this patient to continue to suffer as is and refer him over to Pain Management, but I do believe that an operative procedure may help.

If you have any concerns, please do not hesitate to give me a call.

Thank you,

Sumeer Lal, M.D.

SL/dkh

Cc: Ben Johnson

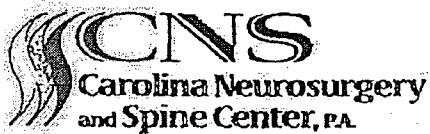
†Diplomate of the American Board of Neurological Surgery (Board Certified) *Fellow of the Royal College of Surgeons of Canada (Board Certified)

303-C West Alexander Avenue • Greenwood, SC 29648 • Phone: (864) 943-1267 • (800) 611-0823 • Fax: (864) 943-1860

Received on 7/19/2006 4:57:35 PM [Eastern Day]

APA - 21

ROA -170



ALP DP33 NOV 20 2006

Michael Kilburn, M.D.^{†*}
Sumeer Lal, M.D.^{†*}

November 8, 2006

Scott Kellner, M.D.
Family Healthcare Center
23013 Hwy 76 E
Clinton SC 29325

RE: Ben Johnson
ID: 248-41-6693

Dear Dr. Kellner,

Mr. Johnson continues to improve. He is now three months postop. He still has some pain, but he is down to taking two Darvocet daily. Mr. Johnson is scheduled to begin a four week course of work-hardening followed by a functional capacity evaluation and then will follow-up in the office in six weeks.

If you have any concerns, please do not hesitate to give me a call.

Sumeer Lal, M.D.

SL/dkh

Cc: Vincent Toussaint, M.D.

[†]Diplomate of the American Board of Neurological Surgery (Board Certified) ^{*}Fellow of the Royal College of Surgeons of Canada (Board Certified)

303-C West Alexander Avenue • Greenwood, SC 29646 • Phone: (864) 943-1267 • (800) 611-0823 • Fax: (864) 943-1860

ALP DP27 DEC 26 2006

Michael Kilburn, M.D.*
Sumeer Lal, M.D.*
Carrie Hawkins, PA-C

December 13, 2006

Scott Kellner, M.D.
Family Healthcare Center
23013 Hwy 76 E
Clinton SC 29325

RE: Ben Johnson
ID: 248-41-6693

Dear Dr. Kellner,

Mr. Johnson seems to have had a slight deterioration. I am not entirely sure why that is. He was doing therapy and then he started having problems. We are going to be sending him for an evaluation with a new MRI and told him to increase his Lyrica and we will see him in follow-up in the very near future.

Thank you.

Sumeer Lal, M.D.

SL/dkh

Cc: Vincent Toussaint, M.D.

†Diplomate of the American Board of Neurological Surgery (Board Certified)

*Fellow of the Royal College of Surgeons of Canada (Board Certified)

303-C West Alexander Avenue • Greenwood, SC 29646 • Phone: (864) 943-1267 • (800) 611-0823 • Fax: (864) 943-1860

ALP DPU/ JAN 08 2007



Michael Kilburn, M.D.^{†*}
Sumeer Lal, M.D.^{†*}
Carrie Hawkins, PA-C

December 20, 2006

Scott Kellner, M.D.
Family Healthcare Center
23013 Hwy 76 E
Clinton SC 29325

RE: Ben Johnson
ID: 248-41-6693

Dear Dr. Kellner,

Mr. Johnson is going to be started on Cymbalta. His MRI does not show any pathology of any concern from my end. I will be continuing to follow him closely. Follow-up is arranged in four weeks time.

If you have any questions or concerns, please do not hesitate to give us a call.

Thank you,

Sumeer Lal, M.D.

SL/dkh

Cc: Vincent Toussaint, M.D.

[†]Diplomate of the American Board of Neurological Surgery (Board Certified) ^{*}Fellow of the Royal College of Surgeons of Canada (Board Certified)

303-C West Alexander Avenue • Greenwood, SC 29646 • Phone: (864) 943-1267 • (800) 611-0823 • Fax: (864) 943-1860

ALP DP34 FEB 05 2007



Michael Kilburn, M.D.*
Sumeer Lal, M.D.*
Carrie Hawkins, PA-C

January 29, 2007

Pain Management
Greenwood office

RE: Ben Johnson
ID: 248-41-6693

Dear Sirs,

I would appreciate if you could evaluate Mr. Johnson. He is a gentleman who had a traumatic injury at work and had underwent an L5 laminectomy, pedicle screws and did very well initially, but then started to have more problems with pain. MRI shows no pathology. He is a lot better than he was preoperatively, but still has a lot of problems with pain. I was anticipating that this maybe an issue and I think this pain is real. I have elected to move in a direction where I feel strongly that consideration for an epidural spinal cord stimulator trial would be appropriate, and if that works, I think that a percutaneous stimulator is not unreasonable. He does not really want to have the surgically implanted one, but if that is necessary, I would be happy to do it for him.

If you have any concerns, please do not hesitate to give us a call.

Thank you,

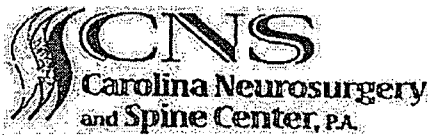
Sumeer Lal, M.D.

SL/dkh

Cc: Scott Kellner, M.D.
Vincent Toussaint, M.D.

†Diplomate of the American Board of Neurological Surgery (Board Certified) *Fellow of the Royal College of Surgeons of Canada (Board Certified)

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Michael Kilburn, M.D.*
Sumeer Lal, M.D.*
Carrie Hawkins, PA-C

July 17, 2007

ALP DP9 JUL 30 2007

Scott Kellner, M.D.
Family Healthcare Center
23013 Hwy 76 E
Clinton SC 29325

RE: Ben Johnson
ID: 248-41-6693

Dear Dr. Kellner,

Mr. Johnson had a spinal cord stimulator trial. He states that his pain was better after the trial. He has approval for placement of a spinal cord stimulator. We will be organizing it for him. Risks were detailed. If you have any concerns, please do not hesitate to give us a call.

Thank you,

Sumeer Lal, M.D.

SL/dkh

Cc: Vincent Toussaint, M.D.

[†] Diplomate of the American Board of Neurological Surgery (Board Certified) ^{*} Fellow of the Royal College of Surgeons of Canada (Board Certified)

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Tab 5
Stuart Tinkler, M.D.
Christopher Knox, M.D.
Self Regional Healthcare/Radiology

IMNETRADA HPF RAD REPORT DOWNLOAD

03010615:22 X

A0605800313

SELF REGIONAL HEALTHCARE
Greenwood, S.C.

DEPARTMENT OF RADIOLOGY

Patient Name: JOHNSON, BEN L
Unit Number: A000151395

Check-in Date: 02/27/06 1459
Location: DIS - OPS

Account # 0605800313

BD: 11/08/64 Age: 41Y

Sex: M

Ordering Physician HAASIS, JOHN C

Admit Phys: HAASIS, JOHN C

HAASIS, JOHN C
1325 SPRING ST

HAASIS, JOHN C
1325 SPRING ST

GREENWOOD SC

29646

GREENWOOD

SC 29646

Chk-in # Order
654194 0003

Exam

68868

XR FACET INJECTION FLUORO

Ord Diag: LBP

Fluoro procedure. No films for dictation for Star Radiology.

Read By- NONE

Released By- NONE

Transcriptionist- CAROLYN ANN COX

Released Date Time- 03/01/06 1522

FINAL

Page 1

PRINTED BY: E16572
DATE 3/8/2006

APA - 27

ROA -177

IMNETRADA HPF RAD REPORT DOWNLOAD

10020616:26

X

A0627100248

SELF REGIONAL HEALTHCARE
Greenwood, S.C.

DEPARTMENT OF RADIOLOGY

Patient Name: JOHNSON, BEN L
Unit Number: A000151395

Check-in Date: 09/28/06 1215
Location: DIS - OP

Account #: 0627100248

BD: 11/08/64 Age: 41Y

Sex: M

Ordering Physician LAL, SUMEER

Admit Phys: LAL, SUMEER

LAL, SUMEER
303C WEST ALEXANDER AVE

LAL, SUMEER
303C WEST ALEXANDER AVE

GREENWOOD SC

29646

GREENWOOD

SC 29646

Chk-in # Order
731578 0001

Exam
87292 I XR LUMBAR SPINE 2 OR 3 VIEWS
Ord Diag: 724.2-LUMBAGO

LUMBAR SPINE-TWO VIEWS: 28 SEPTEMBER, 2006

History: Lumbago.

Findings: AP and lateral views of the lumbar spine show posterior rods and pedicle screws at L5 and S1. The hardware is intact. The spine is aligned. Anterior osteophytes extend off of the L3 inferior end plate.

IMPRESSION:

Spine fusion at L5/S1.

Read By- STUART TINKLER M.D.

Released By- MARION B HUNLEY M.D.

Transcriptionist- DORIS LANGLEY

Released Date Time- 10/02/06 1626

FINAL

Page 1

PRINTED BY: E16572
DATE 10/9/2006

APA-28

ROA-178

SELF REGIONAL HEALTHCARE
Greenwood, S.C.

DEPARTMENT OF RADIOLOGY

Patient Name: JOHNSON, BEN L
Unit Number: A000151395Check-in Date: 12/18/06 1027
Location: OP

Account # 0635200173

BD: 11/08/64 Age: 42Y

Sex: M

Ordering Physician LAL, SUMEER

Admit Phys: LAL, SUMEER

LAL, SUMEER
303C WEST ALEXANDER AVELAL, SUMEER
303C WEST ALEXANDER AVE

GREENWOOD SC

29646

GREENWOOD

SC 29646

Chk-in # Order
759558 0001

Exam

59828

MRI LUMBAR WO AND W CONTRAST
Ord Diag: LBP

MRI OF THE LUMBAR SPINE WITH AND WITHOUT CONTRAST 12/18/2006

CLINICAL INDICATION: Low back pain.

FINDINGS: Multiple T1 and T2 weighted MR images of the lumbar spine were obtained with and without contrast in axial and sagittal planes. Axial images were acquired from L3 through S1. Vertebral body bone marrow signal is well visualized and within normal limits. Loss of normal intervertebral disc signal is seen at L5/S1, secondary to disc desiccation. Post surgical changes of L5/S1 lumbar laminectomy and fusion are noted to be present. The lumbar spine remains well aligned. No levels of significant disc bulge, protrusion, or herniation are seen. No levels of significant neural foraminal or spinal canal narrowing are seen. No abnormal contrast enhancement changes are seen.

IMPRESSION:

Post surgical changes of lumbar laminectomy and fusion at L5/S1 without evidence of complication. The lumbar spine remains well aligned. Disc desiccation changes are present at L5/S1 intervertebral disc.

Read By: CHRISTOPHER KNOX M.D.

Released By: CHRISTOPHER KNOX M.D.

FINAL DUPLICATE

Page 1

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DATE 1/6/2007

IMNETRADA HPF RAD REPORT DOWNLOAD

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A0708500055

SELF REGIONAL HEALTHCARE
Greenwood, S.C.

DEPARTMENT OF RADIOLOGY

Patient Name: JOHNSON, BEN L
Unit Number: A000151395

Check-in Date: 03/26/07 1227
Location: DIS - OPS

Account # 0708500055

BD: 11/08/64 Age: 42Y

Sex: M

Ordering Physician HAASIS, JOHN C

Admit Phys: HAASIS, JOHN C

HAASIS, JOHN C
1325 SPRING ST

HAASIS, JOHN C
1325 SPRING ST

GREENWOOD SC

29646

GREENWOOD

SC 29646

Chk-in # Order
794488 0001

Exam
68868

XR FACET INJECTION FLUORO
Ord Diag: BACK PAIN/SNRE

Fluoro procedure. No films for dictation for Star Radiology.

Read By- NONE NONE

Released By- NONE NONE

Transcriptionist- CAROLYN ANN COX

Released Date Time- 03/27/07 0746

FINAL

Page 1

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DATE 4/6/2007

APA - 30

ROA -180

IMNETRADA HPF RAD REPORT DOWNLOAD

07200714:16 X

A0718600350

SELF REGIONAL HEALTHCARE
Greenwood, S.C.

DEPARTMENT OF RADIOLOGY

Patient Name: JOHNSON, BEN L
Unit Number: A000151395

Check-in Date: 07/09/07 1731
Location: FRE - PHS

Account # 0718600350

BD: 11/08/64 Age: 42Y

Sex: M

Ordering Physician HAASIS, JOHN C

Admit Phys: HAASIS, JOHN C

HAASIS, JOHN C
1325 SPRING ST

HAASIS, JOHN C
1325 SPRING ST

GREENWOOD SC

29646

GREENWOOD

SC 29646

Chk-in # Order
832385 0002

Exam
68996

XR FLUORO UP TO 1 HOUR

Ord Diag: PAIN STIMULATOR PLACEMENT3

Fluoro only. No films for dictation in Star Radiology under this CI#.

Read By- NONE NONE

Released By- NONE NONE

Transcriptionist- NONE NONE

Released Date Time- 07/20/07 1416

FINAL

Page 1

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DATE 7/24/2007

APA-31

ROA-181

Tab 6
Sumeer Lal, M.D.
John C. Haasis, M.D.
Resf Regional Healthcare/Medical Record

POOR QUALITY

ALP 1703 AUG 11 2006

SELF REGIONAL HEALTHCARE
GREENWOOD, SC 29646

MEDICAL RECORD

PATIENT NAME: Johnson, Ben ACCT NO: 06213-01268
PHYSICIAN: Sumeer Lal, M.D. PROC. DATE: 08-03-06

Cc: Chart
Self Regional Healthcare
Scott Kellner, M.D.

PROCEDURE NOTE

SURGEON: Sumeer Lal, M.D.

INDICATIONS FOR SURGERY: Gentleman presenting with trauma at work, radiculopathy, back pain, disc degeneration, desiccation, possible nerve root impingement of the S1 nerve root on the right-hand side. Decision was made to proceed with an L5/S1 fusion with L5 laminectomy. The patient understood the risks involved with surgery including bleeding, infection, dural tear, nerve root injury, paralysis, loss of bladder/bowel/sexual function, pseudoarthrosis, and hardware failure, and of course, the most importantly that not all his pain would resolve. Patient agreed to proceed with surgery.

PREOPERATIVE DIAGNOSIS:

1. Radiculopathy
2. Back pain

POSTOPERATIVE DIAGNOSIS:

1. Same

OPERATION DONE:

1. L5 laminectomy
2. Decompression S1 nerve roots bilaterally
3. L5/S1, right, discectomy
4. Decompression lateral recess bilaterally
5. Pedicle screw nonsegmental instrumentation L5 to S1 using TSRH system
6. Arthrodesis, lumbar, posterolaterally L5 to S1
7. Intraoperative use of EMG x 1 hour
8. Fluoronavigation

OPERATIVE REPORT: Patient was taken to the OR, given 2 g IV Ancef, 10 mg of IV Decadron, placed under general anesthesia in the prone position. Markings were made for skin incision. Patient was prepped and draped in the appropriate manner using sterile technique. 20 cc and 1% Lidocaine with 1:200,000 Epinephrine infiltrated the wound. Skin incision with scalpel and Bovie was carried out to the lumbosacral fascia. Paraspinal muscles were dissected off of sacrum, L5, and inferior portion of L4. Radiographic confirmation of level was undertaken. Lexxel was used to remove the spinous process of L5 and the lamina of L5 was removed with Lexxel and a variety of Kerrison punches. Upon completion of that, we then proceeded to

PATIENT NAME: Johnson, Ben
PHYSICIAN: Sumeer Lal, M.D.
Page 2

ACCT NO: 06213-01268
PROC. DATE: 08-03-06

decompress the S1 nerve roots bilaterally. Evaluated the disc spaces bilaterally, it appeared that the L5/S1 disc on the right-hand side was very prominent and a decision was made to proceed with a decompression of that nerve and that was done without any difficulty by using #11 blade to cut into the disc space. Upon completion of that, we then proceeded to make sure that our lateral recesses were well decompressed bilaterally. Once we felt that was adequate, we then proceeded to place our reference arc on S1 for the navigation system. Blank AP and lateral images were taken, which facilitated placement of pedicle screws, 6.5 x 35 screws were placed into the sacrum bilaterally, 6.5 x 35 was also placed in the right L5 pedicle with some difficulty placing it initially, but it went in without any further difficulty and 5.5 x 40 screw placed on the left-side at L5. Screws were all placed with the use of x-ray, navigation system and each screw was tested to be in adequate placement with plain x-ray, pedicle probe and NuroVision confirmed that with using electrodiagnostics that there was no compression of any of the nerves. Upon completion of this, we then decontacted posterolaterally, placed Infuse and autograft spine local in the posterolateral gutters. Upon completion of that, 4-cm rod placed on the right, 3-cm rod on the left with standard connectors and secured into location connecting the rod to screw and the connector with the anti-torque device. Upon completion of that, gelfoam was placed overtop of the dura, and intrathecal Duramorph was placed at L3/4, 0.5 mg/1 cc. Drain was placed through a separate stab incision. Paraspinal muscles were closed with 0 Vicryl, fascia with 3-0 Vicryl sutures, subcuticular tissues with inverted 2-0 Vicryl sutures followed by staples. Estimated blood loss 25 ml. No complications.



Sumeer Lal, M.D.

SL/dkh

Self Regional Healthcare
1325 Spring Street
Greenwood, SC 29646
Phone (864) 725-4111
Fax (864) 725-4810

ALP DP31 JUL 30 2007

PATIENT: JOHNSON, BEN ACCT: 0718600350
PHYSICIAN: John C. Haasis, MD ROOM:
ADMITTED: 7/9/2007 DICTATED: 7/9/2007
DISCHARGED: 7/9/2007 TRANS DT: 7/16/2007

OPERATIVE REPORT

DATE: 07/09/2007.

INDICATIONS FOR PROCEDURE: Intractable back and right lower extremity pain. The patient has a long history of back and lower extremity pain following an apparent work-related injury. He subsequently required surgical intervention. Unfortunately, he continued to report ongoing difficulties with pain affecting quality of life measures as well as function. He has undergone a variety of conservative care options including medication trials, therapeutic injections, as well as physical therapy and TENS with continued complaints of pain affecting quality of life measures as well as function. Following psychological clearance, the patient presents today for scheduled SCS trial.

PREOPERATIVE DIAGNOSIS: Failed back surgery syndrome.

POSTOPERATIVE DIAGNOSIS: Failed back surgery syndrome.

PROCEDURE: Percutaneous placement of an 8-electrode array spinal cord stimulator; procedure performed under fluoroscopic guidance.

SURGEON: John C. Haasis, MD.

ANESTHESIA: MAC.

BLOOD LOSS: None.

PROCEDURE: After informed and written consent, the patient was taken to the operative suite. He was placed in the prone position. His back was sterilely prepped and draped. He received 2 grams of Ancef preop. Under fluoroscopic guidance, a skin wheal was raised superficial to the pedicle of L2 on the left with 5 mL of 1% lidocaine.

PATIENT: JOHNSON, BEN
PHYSICIAN: John C. Haasis, MD

ACCT: 0718600350
ROOM:

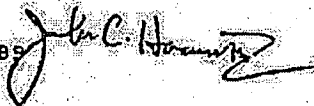
PAGE 2

solution. An additional 10 mL of 1% lidocaine solution was infiltrated subcutaneously down to the lamina at L1. Then using a 14-gauge Tuohy needle supplied by the manufacturer and loss of resistance technique with normal saline solution, the epidural space was identified. Negative heme, negative paresthesia, negative CSF. An 8-electrode array was then advanced in the cephalad direction crossing midline at T10 with the tip at the lower aspect of the T9 vertebra left of the midline. At this juncture, trial stimulation was begun. The patient afforded good coverage about his back and lower extremities. Under fluoroscopic guidance, Tuohy needle was then removed, maintaining electrode position in the epidural space. The electrode was then secured to the skin with a 2-0 Vicryl. Sterile dressing and antibiotic was then applied. The patient was then returned to the supine position and escorted to PACU.

His physical exam remained unchanged. No complications were noted. The patient will be discharged in stable condition with instructions to call with any problems including but not limited to fever, chills, rash, lower extremity weakness, paresthesias, problems with bowel or bladder or gait. He will follow up in the office in approximately three days to assess efficacy of trial. He will continue Keflex po q.i.d. pending electrode removal.

JCH:sm
Job#

12189



ALP DP4S AUG 09 2007

SELF REGIONAL HEALTHCARE
GREENWOOD, SC 29646

MEDICAL RECORD

PATIENT NAME: Johnson, Ben
PHYSICIAN: Sumeer Lal, M.D.

ACCT NO: 07207-00094
PROC. DATE: 08-02-07

Cc: Chart
Self Regional Healthcare

PROCEDURE NOTE

SURGEON: Sumeer Lal, M.D.

INDICATIONS FOR SURGERY: Pleasant gentleman presenting with chronic back. Decision was made to proceed with a spinal cord stimulator. The patient understood the risks involved with surgery including bleeding, infection, dural tear, nerve root injury, paralysis, loss of bladder/bowel/sexual function, pseudoarthrosis, hardware failure. The patient agreed to proceed with surgery.

PREOPERATIVE DIAGNOSIS:

1. Chronic pain

POSTOPERATIVE DIAGNOSIS:

1. Same

OPERATION DONE:

1. Placement of an ANS 3245 Lamitrode 44-C paddle lead placed at T10/11 with lead tunneled to the left lateral subcutaneous pocket connected to an ANS 3216 EON rechargeable IPG (no intraoperative programming)

OPERATIVE REPORT: Patient was taken to the OR, given 2 g IV Ancef, 10 mg of IV Decadron, placed under general anesthesia in the prone position. Markings were made for skin incision after x-ray confirmed the T10/11 entry point. After that was completed and markings had been made, patient was prepped and draped appropriately using sterile technique. 20 cc and 1% Lidocaine with 1:200,000 Epinephrine infiltrated the wounds. Skin incision with scalpel and Bovie was carried out through the thoracic fascia. Paraspinal muscles were dissected off of T10/11. Self-retaining retractors were placed into the wound, interspinous ligament was removed. Ligamentum flavum was removed. Epidural fat was exposed, dura was exposed and dummy lead was then placed into location. After that was done, x-ray confirmed good location, ANS 3245 Lamitrode was placed into location and confirmed with x-ray. Subcutaneous pocket was made on the left-hand side above the posterior superior iliac crest and the passer was passed from that pocket to the thoracic area. Leads were then sent from the thoracic area to the pocket and secured into the ANS battery. After that was done, the battery was tested for impedance and implanted. Another x-ray was taken showing no movement. Please note that the lead was anchored with the anchor and a 2-0 Silk suture. The fascia was closed with 0 Vicryl, subcuticular tissues with

PATIENT NAME: Johnson, Ben
PHYSICIAN: Sumter Lal, M.D.
Page 2

ACCT NO: 07207-00094
PROC. DATE: 08-02-07

Inverted 2-0 Vicryl followed by a running 2-0 Nylon suture which was locking in nature and in the pocket where the batter was with inverted 2-0 Vicryl followed by another 2-0 Nylon suture running and locking. Patient was then taken to the recovery room in good clinical condition.

Sumter Lal, M.D.

SL/dkh

Self Regional Healthcare
1325 Spring Street
Greenwood, SC 29646
Phone (864) 725-4111
Fax (864) 725-4810

PATIENT: JOHNSON, BEN ACCT: 0720700094
PHYSICIAN: CARRIE HAWKINS, PA-C ROOM:
ADMITTED: 08-02-07 DICTATED: 08-03-07
DISCHARGED: 08-03-07 TRANS DT: 08-06-07

Carrie Hawkins, PAC, dictating for Sumeer Lal, MD.

DISCHARGE SUMMARY

The patient was admitted on August 2, 2007, with chronic pain and underwent implantation of a spinal cord stimulator.

ALLERGIES:

The patient has no drug allergies.

MEDICATIONS ON ADMISSION:

1. Diclofenac.
2. Flexeril.
3. Naproxen.

PAST MEDICAL HISTORY:

Patient has an unremarkable past medical history.

SOCIAL HISTORY:

Patient's social history positive for 1 pack per day and negative for alcohol.

FAMILY HISTORY:

The patient has no noted family history.

PAST SURGICAL HISTORY:

Includes a lumbar fusion.

HOSPITAL COURSE:

Patient's course in hospital unremarkable.

Patient discharged home on:

1. Percocet 5. Take 1 to 2 p.o. q.4-6 h. p.r.n. pain.
2. Dicloxacillin 500 mg. Take 1 p.o. q.i.d. for 1 week.

The patient will follow up in our office in approximately 3 to 4 weeks.

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PATIENT: JOHNSON, BEN
PHYSICIAN: CARRIE HAWKINS, PA-C

ACCT: 0720700094
ROOM:

Page 2

CH/ca

Job# 24563

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Authenticated by Sumeer Lal, MD On 09/25/2007 02:22:03 PM

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APA-39

ROA-190

Tab 7
John C. Haasis, M.D., Leanne Watkins, FNP
Self Regional Healthcare/Pain Clinic

SELF REGIONAL HEALTHCARE
GREENWOOD, SC 29646

MEDICAL RECORD

PATIENT NAME: JOHNSON, BEN ACCT NO: 0605800313
PHYSICIAN: JOHN HAASIS, M.D. ROOM NO:
ADMITTED: DICTATED: 2-27-06
DISCHARGED: TRANS DT: 2-27-06

CC: Dr. Sumeer Lal

PAIN MANAGEMENT

DATE: 2-27-06.

REFERRING PHYSICIAN: Dr. Sumeer Lal.

The patient is a 41 year old African-American male seen at the request of Dr. Lal for evaluation regarding chronic back and right lower extremity pain. The patient notes an onset of symptoms following an apparent work related injury in November of 2005. He apparently was evaluated by his company physician on several occasions following the accident. He continued to note ongoing difficulties with pain and apparently was placed on a light duty regimen. Per patient history, he was unable to tolerate those restrictions secondary to pain. With continued complaints of pain, he underwent further evaluation and subsequent workup including an MRI. Following the study, he was referred to Dr. Lal of neurosurgery. He presents today for further evaluation and consideration for fluoroscopically directed neuroaxial injections. He describes back and right lower extremity pain which is constant. Rated a 7 to 10/10. He describes his pain as a sharp, dull, burning, throbbing pain. He reports some intermittent numbness and paresthesias about his right lower extremity. He denies any significant left lower extremity complaints. Standing, bending, pushing, pulling, lifting maneuvers exacerbate symptoms. Mechanical unloading at times as well as medications provide some benefit. Please refer to medical questionnaire dated 2-27-06 for past treatments, review of systems, past medical history, past surgical history, current medications, allergies, social history, and family history.

PHYSICAL EXAMINATION: He is awake and alert, oriented, in no apparent distress, accompanied with his mother.
VITAL SIGNS: Stable. Blood pressure of 171/83, pulse of 98, respirations are 16.
HEENT: Within normal limits.
NECK: Supple. Chest is clear.
CARDIAC: Regular.
ABDOMEN: Soft, non-tender. Positive bowel sounds.

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DATE 3/8/2006

SELF REGIONAL HEALTHCARE
GREENWOOD, SC 29646

MEDICAL RECORD

PATIENT NAME: JOHNSON, BEN ACCT NO: 0605800313
PHYSICIAN: JOHN HAASIS, M.D. ROOM NO:

Page 2

BACK: Some tenderness to deep palpation about the low back, some paraspinal muscle spasms are evident. A decrease in range of motion noted secondary to patient's report of pain in flexion as well as lateral rotation maneuvers. D-5 Waddell's sign. No pain behavior is elicited.

EXTREMITIES: Negative cyanosis, clubbing, or edema. No evidence of muscle wasting or fasciculations. Pulses are intact. Extremities are warm.

NEUROLOGICAL: Cranial nerves II through XII are intact. Cerebellar function is intact. He has difficulty standing on his toes or heels or squatting secondary to back and right lower extremity pain. Gait is somewhat antalgic requiring crutch to ambulate with assistance. Reflexes are equal and symmetric. Straight leg raise is positive on the right at approximately 25 degrees in the sitting position. No spasticity, clonus, or long tract signs are evident. Slight decrease in pinprick sensation noted about the posterior and lateral calf on the right. Toes are downgoing.

STUDIES: MRI of the lumbosacral spine dated 12-27-06, is noteworthy for mild multi-level spondylosis, shallow right paracentral disk protrusion as well noted at the L5-S1 level.

IMPRESSION:

1. Lumbar radiculopathy, degenerative disk disease, sciatica, nerve root dysfunction.

DISPOSITION: Given the patient's ongoing difficulties with pain affecting quality of life measures as well as function, his failure to respond to conservative care including work restrictions, as well as medication trials, and as per Dr. Lal's request today, the patient underwent fluoroscopically directed neuroaxial injection on the right at the L5-S1 level. No complications were noted. Post block instructions were given. A prescription was provided for physical therapy as well. He will followup accordingly.

JH/wls
#12829

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APA-41

ROA-193

SELF REGIONAL HEALTHCARE
GREENWOOD, SC 29646

MEDICAL RECORD

PATIENT: JOHNSON, BEN ACCT: 0610700187
PHYSICIAN: John C. Haasis, MD ROOM:
ADMITTED: DICTATED: 4/17/2006
PROC. DATE: TRANS DT: 4/17/2006

CC: Sumeer Lal, MD

PAIN MANAGEMENT

DATE: April 17, 2006

The patient returned today with ongoing complaints of back and right lower extremity pain. He is status post 2 therapeutic injections, noting minimal if any benefit. He presents today for further evaluation. He continues to note difficulties with back and right lower extremity pain. He continues to remain out of work. Brief attempt at physical therapy. However, he reported that that increased his pain and complaints. He presented today for further evaluation and consideration for ongoing management.

SOCIAL HISTORY: Otherwise remained unchanged.

FAMILY HISTORY: Otherwise remained unchanged.

MEDICATIONS: Medications were reviewed.

PHYSICAL EXAMINATION: On exam today, he is awake and alert, oriented, in no apparent distress. Gait antalgic. The straight leg raise is positive on the right. Some hyperesthesia is appreciated in the L5 and S1 distribution on the right. No spasticity, clonus, or long tract signs are evident.

IMPRESSION: Degenerative disk disease, lumbar radiculopathy, herniated nucleus pulposus unimproved.

DISPOSITION: At this juncture and time, given his failure to respond optimally to conservative care, including physical therapy as well as to therapeutic injections, repeat procedures will be deferred. He will follow up with Dr. Lal to consider possible neurosurgical intervention. In the interim, a note was provided for him to remain out of work pending neurosurgical consultation.

JCH:lb
Job# 5806

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DATE 4/27/2006

Self Regional Healthcare
1325 Spring Street
Greenwood, SC 29646
Phone (864) 725-4111
Fax (864) 725-4810

PATIENT: JOHNSON, BEN ACCT: 0707100039
PHYSICIAN: John C. Haasis, MD ROOM:
ADMITTED: 3/12/2007 DICTATED: 3/12/2007
DISCHARGED: 3/12/2007 TRANS DATE: 3/12/2007

cc: Sumeer Lal, MD

PAIN CLINIC NOTE

The patient returns today after last being seen approximately one year ago. Since that time, he has undergone back surgery. He returns today reporting ongoing difficulties with back and right lower extremity pain. He apparently did well following back surgery; however, during physical therapy, reported an increase in symptoms. He has subsequently been reevaluated via his treating neurosurgeon, and referral is made back to our practice for further evaluation and consideration for additional treatment options. He continues to report pain affecting quality of life measures as well as function. He continues to utilize a cane to assist with ambulation. His spirits remain upbeat. He denies any problems with bowel or bladder, shortness of breath, fever, chills, rash, nausea, vomiting, visual changes, difficulties with urination. Social and family history otherwise remained unchanged.

MEDICATIONS: Reviewed and include Cymbalta 90 mg nightly.

PHYSICAL EXAMINATION:

VITAL SIGNS: On exam today, he is awake and alert, oriented, in no apparent distress. His affect is appropriate.

VITAL SIGNS: Stable. BP of 151/90, a pulse of 76, respirations 14.

HEENT: Within normal limits.

NECK: Supple.

CHEST: Clear.

CARDIAC: Regular.

ABDOMEN: Soft, nontender, positive bowel sounds, positive obesity.

BACK: Well-healed surgical incision. Paraspinal muscle spasms are evident. Pain reported with flexion maneuvers. Paraspinal muscle spasms are noted.

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APA - 43

ROA -195

JOHNSON, BEN
John C. Haasis, MD

ACCT: 0707100039
ROOM:

PAT
PH

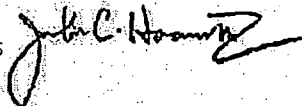
EXAMINATIONS: Negative cyanosis, clubbing, or edema. Pulses are intact. Extremities are warm. He has difficulty standing on his toes, heels, and squatting secondary to back and right lower extremity pain. Gait is antalgic, utilizing a cane to assist with ambulation.

NEURO: Cranial nerves II-XII intact. Cerebellar function intact. Straight leg raise is positive on the right in the sitting position at approximately 30 degrees. Some dysesthesia is noted to light touch in the L5 and S1 distribution. Mild weakness noted about the great toe. No long tract signs are evident. Toes are downgoing. No spasticity appreciated.

IMPRESSION: Failed back surgery syndrome, degenerative disk disease, lumbar radiculopathy, nerve root dysfunction.

DISPOSITION: We reviewed and discussed possible treatment options at this juncture. At this time, we will go ahead and order an EMG, nerve conduction study to document any radicular pathology. In addition given his mixed results to therapeutic injections presurgery, a repeat procedure will be offered postprocedure in an attempt to decrease any ongoing nerve root irritation and hopefully decrease his symptoms and get him back into physical therapy and hopefully back to work. We also provided information with regards to spinal cord stimulation. This treatment option was discussed via his treating neurosurgeon. Some pain medication was provided. Risks, benefits, and limitations to medications were discussed and pain management contract was outlined. He will follow up accordingly.

JCH/rr
Job# 17245



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APA - 44

ROA -196

Self Regional Healthcare
1325 Spring Street
Greenwood, SC 29646
Phone (864) 725-4111
Fax (864) 725-4810

PATIENT: JOHNSON, BEN
PHYSICIAN: John C. Haasis, MD
ACCT: 0706500055
ROOM:
ADMITTED: 3/26/2007
DISCHARGED: 3/26/2007
DICTATED: 3/26/2007
TRANS DATE: 3/27/2007

cc: Sumner Lal, MD
Kimyette Saunders-Bowie at 2908 J. Tazewell Pike,
Knoxville, TN 37918

PAIN CLINIC NOTE

DATE: 3/26/2007

HISTORY: The patient returns today with ongoing complaints of chronic back and lower extremity pain; postlaminectomy syndrome, lumbar. Since last visit, he has undergone neurophysiological testing. These results were reviewed and discussed. He continues to report a significant amount of right lower extremity pain. He reviewed and discussed results of his most recent imaging studies, past surgery as well as results of his neurophysiological testing. He presents today for scheduled therapeutic block. Medications were reviewed, remained unchanged. He reports benefit. He denies any significant side effects.

SOCIAL/FAMILY HISTORY: Otherwise remained unchanged.

PHYSICAL EXAMINATION: On exam, he is awake and alert. His affect is appropriate. A well-healed surgical incision noted about the low back, a decrease in lumbar lordosis. Some pain noted to palpation. Decreased range of motion. Straight leg raise is positive on the right. No spasticity, clonus, or long tract signs are evident.

IMPRESSION: Failed back surgery syndrome, degenerative disk disease (DDD), nerve root dysfunction, unimproved.

DISPOSITION: Given his ongoing difficulties with back and leg pain and his failure to respond optimally to a variety of conservative care, therapeutic injections were offered targeting suspected irritation at the L4-5 and L5-S1 levels on the right. No complications were noted. Postprocedure instructions were provided. We reviewed the case with his

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DATE 4/6/2007

PATIENT: JOHNSON, BEN
PHYSICIAN: John C. Heasie, MD

ACCT: 0708500055
ROOM:

Page 2

case manager today. If he fails to improve following this injection, I do not believe repeat procedures to be warranted. We did review and discuss Dr. Lal's past letter suggesting the possibility of spinal cord stimulation. Certainly, if he fails injection therapy, this is a reasonable treatment option at this juncture. We will discuss this further upon his followup in approximately 1 month.

JCH/ea
Job# 24099

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APA - 46

ROA -198

Self Regional Healthcare
1325 Spring Street
Greenwood, SC 29646
Phone (864) 725-4111
Fax (864) 725-4810

PATIENT: JOHNSON, BEN ACCT: 0711300041
PHYSICIAN: John C. Haasis, MD ROOM:
ADMITTED: 4/23/2007 DICTATED: 4/23/2007
DISCHARGED: 4/23/2007 TRANS DATE: 4/23/2007

cc: Kimyette Saunders-Bouie at 2908 J Tazewell Pike,
Knoxville, Tennessee, 37918
Sumeer Lal, MD

PAIN CLINIC NOTE

The patient returns with ongoing complaints of back and right lower extremity pain; postlaminectomy syndrome. We attempted to reduce his radicular complaints with therapeutic injections targeting suspected nerve root irritation. Unfortunately, he continues to report pain affecting quality of life measures as well as function. He returns today for reevaluation. Medications were reviewed. Social and family history otherwise remained unchanged. He remains out of work.

PHYSICAL EXAMINATION: On exam, he is awake and alert, his affect is appropriate. He is with his mother. Vital signs remain stable. Gait antalgic, utilizing a cane. Straight leg raise is positive on the right, approximately 25 degrees in a sitting position. Some dysesthesia is again noted in the L4 and L5 distribution to light touch. No long tract signs are evident. Increased pain is reported with flexion maneuvers. Well-healed surgical incision noted about the back with associated paraspinal muscle spasms.

IMPRESSION: Failed back surgery syndrome, degenerative disk disease, lumbar radiculopathy, unimproved.

DISPOSITION: We reviewed and discussed past treatments including his last evaluation with Dr. Lal of neurosurgery. A spinal cord stimulator was suggested. Last visit we provided information with regards to this modality. Given his failure to respond optimally to therapeutic injections as well as other conservative treatments including physical therapy and medication trials, at this juncture in time I believe a trial of spinal cord stimulation to be warranted. We will approach his insurance carrier for approval. We

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DATE 5/1/2007

PATIENT: JOHNSON, BEN
PHYSICIAN: John C. Haasis, MD

ACCT: 0711300041
ROOM:

PAGE 2

will continue his medications. Risks, benefits, and limitations to medications were discussed. We will follow up accordingly. We will continue his out of work status.

JCH/rr
Job# 7138

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DATE 5/1/2007

APA - 48

ROA -200

Self Regional Healthcare
1325 Spring Street
Greenwood, SC 29646
Phone (864) 725-4111
Fax (864) 725-4810

PATIENT: JOHNSON, BEN
PHYSICIAN: Leanne Watkins, FNP
ADMITTED: 9/17/2007
DISCHARGED: 9/17/2007

ACCT: 0725700286
ROOM:
DICTATED: 9/17/2007
TRANS DATE: 9/18/2007

PAIN CLINIC NOTE

DATE OF BIRTH: 11/8/64

INTERVAL HISTORY: The patient returns today for followup of his chronic low back and right lower extremity pain. He rates his pain 10 out of 10 today and describes it as an aching sensation in a global distribution in his right lower extremity. He states that since he underwent FCE on 9/5/07, this pain has been worse. Dr. Lal is working on placing the patient at MMI with permanent restrictions. The patient denies any new areas of paresthesia or weakness or any changes in his bowel or bladder, although he does complain of pain in his low back and right hip area when bearing down during a bowel movement. He denies any chest pain, shortness of breath, headache, nausea, or constipation. He has a bowel movement twice a day.

PHYSICAL EXAMINATION:

VITAL SIGNS: Blood pressure 157/101, pulse 65.
GENERAL: He is alert and oriented x3. No acute distress. Behavior is appropriate. Thought content is intact.
BACK AND LOWER EXTREMITIES: He has almost no range of motion of his lumbar spine. He does have straight leg raise on the right. Sensation is equal in bilateral lower extremities to light touch. Manual muscle strength is 4/5 in right lower extremity, 5/5 in the left. No spasticity, clonus, or long-tract signs are evident. He is tender over his incision in the lumbar region.

IMPRESSION:

1. Failed back surgery syndrome.
2. Degenerative disk disease.
3. Radiculopathy.
4. Herniated nucleus pulposus.

PLAN: The patient and his case manager are given instructions to call the ANS representative to see about

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DATE 9/29/2007

PATIENT: JOHNSON, BEN
PHYSICIAN: Leanne Watkins, FNP

ACCT: 0725700296
ROOM:

PAGE 2

adjustment of his spinal cord stimulator. We will refill his Lortab 1 po every 8 hours prn pain. This will be per Dr. Haasis. I do give him a prescription for Relafen 500 mg 1 po b.i.d. with food. I instructed him he needs to obtain a primary care provider or go to the emergency room if his blood pressure continues to remain elevated. I believe the increased pain in his back is just due to inflammation, and hopefully, he will respond well to Relafen. If it persists, he may need to see Dr. Lal for further evaluation. I did instruct the patient if he has any changes in his bowel or bladder or develops any new onset of weakness or numbness, he will need to contact a healthcare provider immediately. We will follow up with the patient in 1 month to assess his pain and the effectiveness of his medications.

LW/cm
Job# 15996

Authenticated by Leanne Watkins, FNP On 09/24/2007 12:55:03 PM

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APA - 50

ROA -202

Self Regional Healthcare
1325 Spring Street
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Phone (864) 725-4111
Fax (864) 725-4810

PATIENT: JOHNSON, BEN L
PHYSICIAN: LEANNE WATKINS, NP
ADMITTED: 10/15/2007
DISCHARGED:

ACCT: 0728500264
ROOM:
DICTATED: 10/15/2007
TRANS DT: 10/18/2007

cc: Pain Clinic

PROGRESS NOTE

SERVICE DATE: October 15, 2007

HISTORY OF PRESENT ILLNESS:

Mr. Johnson returns today for followup of his chronic low back pain and lower extremity pain. He describes is pain as an aching, burning sensation. He rates it a 5 out of 10 on the Visual-Analogue Scale (VAS). He states his activity has remained the same since his last visit. His overall pain is greatly improved. He did undergo a spinal cord stimulator adjustment and this has been very beneficial for him. He denies any side effects from his medications, or any new medications since his last visit. He denies any changes in his health history or any new areas of paresthesia, weakness or any changes in his bowel or bladder. He still has a refill left on his Lortab 7.5 that was given on September 17, 2007. He is taking the Relafen with good benefit. He takes it twice a day with food. He denies any gastrointestinal (GI) discomfort from it. He is awaiting placement of Maximum Medical Improvement (MMI) and restrictions from Dr. Lal. He is accompanied by his case manager today. His blood pressure is elevated 154/94. Because of this and past elevations, I did encourage the patient to seek care regarding hypertension. He does not have insurance and cannot afford a primary care provider. I directed him toward the free clinic in his area. In regard to the patient's longterm care, he will need a lifetime medical care related to his stimulator, including battery replacement when needed. He will need ongoing medication probably throughout his life, therefore, he will need to follow up with us every 3 months for refills. I did refill his

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APA - 51

ROA -203

PATIENT: JOHNSON, BEN L
PHYSICIAN: LEANNE WATKINS, NP

ACCT: 0728500264
ROOM:

PAGE 2

Relafen
today. He will call the office when he needs his Lortab refilled.

LW/dm

Job #: 2002240/300514377

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APA-52

ROA -204

Self Regional Healthcare
1325 Spring Street
Greenwood, SC 29646
Phone (864) 725-4111
Fax (864) 725-4810

PATIENT: JOHNSON, BEN L
PHYSICIAN: LEANNE WATKINS, NP
ADMITTED: 01/14/2008
DISCHARGED:

ACCT: 0801100114
ROOM:
DICTATED: 01/14/2008
TRANS DT: 01/15/2008

cc: Pain Clinic

PROGRESS NOTE

SERVICE DATE: January 14, 2008

SUBJECTIVE:

Mr. Johnson returns today for followup of his chronic low back pain. Today, he complains of pain all over including an aching sensation in bilateral upper extremities. He describes his pain as a sharp pain and rates it a 9 out of 10 on the BAS scale. He does complain of some increased anxiety and feels his pain is related to this increased stress because he has been told that he needs to return to work. After reviewing his chart, I do see where Dr. Lal placed the patient at maximum medical improvement (MMI) and rendered an impairment rating and said that he could tolerate a sedentary level of work. The patient denies any other paresthesia or weakness or any changes in his bowel or bladder. He is currently taking his Lortab three times a day as prescribed. He is complaining of a little bit more increased back pain and muscle spasms.

PHYSICAL EXAMINATION:

VITAL SIGNS: Blood pressure 142/95, pulse 85.

GENERAL: He is a well-appearing male in no acute distress. He is alert and oriented x3. His thought content is intact. He does talk about his pain in an excessive manner. He walks with antalgic gait. SPINE AND EXTREMITIES: He has almost no range of motion of the lumbar spine as he limits this secondary to complaints of pain. He is tender to the lightest touch on the paravertebrals as well as facets in the lumbar regional and bilateral sacroiliac (SI) joint and gluteal muscles. There are some spasms of the paravertebral muscles noted. Strength is 4/5 in bilateral lower extremities. The patient does

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PATIENT: JOHNSON, BEN L
PHYSICIAN: LEANNE WATKINS, NP

ACCT: 0801100114
ROOM:

PAGE 2

limit this secondary to complaints of pain. There is no clonus, atrophy or long-tract signs noted.

IMPRESSION:

1. Low back pain.
2. Failed back surgery syndrome.
3. Spasm of the muscles.

PLAN:

1. I will give the patient a prescription for Flexeril 10 mg one p.o. every 8 hours as needed for muscle spasms. He was educated on the side effects of the medication.
2. He is to continue his Lortab and was given a prescription from Dr. Haasis for this medication today.
3. The patient did state that he sees Dr. Toussaint and has started a high blood pressure medication. He denies obtaining any controlled substances or narcotics from Dr. Toussaint. I have reviewed the narcotic agreement with the patient. We discussed the risks, limitations, and benefits of the medication.
4. I instructed him for his increased anxiety to talk to his family physician about further treatment if needed.
5. We will follow the patient in 2 months.

LW/pf

Job #: 2012179/310726159

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Self Regional Healthcare
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Greenwood, SC 29646
Phone (864) 725-4111
Fax (864) 725-4810

PATIENT: JOHNSON, BEN L
PHYSICIAN: LEANNE WATKINS, NP
ADMITTED: 03/10/2008
DISCHARGED:

ACCT: 0806400068
ROOM:
DICTATED: 03/10/2008
TRANS DT: 03/10/2008

cc: Pain Clinic

PROGRESS NOTE

SERVICE DATE: March 10, 2008

Mr. Johnson returns today to follow up on his chronic back and left lower extremity pain and narcotic management. Today he rates his pain a 7/10 on the visual analog scale (VAS). He describes his pain as a constant aching sensation. He does feel the spinal cord stimulator gives him some coverage in relief of his pain. However, now he is complaining of some left foot and ankle pain and states that it swells at times. He denies any new areas of paresthesia or weakness or any changes in his bowel or bladder. He does feel his Lortab that he is currently taking 3 times a day gives him some benefit and relief of his pain. Additionally, he is taking Relafen and Flexeril as needed.

Today he was also seen briefly by Dr. Hassis, and it was noted that his eyes were very red and almost a little yellow tinged or jaundiced.

He uses a cane to assist with mobility.

PHYSICAL EXAMINATION:

Blood pressure 134/84, pulse 80. General: He is a well-appearing male; he is in no acute distress; he is alert and oriented x3; his thought content is intact. He does exhibit some increased pain display today. He has almost no range of motion of the lumbar spine as he limits this during his examination. He is tender in the low back over the facets at L4-5 bilaterally. He has a positive straight leg raise in the right lower extremity. In the left lower extremity, he is tender around his ankle and the anterior portion of his foot. There is no swelling, warmth, or erythema noted. Pedal pulses are +2 bilaterally in lower extremities. Motor strength is 4/5 in bilateral

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PATIENT: JOHNSON, BEN L
PHYSICIAN: LEANNE WATKINS, NP

ACCT: 0806400068
ROOM:

PAGE 2

lower extremities; this is secondary to the patient's limiting secondary to complaints of pain.

IMPRESSION:

1. Failed back surgery syndrome.
2. Low back pain.
3. Spasm of the muscle.

PLAN:

The patient does not see his primary care provider on a regular basis, and as we do prescribe medications that can affect the kidneys and liver, we would like to order a CMET to assess his renal and liver function as well as a CBC. The patient still has some medications remaining; therefore, we will seek approval for this blood work from Worker's Compensation, and at the time he comes to have it drawn, he may pick up his prescription refills. The patient is instructed to follow up with his family doctor, though, for any further complaints of pain in his left ankle.

LW/ca

Job #: 2017214/317626823

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APA - 56

ROA -208

Tab 8
C. David Tollison, Ph.D.
Carolinas Center for Advanced
Management of Pain

Carolinas Center for Advanced Management of Pain
279 E Kennedy St, Spartanburg, SC 29302
864-583-0053 Fax: 864-583-0390

ALP DP33 JUL 13 2007
July 5, 2007

Page 1
Chart Document

MR BEN L JOHNSON
Male DOB: 11/08/1964

Home: (864) 938-1007

06/27/2007 - Office Visit: Psych Initial Consult
Provider: Charles David Tollison PhD
Location of Care: Carolinas Center for Advanced Mgmt of Pain - Greenville Office
This document contains confidential information.

Psychological Evaluation

Medical History

Patient is referred by Dr. Haasis from Greenwood office for psychological evaluation as part of the spinal cord stimulator protocol. Chronic LB and RLE pain and diagnosed with postlaminectomy syndrome with surgery August 2006 with no improvement. Pain onset November 2005 in work-related lifting incident. Pain intensity increased with prolonged walking, standing, sitting, and exertion. Otherwise, he reports himself as healthy.

Treating Physicians: John C. Haasis, MD

Alcohol: Denies

Illegal Substances Denies

Tobacco: 2 ppd

Psychological Assessment

Denies psychological problems of significant intensity but does admit to some mild intensity symptoms of stress, worry, and anxiety. He reports that his smoking has increased over the past year and he has times when feels anxious and nervous but not particularly severe or uncontrolled. His primary complaint is of pain and the functional limitations imposed by pain. Denies panic, phobias, thought disorder and hallucinations, depression, etc. Expresses a fear of falling and uses a straight cane to assist in ambulation.

Prior mental health treatment: No

Sleep: off and on, when unable to achieve sleep it typically due to pain.

Crying: denies

Appetite/Weight: losing a little weight and mother reports that he doesn't eat like he used to

Concentration/Memory: Cognitively intact and clear

Suicidal Ideation/Intent Denies

Patient describes symptoms of: Sadness, Reduced pleasure in living, Discouragement, Changes in personality and mood, Helplessness

Able to provide basic information on self? Yes

Oriented to time, person, place, and situation? Yes

Alert and responsive to inquiry? Yes

Associations in fact? Yes

Fluid verbalization? Yes

Recite days of week in reverse order? Yes

Recite months of year in reverse order? No

Hallucinations/delusions/psychotic symptoms? No

Estimated Intelligence: borderline to low average

Vocational History: last employed November 2005 when employed by Renfrow loading trucks. Longest job held was 5 years at Whitten Center in resident care (bathing and supervision)

Social History: Age: 42 Year Old DOB: 11/08/1964

Carolinas Center for Advanced Management of Pain
279 E Kennedy St. Spartanburg, SC 29302
864-583-0053 Fax: 864-583-0390

July 5, 2007
Page 2
Chart Document

MR. BEN L. JOHNSON
Male DOB: 11/08/1964

Home: (864) 938-1007

Marital Status: single, never married
Children: one son age 22
Education: graduated high school (special education)
Living Arrangement: with mother who accompanies

Behavioral Observations

Height: 5' 9"
Weight: 245 lbs
Attired: casually attired
Grooming/Hygiene: Appropriate
Eye Contact: Appropriate
Sit/Rise: Independent
Ambulation: Independent
Unusual Mannerisms: None Observed
Psychomotor Agitation/Retardation: Within Normal Limits
Affect: Blunted
Mood: Dysphoric
Facial Expression: Within Normal Limits
Cooperative: Yes

Activities of Daily Living

License/Drive: Yes
Clean: Limited
Laundry: Limited
Shop/Errands: Limited
Personal Hygiene: Appropriate
Lives with mother who performs most of routine and daily chores because patient complains of increased pain with exertion. He is capable of making sandwich and like chores if given rest periods.

Social Functioning

Visit Others: family, infrequently
Receives Visitors: family and girlfriend stops by daily, and son visits couple times per week
Attend Functions: denies
Entertainment Venues: denies
Friends: couple but rarely sees
Pass Time: television, short walks around house
Spends most of his time at home and primary interaction is with mother and girlfriend who stops by most everyday. Previously enjoyed dancing and fishing but feels he no longer able to engage.

Assessment

Hx of chronic LB and RLE pain with failed surgery in August 2006 and failure to respond to conservative treatment. Some mild intensity adjustment with anxiety but pretty well controlled and does not appear to be influencing his perception of pain or treatment.

Axis I - Adjustment Disorder with Anxiety Features

Carolinas Center for Advanced Management of Pain
279 E Kennedy St Spartanburg, SC 29302
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July 5, 2007
Page 3
Chart Document

MR BEN L JOHNSON
Male DOB: 11/08/1964

Home: (864)938-1007

Axis II - deferred
Axis III - failed surgical and post-laminectomy syndrome
Axis IV - health, occupational, economic, legal
Axis V - 65-70

Plan

Proceed with elective surgery, no psychological contraindications observed. Expectations regarding SCS appear appropriate. His intelligence is limited so it is recommended that communication and a full explanation of the stimulator trial be conducted in a slow fashion with language targeting his level of cognitive functioning. I question him on his understanding of the surgical procedure and the stimulator and he seems to have a pretty good understanding.

New Orders:

Psychiatric Diagnostic Exam [90801]

Signed by Charles David Tollison PhD on 06/27/2007 at 12:44 PM

Tab 9
David S. Rogers, M.D.
Oaktree Medical Centre, P.C.

OAKTREE MEDICAL CENTRE, P.C.
DEPARTMENT OF NEUROLOGY

PATIENT'S NAME: BEN L. JOHNSON
SSN: 248-41-6693
MRN: 45140
DATE OF BIRTH: 11/08/64
DATE OF EVALUATION: 04/15/08

RECORDS REVIEWED:

- Ergo Science physical work performance evaluation dated 09/06/07.
- Physicians Health Rehab MRI of the L5 spine report from December 27, 2005.
- HealthSouth of Greenwood rehabilitation records from March 8, 2006 through August 30, 2007.
- Carolina Neurosurgical and Spine Center office records of Sumner La., MD from January 30, 2006 through October 17, 2007.
- South Regional Healthcare records of John Haasis, MD from February 27, 2006 through March 10, 2008.
- South Regional Healthcare MRI report of the lumbar spine from December 18, 2006.
- Family Healthcare Center office records of Scott A. Kellner, MD from November 17, 2003 through January 4, 2006.
- Southeastern Neurosurgical consultation of Alfred T. Nelson Jr., MD from June 5, 2007.

PRESENT ILLNESS:

Mr. Johnson is a 43-year old, right-handed, male who presents for an Independent Medical Evaluation. Mr. Johnson states that he was in a normal state of health until he was involved in a work-related lifting injury occurring November 15, 2003. At the time of his injury, Mr. Johnson states he was employed as a laborer at the Renfro Warehouse. Mr. Johnson states he was lifting small boxes, weighing approximately seven to ten pounds each, when he felt a "pop" in his lower back. Mr. Johnson states that he had immediate lumbar pain. Mr. Johnson states, "I couldn't walk for a minute or two". Mr. Johnson states that he did not only have lumbar pain, but pain radiating through both lower extremities. The patient states the pain was particularly sharp. Mr. Johnson states that he informed his supervisor and was told to "go home and rest". Mr. Johnson returned to work the next day, but states he had a significant discomfort in performing routine duties. Mr. Johnson states he was then provided an appointment to see Scott A. Kellner, MD at the Family Healthcare Center. Mr. Johnson was evaluated by Dr. Kellner on November 17, 2005. Dr. Kellner documented Mr. Johnson's work related injury of two days prior. Dr. Kellner noted that Mr. Johnson was complaining of pain described as moderate to severe and located in the right lower back with pain radiating into the right thigh. Dr. Kellner diagnosed Mr. Johnson with backache, unspecified, and ordered plain film x-rays of the lumbar spine to be performed. The x-rays were interpreted as demonstrating anterior osteophytes with no evidence of fractures. There is also noted calcium at the anterior L3-4 vertebral body. Dr. Kellner then prescribed non-steroidal anti-inflammatory and muscle relaxants for Mr. Johnson.

Continued . . .

HISTORY OF PRESENT ILLNESS (Continued):

On a return visit to Dr. Kellner on December 12, 2005, Dr. Kellner stated that Mr. Johnson "hurts when he gets up and when he walks, also hurts to lie down". Dr. Kellner then ordered an MRI of the lumbar spine to be performed. An MRI of lumbar spine was obtained at Physicians Health and Rehab on December 27, 2005, which demonstrated a bifacetal disc bulge at L3-4, diffuse annular disc bulge at L4-5, and a right paracentral prominent shallow broad-based disc protrusion, which contacted the transecting right S1 nerve root at the L5-S1 level. On a return visit to Dr. Kellner on January 4, 2006, Dr. Kellner documented that Mr. Johnson had pain radiating to the lateral aspect of the left leg (down to foot) and that Mr. Johnson's back pain was "not getting any better on right, although left is better". Dr. Kellner then ordered Mr. Johnson to have a neurosurgical evaluation performed and "assume management for problem and return to primary caregiver at conclusion of care". Mr. Johnson was evaluated at Carolina Neurosurgery and Spine Center on January 30, 2006 by Sumner Lal, MD. Dr. Lal documented Mr. Johnson's work-related injury of the previous November. Dr. Lal stated, "I think it is possible that the disc protrusion is causing an S1 radiculopathy and will result in some lower back pain". Dr. Lal then referred Mr. Johnson for pain management at South Regional Healthcare under the direction of John Haas, MD. Dr. Haas provided Mr. Johnson with a course of steroid injections. The initial injection reportedly provided three days of relief per Mr. Johnson. The patient states that the subsequent two injections provided no significant relief. Mr. Johnson was referred for rehabilitative care through HealthSouth of Greenwood beginning on March 8, 2006, and extending to August 30, 2007. On termination of rehabilitation, it was noted that Mr. Johnson made "fair progress". On a return visit to Dr. Lal on May 8, 2006, Dr. Lal generated a letter stating, "Mr. Johnson has failed all conservative therapy, epidural steroids, Lyrica, and physical therapy and we have elected to get a new MRI because his is greater than six months old. As you know, if the MRI does not show some pathology then I think that consideration for surgery is not unreasonable". On July 12, 2006, Dr. Lal generated a letter to Health Direct Incorporated stating, "Mr. Johnson's application for having surgery was denied by Health Direct. The patient has right-sided radiculopathy and disc bulge on the right hand side, but he also has a lot of low back pain and disc degeneration, desiccation, but no disc space collapse at L5-S1. Although, there is no instability that I can see on imaging studies, I think that this patient would benefit from a decompression and a pedicle screw fixation, but no interbody grafting. I think that this would potentially give him a chance to improve. Of course, there is a possibility that he will not have complete improvement, because of the high degree of pain that he has, and if he does not then, he may need a spinal cord stimulator trial. Other options are to allow this patient to continue to suffer as is and refer him over to pain management, but I do believe that an operative procedure may help." On August 3, 2006, Mr. Johnson underwent lumbar surgery performed by Dr. Lal. Following surgery, Mr. Johnson stated "I felt a little better, then I went back to work and it blew it back up, I couldn't get out of bed". On November 8, 2006 Dr. Lal stated, "Mr. Johnson continues to improve. He is now three months postop. He still has some pain, but he is down to taking two Darvocet daily. Mr. Johnson is scheduled to begin a four week course of work hardening followed by a functional capacity evaluation..." On December 13, 2006, Dr. Lal generated a letter for Dr. Kellner stating, "Mr. Johnson seems to have had a slight deterioration. I am not entirely sure why that is. He was doing therapy and then he started having problems". Dr. Lal then ordered a repeat MRI to be performed. An MRI of the L5 spine was obtained at Regional Health Care on December 18, 2006, which demonstrated postoperative changes of an L5-S1 lumbar laminectomy and fusion without evidence of complication.

Continued...

HISTORY OF PRESENT ILLNESS (Continued):

The lumbar spine remained well aligned. Degenerative disc changes were also noted at the L5-S1 intervertebral disc level. A second opinion was requested for evaluation of possible spinal cord stimulator for Mr. Johnson. Mr. Johnson presented to Southeastern Neurosurgical and was evaluated by Alfred T. Nelson Jr., MD on June 5, 2007. Dr. Nelson noted that Mr. Johnson was ambulating with a cane, had a pain level of 8/10, and had functional impairment described as "very severe - when present the patient is unable to carry out any daily activities". Dr. Nelson noted that a nerve conduction EMG study had been performed at Carolina Neurology on March 21, 2007; however, Dr. Nelson did not note the results of such testing and at the time of this discussion, I do not have a copy of that testing for review. Dr. Nelson did state, "I think it is reasonable to consider a trial for a stimulator in this case. If he has no relief with the trial, there is no reason to proceed. If he gets significant relief, we can proceed with a permanent stimulator". Dr. Nelson then recommended Mr. Johnson return to Dr. Haas for the stimulator trial. On a return visit to Dr. Lal on July 17, 2007, Dr. Lal stated that the spinal cord stimulator was providing relief. Mr. Johnson states that this stimulator "helped a little bit". On October 17, 2007, Dr. Lal stated, "Mr. Johnson's functional capacity evaluation after his stimulator placement shows that his overall level of work falls within the sedentary range. He cannot exert greater than ten pounds and that was only occasionally. Sedentary work involves sitting for most of the time and may involve walking and standing for brief periods of time. Also he does have some difficulty with limited ability to sit, so therefore, because he develops back pain we will have to alternate between sitting and other tasks while tolerating his sedentary level of work. I believe he has reached maximum medical improvement and the impairment rating for him is DRE thoracolumbar Category 5, with approximately 25% whole person impairment". At the most recent visit I have at South Regional Healthcare, Dr. Haas stated that Mr. Johnson has pain rated at 7/10 on the VAS. "He describes his pain as a constant, aching sensation. He does feel the spinal cord stimulator gives him some coverage and relief from his pain. However, now he has complaining of some left foot and ankle pain and states that it "swells at times". Dr. Haas also noted that Mr. Johnson continues to use a cane to assist with his mobility. Dr. Haas' diagnosis at that time was "failed back surgery syndrome, low back pain, spasms of the muscle".

Mr. Johnson states that he remains under the care Dr. Haas at this time.

Mr. Johnson's chief complaint today is "my right leg and back". The patient states that he has constant low back pain described as "achy". The patient states that he has an increase in sharp pain with movement or prolonged sitting. The patient reports paresthesias in the right hip and through the right lower extremity, largely in an L5 and S1 distribution. The patient reports weakness in the right lower extremity that has caused him to fall. The patient states the last fall was two weeks ago with no significant injury. The patient does report pain on defecation. The patient reports marked decrease in sexual activity due to pain, as well as decreased libido. The patient denies any urinary incontinence.

The patient reports impairments of activities of daily living. The patient states that he has difficulty donning and doffing shoes and socks. The patient states that sitting, standing or walking for more than ten minutes creates a significant increase in his level of discomfort. The patient reports disrupted sleep secondary to pain.

Continued....

BEN L. JOHNSON

April 15, 2008

PAGE 4

HISTORY OF PRESENT ILLNESS (Continued):

Recreationally, patient states, "I just walk around the house and watch TV". The patient states he no longer goes fishing or plays ball. Occupationally, the patient has been out of work since November 15, 2005. The patient states that he has to ambulate by using a cane and has difficulty bending over and lifting even light objects.

PAST MEDICAL HISTORY:

The patient denies any prior significant injuries, motor vehicle accidents, falls, or sporting injuries. The patient states that he had a "pulled muscle" approximately fifteen years ago in the lower back, but that was treated with chiropractic care successfully with no significant sequelae. The patient states he did not have a history of hypertension prior to his work-related injury in November of 2005.

SURGICAL HISTORY:

Notable for a lumbar laminectomy and fixation on August 3, 2006, and spinal cord stimulator placement in July of 2007.

CURRENT MEDICATIONS:

Lorab 7.5 q6h p.r.n.
HCYZ 25 mg PO q day
Ridifen PO b.i.d.
Unspecified muscle relaxant prescribed by Dr. Haasala.

ALLERGIES:

The patient has no known allergies to foods and medications.

FAMILY HISTORY:

Notable for patient's mother diagnosed with hypertension. The patient's father died at the age of 70 due to natural causes. Of four siblings diagnosis of diabetes, cancer, seizure disorder, and MI have been contributed. The patient has a 23-year-old son in a normal state of health.

SOCIAL HISTORY:

The patient is single and lives with his mother. The patient was last employed on November 15, 2005, working for Renfro Warehouse as a laborer. The patient states he believes he is currently on medical leave. Prior to employment at Renfro, he worked at the Whitten Center in Clinton for five years assisting handicap people. The patient has a high school education and is literate. The patient denies any history of excessive ETOH use. The patient smokes one pack of cigarettes per day and has been smoking four years.

Continued . . .

PATIENT PROFILE:

The patient presents today reporting some moderate lumbar and right lower extremity pain. The patient demonstrated no overt pain behavior. The patient did have to get off the examination table during the examination due to discomfort. The patient did extend his arms on the examination table to reduce lumbar pressure. The patient's mood appeared depressed and affect was flat. The patient completed a Beck's depression inventory with a score of 40. It was notable for increased sadness, self-failure, guilt, tearfulness, self-punishment, disgust, self-blame, irritability, and worry regarding physical problems. The inventory was also notable for decrease enjoyment of most activities, social interests, self-esteem, energy level, weight, sexual interest, initiative, appetite, and decision making ability. The patient completed a Mood Disorder Questionnaire that demonstrated no evidence of bipolar affective disorder. When asked if the patient thought he had lost control of his current physical condition, the patient stated, "The problems are doing it". The patient admits to depression "sometimes". When asked if the patient's injuries have had an emotional impact on him, Mr. Johnson stated, "I have to make myself get through the day". The patient denies any suicidal or homicidal ideations. The patient reports difficulty falling and staying asleep. The patient states that he takes up to two hours to obtain sleep on occasion. The patient states that at night he may awaken for up to two hours. The patient states sleep is disrupted by pain. The patient states, in general, he does not obtain restorative sleep. The patient states he will supplement his sleep with daytime naps.

PHYSICAL EXAMINATION:

Temp: 97.6° P: 86 and regular BP: 130/78 Ht: 5'9" Wt: 235 lbs.

General:

This is a well-nourished, well-developed, overweight, right-handed, Negroid male in no apparent physical distress.

HEENT:

Head was normocephalic. Eyes PERRLA, EOML. Funduscopic examination revealed Grade I hypertensive retinopathy bilaterally. Visual acuity was 20/30 OD, OS, and 20/25 OU without correction. ENT was unremarkable.

Neck:

Anterior flexion and hyperextension was 58-degrees. Right rotation was 67-degrees with 69-degrees to the left. The patient had cervical spinous process tenderness at the C6 and C7 levels. There are no carotid bruits detected. CTA bilaterally.

Lungs:

Heart was irregularly irregular with no rub or murmur detected.

Heart:**Skin, Spine, and****Extremities:**

Demonstrated no edema, clubbing, or cyanosis. The patient had a positive Phalen's sign at the right wrist. There is a positive Tinel's sign at right elbow and at the wrists bilaterally. Thigh circumference was 51.3-cm on the right with 52.0-cm on the left. Calf circumference was 40.5-cm on the right with 42.0-cm on the left. The patient had a straight leg raise positive at 45-degrees on the right and 65-degrees on the left. Lumbar flexion was 38-degrees and extension was 14-degrees, limited by discomfort. On palpation, the patient had marked tenderness in the bilateral lumbar paraspinals.

Continued...

PHYSICAL EXAMINATION (Continued):Neurological/
Mental Status:

Mental status: The patient was alert and oriented x 4. Speech was fluent and non-pressured. The patient's fund of knowledge appears diminished for his age and reported level of education. Cranial nerves II through XII were intact per protocol.

Motor Strength:

The patient demonstrated grip strength of 36, 34, and 31 pounds on the right compared to 95, 86, and 91 pounds on the left utilizing a JAMAR Dynamometer at the 4 cm setting. The patient demonstrated bilateral extensor hallucis longus weakness rated at 4-/5 bilaterally. Knee and hip flexion were limited by discomfort on the right. DTRs demonstrated diminished right Achilles' tendon reflex.

Sensory:

The patient demonstrated decreased vibratory perception at the right wrist and right knee. The patient had decreased thermal perception in a right L5 and S1 distribution that was well demarcated. Coordination PTN and RAM were performed without difficulty. The patient's gait was antalgic, favoring the right lower extremity. The patient ambulated with a cane in the right hand. The patient had difficulty performing up-toe walk due to right ankle weakness. Heel walk produced right S1 joint discomfort. The patient had a negative Romberg.

MEDICAL ASSESSMENT:

1. Stage I-II hypertension despite medication therapy. Mr. Johnson reports no prior history of hypertension before his work-related lifting injury. I have no medical records to indicate pre-existing hypertension. I will consider this a Class II Impairment. Per Table 4-2, page 66, of The Guides and Evaluation of Permanent Impairment, Fifth Edition, a Class II hypertensive cardiovascular disease may be awarded between 10% and 29% whole person impairment. I will conservatively estimate this as a 10% whole person impairment. This impairment rating is assessed largely on the patient's medical history. Most certainly, this is a conservative estimate and is reflective of the degree of chronic pain and sedentary change in lifestyle, which would have a direct impact on Mr. Johnson's cardiovascular status.
2. DRE Lumbar Category V. Per Table 15-3, page 384, of The Guides and Evaluation of Permanent Impairment, Fifth Edition, Mr. Johnson demonstrates alteration in motion segment integrity status post surgery with significant lower extremity impairment indicated by atrophy, loss of relative reflexes, pain, and sensory changes. A DRE Lumbar Category V has previously been awarded by Sumeer Lal, M.D., the patient's neurosurgeon. I am in agreement that a 25% whole person impairment is appropriate. This is indicated per Table 15-3, page 384, of The Guides and Evaluation of Permanent Impairment, Fifth Edition. A 25% whole person impairment translates to a 33% lumbar spinal impairment per the criteria established on page 427 of the above-mentioned text.

Continued ...

BEN L. JOHNSON

April 15, 2008

PAGE 7

3. Behavioral/Emotional Dysfunction (i.e. depression with features of anxiety and insomnia). Mr. Johnson reports a significant decrease in activities of daily living as well as reduced recreational and occupational capacities. Mr. Johnson completed a Beck's Depression Inventory with a score of 40 indicating a moderate to severe level of depression. I will conservatively estimate this as a Class II Behavioral/Emotional Disorder. Per Table 13-8, page 325, of The Guides and Evaluation of Permanent Impairment, Fifth Edition, a Class II impairment may be awarded between 15% and 29% whole person impairment. I will conservatively estimate this as a 15% whole person impairment. Further neuropsychologic/psychiatric testing would likely determine a greater degree of dysfunction.

In summary, 25% whole person impairment due to DRE Lumbar Category V, added to a 15% whole person impairment due to Class II Behavioral/Emotional Dysfunction, added to a 10% whole person impairment due to Stage I-II hypertension utilizing the Combined Values Chart, page 604 of the Guides and Evaluation of Permanent Impairment, Fifth Edition would equate to a 42% whole person impairment in total. Furthermore, it is my medical opinion that Mr. Johnson does require psychiatric/psychological support to prevent further deterioration in his current level of functioning.

David S. Rogers, M.D.

DSR/atc12: Voice File: 0424-003

cc: Ms. Linda B. McKenzie, Attorney-At-Law
P.O. Box 2547
Greenville, SC 29602

Tab B
Employer Knowledge:
Second Injury Fund Questionnaire

24579

#248-41-6693

Second Injury Fund Questionnaire

NAME Bernadine JOB APPLIED FOR Shipping
 SEX M PERSONAL PHYSICIAN Dr. Toussaint
 I certify that the following statements are complete and true. I understand that this will become a part of my medical record and any falsification of this record is cause for termination of my employment.

Bernadine
 Signature

8-19-05
 Date

A. Current History

1. Are you presently under the care of a doctor? Yes Toussaint
 2. Do you take any medication? If so, for what reason? No

B. Past History

Have you ever:

1. Had an operation? Yes
 2. Been a patient in a hospital? Yes
 3. Been seriously injured (home, sports, auto accident)? No
 4. Had a work related injury that required you to see a physician or treatment in an emergency room? Yes
 5. Worked in a dusty trade, around mining, sand blasting, lead, asbestos, glass blowing, paint spraying, diesel fumes, chemicals, welding? Yes No ✓ If so, when where, and length of time:
 6. Had any problems with your nerves?

C. Review of Systems-answer all questions

Have you had:

Y N

- | | Y | N |
|--|---|---|
| 1. Skin rash, eczema | | ✓ |
| 2. Allergies | | ✓ |
| 3. Lumps, growths, cysts | | ✓ |
| 4. Cancer | | ✓ |
| 5. Vision problems | | ✓ |
| 6. A hearing aid | | ✓ |
| 7. A ruptured ear drum | | ✓ |
| 8. Tuberculosis, asthma, bronchitis | | ✓ |
| 9. High blood pressure | | ✓ |
| 10. Heart problems | | ✓ |
| 11. Swelling of legs or ankles | | ✓ |
| 12. Varicose veins | | ✓ |
| 13. Stroke | | ✓ |
| 14. Hernia or rupture | | ✓ |
| 15. Stomach Ulcer | | ✓ |
| 16. Jaundice, hepatitis, or liver disease | | ✓ |
| 17. Kidney or bladder problems | | ✓ |
| 18. Freckle/bleeding | | ✓ |
| 19. Diabetes | | ✓ |
| 20. Thyroid problem, goiter | | ✓ |
| 21. Fits, convulsions or epilepsy | | ✓ |
| 22. Dizziness, fainting or blackout spells | | ✓ |
| 23. Frequent headaches | | ✓ |

1

Y N

- | | Y | N |
|--|---|---|
| 24. Head injury or loss of consciousness | | ✓ |
| 25. Back injury, back trouble or disc problem | | ✓ |
| 26. Back surgery | | ✓ |
| 27. Arthritis, rheumatism | | ✓ |
| 28. Swollen, painful joint | | ✓ |
| 29. Back pain with lifting | | ✓ |
| 30. Dislocations, fractures | | ✓ |
| 31. Neck injury, pain or stiffness | | ✓ |
| 32. Muscle weakness | | ✓ |
| 33. Injury or surgery to any joint | | ✓ |
| 34. Weakness or numbness of arm, wrist, leg, and or knee | | ✓ |
| 35. Swelling of forearms | | ✓ |
| 36. Numbness or tingling of hands or fingers at night | | ✓ |
| 37. A ganglion cyst | | ✓ |
| 38. Do you participate in golf, tennis, handball, or bowling? | | ✓ |
| 39. Do you have any hobbies requiring repetitive motion or vibrating hand tools? | | ✓ |
| 40. Have you ever had a job requiring repetitive motion or vibrating hand tools? | | ✓ |

R

Have you ever received a pension for disability for any reason? no

Have you ever received workers' compensation for any on the job injury? no

Date of last Tetanus booster _____

Use of Tobacco: Smoke ☒ Chew _____ Snuff _____

Use of Alcohol: Daily _____ Occasionally ☒ Never _____

Explanation of positive answers:

My name is Ben and I have brought
my friend who has known me for yrs.
not to have done no drugs nor hardly
drink much for as long as she known
me. I do only cigarettes. soon dropping
that.

Date 8-19-05

Reviewer Kyle Evans

Tab C
Medical Certificate:
Dr. Sumeer Lal

Re: SIF - Ben Lucina Johnson v. American Services, Inc.
W.C.C. No.: 0520310
STF File No.: 131817
Soc. Sec. No.: 248-41-6693
Date of Injury: 11/15/2005

To the best of my knowledge and within a reasonable degree of medical certainty:

- A. The patient had chronic back pain prior to November 15, 2005.
Yes ☒ No ☐
- B. The pre-existing chronic back pain is permanent and serious enough to constitute a hindrance or obstacle to employment or re-employment.
Yes ☒ No ☐
- C. The injury of November 15, 2005 combined with or aggravated the pre-existing chronic back pain (i.e., had the patient had a previously healthy back, it is likely this accident would have resulted in a less severe overall condition?).
Yes ☒ No ☐

Date: 6/1/11

Samuel Lal
Samuel Lal, M.D.
Carolina Neurosurgery and Spine Center, P.A.

Tab D
Medical Certificate:
Dr. C. David Tollison

Re: SIF - Ben Lucius Johnson v. American Services, Inc.

W.C.C. No.: 0520310

SIF File No.: 131817

Soc. Sec. No.: 248-41-6693

Date of Injury: 11/15/2005

To the best of my knowledge and within a reasonable degree of medical certainty:

A. The patient had anxiety prior to November 15, 2005.

Yes ☒ No ☐

B. The pre-existing anxiety is permanent and serious enough to constitute a hindrance or obstacle to employment or re-employment.

Yes ☒ No ☐

C. The injury of November 15, 2005 combined with or aggravated the pre-existing anxiety (i.e., had the patient had not been anxious, it is likely this accident would have resulted in a less severe overall condition?)

Yes ☒ No ☐

D. The aggravation or combination of the pre-existing anxiety with the injury of November 15, 2005 resulted in:

1. Substantially greater lost time from work (i.e., had the patient not had pre-existing anxiety, is it likely he would have lost less time from work?)

Yes ☒ No ☐

2. Substantially greater permanent disability (i.e., had the patient not had pre-existing anxiety, is it likely he would have suffered less permanent disability?)

Yes ☒ No ☐

3. Substantially greater medical costs (i.e., had the patient not had pre-existing anxiety, is it likely his overall medical costs would have been reduced?)

Yes ☒ No ☐


C. David Tollison, M.D.
Carolinas Center for Advanced Management of
Pain.

6-9-11
Date

Tab E
Medical Certificates:
Dr. David S. Rogers

Re: SIF - Ben Lucius Johnson v. American Services, Inc.

W.C.C. No.: 0520310

SIF File No.: 131817

Soc. Sec. No.: 248-41-6693

Date of Injury: 11/15/2005

To the best of my knowledge and within a reasonable degree of medical certainty:

A. The patient had hypertension prior to November 15, 2005.

Yes ☒ No ☐

B. The pre-existing hypertension is permanent and serious enough to constitute a hindrance or obstacle to employment or re-employment.

Yes ☒ No ☐

C. The injury of November 15, 2005 combined with or aggravated the pre-existing hypertension (i.e., had the patient had a previously healthy cardiac system, it is likely this accident would have resulted in a less severe overall condition?)

Yes ☒ No ☐

D. The aggravation or combination of the pre-existing hypertension with the injury of November 15, 2005 resulted in:

1. Substantially greater lost time from work (i.e., had the patient not had pre-existing hypertension, is it likely he would have lost less time from work?)

Yes ☒ No ☐

2. Substantially greater permanent disability (i.e., had the patient not had pre-existing hypertension, is it likely he would have suffered less permanent disability?)

Yes ☒ No ☐

3. Substantially greater medical costs (i.e., had the patient not had pre-existing hypertension, is it likely his overall medical costs would have been reduced?)

Yes ☒ No ☐


David S. Rogers, M.D.
Oaktree Medical Centre, P.A.

17 Nov 2011
Date

Re: SIF - Ben Lucius Johnson v. American Services, Inc.

W.C.C. No.: 0520310

SIF File No.: 131817

Soc. Sec. No.: 248-41-6693

Date of Injury: 11/15/2005

To the best of my knowledge and within a reasonable degree of medical certainty:

A. The patient had chronic back pain prior to November 15, 2005.

Yes ☒ No ☐

B. The pre-existing chronic back pain is permanent and serious enough to constitute a hindrance or obstacle to employment or re-employment.

Yes ☒ No ☐

C. The injury of November 15, 2005 combined with or aggravated the pre-existing chronic back pain (i.e., had the patient had a previously healthy back, it is likely this accident would have resulted in a less severe overall condition?)

Yes ☒ No ☐

D. The aggravation or combination of the pre-existing chronic back pain with the injury of November 15, 2005 resulted in:

1. Substantially greater lost time from work (i.e., had the patient not had pre-existing chronic back pain, is it likely he would have lost less time from work?)

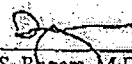
Yes ☒ No ☐

2. Substantially greater permanent disability (i.e., had the patient not had pre-existing chronic back pain, is it likely he would have suffered less permanent disability?)

Yes ☒ No ☐

3. Substantially greater medical costs (i.e., had the patient not had pre-existing chronic back pain, is it likely his overall medical costs would have been reduced?)

Yes ☒ No ☐


David S. Rogers, M.D.
Oaktree Medical Centre, P.A.

17 June 2011
Date

injured worker on the basis of representations allegedly made by the carrier, since the allegations of the complaint indicated that the carrier "guaranteed" payment of the worker's hospital expenses, and the complaint contained sufficient facts to establish contract claims regardless of any other party's claims

under workers' compensation law. *Baker Hosp. v. Firemans Fund Ins. Co.* (S.C. 1994) 314 S.C. 98, 441 S.E.2d 822. Stated in *Ashley v. Ware Shoals Mfg. Co.* (S.C. 1947) 210 S.C. 273, 42 S.E.2d 390.

§ 42-9-370. Preferences or priorities of rights of compensation.

All rights of compensation granted by this Title shall have the same preference or priority for the whole thereof against the assets of the employer as is allowed by law for any unpaid wages for labor.

HISTORY: 1962 Code § 72-188; 1952 Code § 72-188; 1942 Code § 7035-23; 1936 (39) 1231.

Research and Practice References—

82 Am Jur 2d, Workmen's Compensation § 652.

§ 42-9-380. [1962 Code § 72-190; 1952 Code § 72-190; 1947 (45) 103] **Repealed by 1993 Act No. 181, § 1617(A), eff July 1, 1993.**

Editor's Note—

Former § 42-9-380 was entitled: Payments by State Highway Department.

§ 42-9-390. Voluntary settlements.

Nothing contained in this chapter may be construed so as to prevent settlements made by and between an employee and employer so long as the amount of compensation and the time and manner of payment are in accordance with the provisions of this title. A copy of the settlement agreement must be filed by the employer with and approved by only one member of the commission if the employee is represented by an attorney. If the employee is not represented by an attorney, a copy of the settlement agreement must be filed by the employer with and approved by four members of the commission.

HISTORY: 1962 Code § 72-191; 1952 Code § 72-191; 1942 Code § 7035-20; 1936 (39) 1231; 1986 Act No. 388; eff April 29, 1986.

Effect of Amendment—

The 1986 amendment made grammatical changes and rewrote the provisions relative to approval by members of the commission so as to distinguish between those situations where an employee is represented by an attorney and those where he is not.

Research and Practice References—

82 Am Jur 2d, Workmen's Compensation §§ 459 et seq.

CASE NOTES

1. In General

Pursuant to §§ 42-1-310 and 42-9-390, a worker's compensation claimant could unilaterally repudiate an offer of settlement that had been accepted by his counsel prior to approval by the South Carolina Industrial Commission, even though a Commission rule requires approval of settlement agreements involving claimants represented by legal counsel without judicial proceedings, where the closing papers reflecting the agreement of the parties had been prepared but not signed, and thus represented no more than a settlement proposal. *Mackey v. Kerr-McGee Chemical Co.* (S.C.App. 1984) 280 S.C. 265; 312 S.E.2d 565.

Where a settlement has been entered into, it is a duty to file a copy of this settlement agreement with the Industrial Commission. *Lowther v. Standard Oil Co. of N. J.* (S.C. 1945) 206 S.C. 286, 33 S.E.2d 889.

Subject to the conditions in this section [Code 1962 § 72-191] and Code 1962 § 72-351 the Industrial Commission has the power to approve a lump sum settlement, and make it final and binding and not subject to review under any conditions. *Atkins v. Charleston Shipbuilding & Drydock Co.* (S.C. 1945) 206 S.C. 63, 33 S.E.2d 46.

§ 42-9-400. Manner in which employer or insurance carrier shall be reimbursed from Second Injury Fund when disability results from preexisting impairment and subsequent injury.

(a) If an employee who has a permanent physical impairment from any cause or origin incurs a subsequent disability from injury by accident arising out of and in the course of his employment, resulting in compensation and medical payments liability or either, for disability that is substantially greater, by reason of the combined effects of the preexisting impairment and subsequent injury or by reason of the aggravation of the preexisting impairment, than that which would have resulted from the subsequent injury alone, the employer or his insurance carrier shall in the first instance pay all awards of compensation and medical benefits provided by this Title; but such employer or his insurance carrier shall be reimbursed from the Second Injury Fund as created by § 42-7-310 for compensation and medical benefits in the following manner:

(1) Reimbursement of all compensation benefit payments payable subsequent to those payable for the first seventy-eight weeks following the injury.

(2) Reimbursement of fifty percent of medical payments in excess of three thousand dollars during the first seventy-eight weeks following the injury and then reimbursement of all medical benefit payments payable subsequent to the first seventy-eight weeks following the injury; *provided, however*, in order to obtain reimbursement for medical expense during the first seventy-eight weeks following the subsequent injury, an employer or carrier must establish that his liability for medical payments is substantially greater, by reason of the combined effects of the preexisting impairment and subsequent injury or by reason of the aggravation of the preexisting impairment; than that which would have resulted from the subsequent injury alone.

(b) If the subsequent injury of such an employee shall result in the death of the employee, and it shall be determined that the death would not have occurred except for such preexisting permanent physical impairment, the employer or his insurance carrier shall in the first instance pay the compensation prescribed by this Title; but he or his insurance carrier shall be reimbursed from the Second Injury Fund created by § 42-7-310, for all compensation payable in excess of seventy-eight weeks.

(c) In order to qualify under this section for reimbursement from the Second Injury Fund, the employer must establish when claim is made for reimbursement thereunder, that the employer had knowledge of the permanent physical impairment at the time that the employee was hired, or at the time the employee was retained in employment after the employer acquired such knowledge. *Provided, however*, the employer may qualify for reimbursement hereunder upon proof that he did not have prior knowledge of the employee's preexisting physical impairment because the existence of such condition was concealed by the employee or was unknown to the employee.

(d) As used in this section, "permanent physical impairment" means any permanent condition, whether congenital or due to injury or disease, of such seriousness as to constitute a hindrance or obstacle to obtaining employment or to obtaining reemployment if the employee should become unemployed.

When an employer establishes his prior knowledge of the permanent impairment, then there shall be a presumption that the condition is permanent and that a hindrance or obstacle to employment or reemployment exists when the condition is one of the following impairments:

- (1) Epilepsy
- (2) Diabetes
- (3) Cardiac disease
- (4) Arthritis
- (5) Amputated foot, leg, arm or hand
- (6) Loss of sight of one or both eyes or partial loss of uncorrected vision of more than seventy-five percent bilateral
- (7) Residual disability from Poliomyelitis
- (8) Cerebral palsy
- (9) Multiple sclerosis
- (10) Parkinson's disease
- (11) Cerebral vascular accident
- (12) Tuberculosis
- (13) Silicosis
- (14) Psychoneurotic disability following treatment in a recognized medical or mental institution
- (15) Hemophilia
- (16) Chronic osteomyelitis
- (17) Ankylosis of joints
- (18) Hyperinsulinism
- (19) Muscular dystrophy
- (20) Arteriosclerosis

- (21) Thrombophlebitis
- (22) Varicose Veins
- (23) Heavy metal poisoning
- (24) Ionizing radiation injury
- (25) Compressed air sequelae
- (26) Ruptured intervertebral disc
- (27) Hodgkins disease
- (28) Brain damage
- (29) Deafness
- (30) Cancer
- (31) Sickle-cell anemia
- (32) Pulmonary disease

(33) Mental retardation provided the employee's intelligence quotient is such that he falls within the lowest percentile of the general population. However, it shall not be necessary for the employer to know the employee's actual intelligence quotient or actual relative ranking in relation to the intelligence quotient of the general population.

(34) Any other pre-existing disease, condition or impairment which is permanent in nature and which:

(a) Would qualify for payment of weekly disability benefits of seventy-eight weeks or more under § 42-9-30 exclusive of benefits payable for disfigurement; or

(b) Would support a rating of seventy-eight or more weeks of weekly disability benefits when evaluated according to the standards applied to Workers' Compensation claims in South Carolina, or combines with a subsequent injury to cause a permanent impairment rated at seventy-eight weeks or more under § 42-9-30.

(e) The Second Injury Fund shall not be bound as to any question of law or fact by reason of any compensation agreement, settlement, award, and adjudication to which it was not a party, or in relation to which it was not notified at least twenty days prior to a hearing on liability that it might be subject to liability for the injury or death.

(f) An employer or his carrier shall notify the Industrial Commission and the Director of the Second Injury Fund in writing of any possible claim against the fund as soon as practicable but in no event later than after the payment of the first seventy-eight weeks of compensation.

Failure to comply with the provisions of this subsection shall bar an employer or his carrier from recovery from the fund.

(g) If the employee has a permanent physical impairment, as defined in this section and the prerequisites for reimbursement have been met, and if it can be shown that the subsequent injury most probably would not have occurred "but for" the presence of the prior impairment, then reimbursement will be granted as provided in this section even if the combined effects or the aggravation of the preexisting condition by the subsequent injury does not cause the employer's liability for compensation and medical benefits to be substantially greater than that which would have resulted from the subsequent injury alone.

(h) When a third party is deemed to be an employer for the purposes of paying workers' compensation benefits that third party will be entitled to reimbursement from the Second Injury Fund if either he or the employer of record have met the knowledge requirements outlined in this section, as well as all other requirements.

(i) The Second Injury Fund is entitled to a credit for sums recovered by the employer or his workers' compensation carrier from third parties, after the employer or his workers' compensation carrier have been reimbursed for the moneys paid out by them and not reimbursed by the fund.

(j) The Second Injury Fund can enter into compromise settlements at the discretion of the director with approval of a majority of the Industrial Commission, provided a bona fide dispute exists.

(k) Any employer operating in violation of Section 42-5-20 is not eligible for reimbursement from the South Carolina Second Injury Fund.

(l) As a prerequisite to reimbursement from the fund, the insurer shall be required to certify that the medical and indemnity reserves have been reduced to the threshold limits of reimbursement.

HISTORY: 1962 Code § 72-601; 1972 (57) 2578; 1974 (58) 2237; 1976 Act No. 560 § 1; 1982 Act No. 314, § 1A; 1982 Act No. 438, § 1; 1988 Act No. 309, § 1, eff February 24, 1988; 1990 Act No. 589, § 1, eff June 12, 1990.

Editor's Note—

Pursuant to 1986 Act No. 399, § 3, effective May 6, 1986, whenever any reference is made in the 1976 Code or other statutes to the "South Carolina Industrial Commission" or "Industrial Commission", it is changed to the "South Carolina Workers' Compensation Commission".

Effect of Amendment—

The 1988 amendment added subsection (k), providing that certain employers are not eligible for reimbursement from Second Injury Fund.

The 1990 amendment added subsection (l).

Research and Practice References—

82 Am Jur 2d, Workmen's Compensation § 344.

99 CJS, Workmen's Compensation §§ 179, 180.

101 CJS, Workmen's Compensation § 837.

Annual survey of South Carolina law, workers' compensation law. 40 SC L Rev 270 (Autumn 1988).

The Second Injury Fund: Encouraging Employment of the Handicapped Worker in South Carolina. 27 SC L Rev 661.

ATTORNEY GENERAL'S OPINIONS

The Industrial Commission has jurisdiction to entertain claims of the Second Injury Fund at Claimant v. Employer/Carrier hearings. The degree of participation by the Second Injury Fund at these hearings, in absence of statutory directives, is controlled by the procedural mandates provided in Title 42 and the Industrial Commission's rule-making authority provided for in § 42-3-30. If the Second Injury Fund

is allowed to participate in Claimant v. Employer/Carrier hearings, it is bound by the decision as to questions of law and fact and therefore in order to protect the Second Injury Fund's rights and remedies under the Act, the Second Injury Fund must be provided an opportunity to apply for a review of the decision. 1980 Op Att'y Gen. No. 80-33, p. 64.

CASE NOTES

1. In General

Employer's failure to notify Workers' Compensation Commission of its intent to seek reimbursement from Second Injury Fund did not prejudice Commission in any way, and thus, did not bar employer from recovering from Fund, where employer notified Fund of its claim for reimbursement and Commission received actual notice of claim through Fund. *South Carolina Second Injury Fund v. American Yard Products* (S.C. 1998) 330 S.C. 20, 496 S.E.2d 862.

Primary purpose of statute requiring employer or insurer to notify Industrial Commission of possible claim against Second Injury Fund is to establish deadline for perfecting actual claims for reimbursement with Fund, and additional purpose is to provide notice to Fund and Commission of potential claims for reimbursement. *South Carolina Second Injury Fund v. American Yard Products* (S.C. 1998) 330 S.C. 20, 496 S.E.2d 862.

The purpose of the Second Injury Fund is to encourage the employment of disabled or handicapped persons without penalizing an employer with greater liability if the employee is injured because of his preexisting condition. *Liberty Mut. Ins. Co. v. South Carolina Second Injury Fund* (S.C. 1995) 318 S.C. 516, 458 S.E.2d 550, rehearing denied, certiorari granted in part.

The Circuit Court did not err in interpreting § 42-9-400 so that if a carrier incurs greater liability for compensation and/or medical payments as a result of a preexisting injury, he is entitled to reimbursement of those greater payments. *Liberty Mut. Ins. Co. v. South Carolina Second Injury Fund* (S.C. 1995) 318 S.C. 516, 458 S.E.2d 550, rehearing denied, certiorari granted in part.

The Circuit Court erred in ordering the reimbursement of compensation payments from the Second Injury Fund where the workers' compensation carrier did not incur greater compensation payments as a result of the accident; the accident rendered the claimant totally disabled and the claimant's preexisting injury did not increase these payments. *Liberty Mut. Ins. Co. v. South Carolina Second Injury Fund* (S.C. 1995) 318 S.C. 516, 458 S.E.2d 550, rehearing denied, certiorari granted in part.

In an action for reimbursement from the Second Injury Fund, the Workers' Compensation Commission erred in find-

ing that the claimant concealed his previous back injuries where, in response to the question "Do you have any physical condition which may limit your ability to perform the job applied for," the claimant responded "no," since the question on the application was very broad and the commission found that the claimant had no physical limitations which would have prevented him from performing his job when he was hired. *Hartford Acc. and Indem. v. South Carolina Second Injury Fund* (S.C.App. 1994) 316 S.C. 420, 450 S.E.2d 110, rehearing denied, certiorari denied.

The State Workers' Compensation Fund, which paid a firefighter's claim for total disability resulting from heart disease and arteriosclerosis, was entitled to reimbursement from the Second Injury Fund under § 42-9-400, since the firefighter would not have become totally disabled "but for" his prior permanent heart disease, and thus his total disability from heart disease qualified as a subsequent disability arising out of his employment. *State Workers' Compensation Fund v. South Carolina Second Injury Fund* (S.C. 1994) 313 S.C. 536, 443 S.E.2d 546.

The 2-year statute of limitation for filing a workers' compensation claim, § 42-15-40, is inapplicable to claims by employers against the Second Injury Fund because the statute of limitation (1) applies to claims for compensation not reimbursement, (2) governs claims addressed to the commission as opposed to those addressed to the fund, and (3) speaks to an employee's injury, not the employer's notice of inquiry. *Greenwood Mills, Inc. v. Second Injury Fund* (S.C. 1993) 315 S.C. 256, 433 S.E.2d 846.

The Second Injury Fund, as delineated in § 42-7-310, provides reimbursement to employers who are unable to prove that the concealment of a preexisting condition by an employee was willful or reliance on the misrepresentation. *Vines v. Champion Bldg. Products* (S.C. 1993) 315 S.C. 13, 431 S.E.2d 585, rehearing denied.

A state employee did not suffer a "second injury," for which his employer's workers' compensation carrier was entitled to be reimbursed, since the employee's disability from heart disease and arteriosclerosis was the logical progression of the disease over the period of years he worked for the State Forestry Commission. *State Workers' Compensation Fund v. South Carolina Second Injury Fund* (S.C.App. 1992) 310 S.C. 187,

426 S.E.2d 112, rehearing denied, certiorari granted, reversed 313 S.C. 536, 443 S.E.2d 546.

One of the purposes in establishing the Second Injury Fund was to encourage employers to hire handicapped persons by providing reimbursement to the employer or insurer for compensation paid as a result of a second injury. The fund was designed to compensate handicapped workers fully for subsequent injuries without penalizing employers for hiring them in the first place. *American Motorists Ins. Co. v. South Carolina Second Injury Fund* (S.C.App. 1989) 300 S.C. 17, 386 S.E.2d 276.

The right of a claimant to secure reimbursement under the Second Injury Fund depends upon complete compliance with the requirements imposed for recovery. The success and future of the Second Injury Fund depends upon proper and careful application of these statutory requirements. *American Motorists Ins. Co. v. South Carolina Second Injury Fund* (S.C.App. 1989) 300 S.C. 17, 386 S.E.2d 276.

A claimant's work for a textile manufacturing company, which took place away from cotton dust which was present during previous jobs performed by the claimant, did not aggravate a preexisting condition nor did it bring about a condition which added to or combined with a previous condition to create the claimant's disability where the claimant became totally disabled as a result of the progression of byssinosis, which was caused by the claimant's breathing of cotton dust during his 25 years' employment with the company in various capacities. Thus, there was no preexisting physical impairment and no subsequent or second injury, but rather, the claimant suffered a logical progression of an occupational disease indigenous to the cotton industry which he served for 25 years. *American Motorists Ins. Co. v. South Carolina Second Injury Fund* (S.C.App. 1989) 300 S.C. 17, 386 S.E.2d 276.

The notice required by § 42-9-400(f) is effective when it is received. *Cincinnati Ins. Co. v. South Carolina Second Injury Fund* (S.C.App. 1989) 297 S.C. 372, 377 S.E.2d 130, review dismissed 301 S.C. 180, 391 S.E.2d 235.

A worker suffered from a preexisting permanent impairment as defined by § 42-9-400(d) where she began working in

cotton mills in 1943 and became totally disabled due to byssinosis, a form of chronic obstructive pulmonary disease, after working for 9 months for a subsequent employer, since a person with 31 years of exposure to cotton dust who becomes permanently and totally disabled after only 9 additional months of exposure must have had a permanent impairment at the time of employment. *Springs Industries, Inc. v. South Carolina Second Injury Fund* (S.C.App. 1988) 296 S.C. 359, 372 S.E.2d 915.

Employee who suffers second injury is entitled to recover full compensation benefits even though employee recovered benefits after first injury, and employee may qualify for compensation even if employer is not entitled to reimbursement from Second Injury Fund because of employer's failure to maintain proper records, as written record requirement in § 42-9-400(c) was condition of employer's eligibility to recover from Second Injury Fund. *Wyndham v. R.A. & E.M. Thornley and Co.* (S.C.App. 1987) 291 S.C. 496, 354 S.E.2d 399.

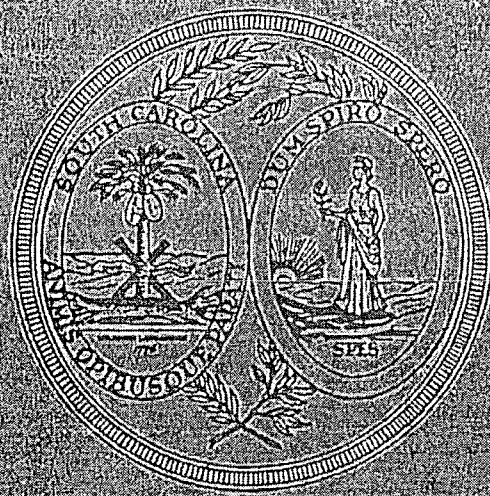
Failure to comply with SC Code § 42-9-400(i) results in loss of right to reimbursement. *Merchants Mut. Ins. Co. v. South Carolina Second Injury Fund* (S.C. 1982) 277 S.C. 604, 291 S.E.2d 667.

Employer's failure to file a written record establishing knowledge of prior permanent physical impairment as required by Code 1962 § 72-60(c) [Code 1976 § 42-9-400(c)] precluded recovery from the second injury fund. *Boone's Masonry Const. Co., Inc. v. South Carolina Second Injury Fund* (S.C. 1976) 267 S.C. 277, 227 S.E.2d 659.

One of the purposes of the second injury fund is to encourage employers to hire handicapped people by providing reimbursement to the insurer, in certain cases, for compensation paid as the result of a second injury. *Boone's Masonry Const. Co., Inc. v. South Carolina Second Injury Fund* (S.C. 1976) 267 S.C. 277, 227 S.E.2d 659.

Provisions of act creating second injury fund applied where disabled employee was hired prior to effective date of act but retained in employment after said date. *Boone's Masonry Const. Co., Inc. v. South Carolina Second Injury Fund* (S.C. 1976) 267 S.C. 277, 227 S.E.2d 659.

**SOUTH CAROLINA
SECOND INJURY FUND**



**A STEP-BY-STEP APPROACH
FOR HANDLING
SECOND INJURY FUND CLAIMS**

July 2002

INTRODUCTION

The mission of the South Carolina Second Injury Fund is to protect employers by limiting the cost of a workers' compensation claim when a disabled employee is injured on the job and encourage employment of the disabled. The degree of the Fund's utilization attests to its success.

While there has always been a great deal of interest in the perfection of Second Injury Fund claims by carriers and self-insured employers, the passage of Americans With Disabilities Act in 1990 has placed renewed emphasis on Second Injury Fund claims. We are providing this manual to people who are responsible for the administration of Second Injury Fund files. This is a "how to" manual. It attempts to break down the basic elements of the claims handling process and outline the major factors to consider as you go from first notice of a claim to final reimbursement, but we must emphasize there are no shortcuts. Each claim stands on its own merits.

This written material and oral presentation are intended to provide those involved in administering workers' compensation general information regarding the South Carolina Second Injury Fund. They are provided with the understanding that the presenters are not engaged in rendering legal, accounting, or other professional services. The material, written and oral, should not be used as a substitute for professional service in specific circumstances dealing with a specific claim, client or legal matter. Users should research original sources of authority and/or obtain the services of a professional.

CONTENTS

SECTION I	--	<u>CLAIM PROCEDURES</u>
SECTION II	--	<u>ASSESSMENT AND REIMBURSEMENT PROCEDURES</u>
SECTION III	--	<u>LEGAL PROCEDURES</u>

CLAIM PROCEDURES

This section contains procedures and examples of the requirements needed in the processing of your Second Injury Fund claims.

Notice to the Second Injury Fund and a sample letter.

Explanation of the notice of possible Second Injury Fund claim and sample of form.

How to meet the knowledge requirement and examples.

Medical questionnaire and examples.

Acceptance package with examples.

Examples of denials.

Second Injury Fund adjuster and county information list.

RE:

1. Did the patient have _____ prior to _____?
YES _____ NO _____
COMMENT:

2. Is the _____ permanent?
YES _____ NO _____

3. Was the _____ serious enough to constitute a
hindrance or obstacle to employment before the injury of
_____?
YES _____ NO _____

If yes, please explain!

4. Did the injury of _____ aggravate or combine with the
pre-existing _____?
YES _____ NO _____
COMMENT:

5. Did the fact that the patient had _____ cause
him/her to lose substantially more time from work than
he/she would have had from the _____ injury alone?
YES _____ NO _____
COMMENT:

6. Did the fact that the patient had _____ cause
him/her to have a substantially higher percentage of
permanent disability than he/she would have had from the
_____ injury alone?
YES _____ NO _____
COMMENT:

7. Have the medical costs in this case been substantially
increased due to the existence of _____?
YES _____ NO _____
COMMENT:

Physician Signature

Date

THE STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

APPEAL FROM LAURENS COUNTY

Eugene C. Griffith, Jr., Circuit Court Judge
Trial Court Case No.: 2013-CP-30-506

Appellate Case No.: 2014-001459

RECEIVED

DEC 19 2014

SC Court of Appeals

American Home Assurance Company, (Carrier).....Appellant

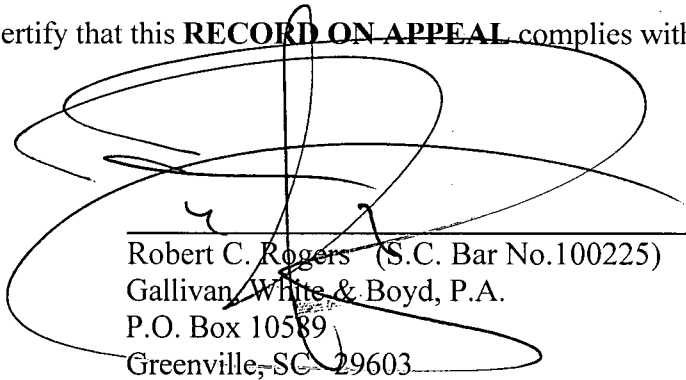
v.

South Carolina Second Injury Fund.....Respondent

(In Re: Ben Johnson (Employee/Claimant) v. American Services, Inc. (Employer))

CERTIFICATE OF COUNSEL

The undersigned does hereby certify that this **RECORD ON APPEAL** complies with Rule
210(c)(g), SCACR.



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Attorney for Appellant

December 18, 2014

THE STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

RECEIVED

DEC 19 2014

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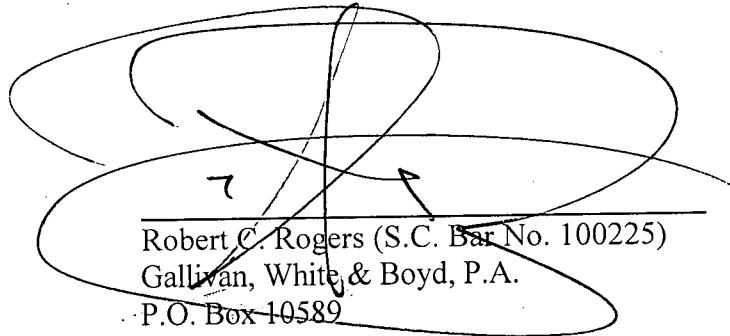
(In Re: Ben Johnson (Employee/Claimant) v. American Services, Inc. (Employer))

PROOF OF SERVICE

I do hereby certify that on the 18th day of December, 2014, I served a copy of the **APPELLANT'S FINAL BRIEF** and **RECORD ON APPEAL** upon the attorney for the Respondent, and others as specified below, by placing a copy of the same in the United States Mail, with due and proper postage affixed thereto, to the following:

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Judicial Director
S. C. Workers' Compensation Commission
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