

THE STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

APPEAL FROM
SOUTH CAROLINA WORKERS' COMPENSATION COMMISSION

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

WCC NO. 1203594
Appellate Case No. 2014-002611

James B. Neff Employee/Appellant

v.

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

FINAL BRIEF OF APPELLANT

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STATEMENT OF ISSUES ON APPEAL

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

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

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

CHRONOLOGY

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

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

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

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

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

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

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

September 14, 2012 Dr. Lehman indicated that Claimant had been using a bone growth stimulator for the past

week only and was utilizing an unfamiliar device.

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

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

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

June 20, 2013 Claimant saw Dr. Schiffern again.

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

STATEMENT OF THE CASE

This was an admitted claim resulting from a work related accident which occurred on April 12, 2012. Claimant was employed

as a welder and was injured when a welding tank suddenly and violently exploded rendering him unconscious. He was initially transported by helicopter to a hospital trauma unit where he was hospitalized for approximately four (4) days. Claimant underwent multiple x-rays and CT scans and neurologic monitoring. His medical assessments included explosion injury with multiple trauma including closed head injury with persistent symptoms of vertigo and blurring vision, probable C7 spinous process cervical fracture, multiple rib fractures, left clavicle fracture with possible AC joint injury, stable elbow fracture, and left ulnar styloid fracture. (Rec. p. 228, p. 277).

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

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

area of the fracture with such being of some concern regarding hardware failure and continued non-union. The doctor strongly suggested a bone stimuator to hopefully get union before the plate breaks - which he had seen happen. He specifically requested a bone stimulator on August 24, 2012 because there was no progression to healing (Rec. p. 235-236).

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

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

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

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

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

ARGUMENTS

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

"Every natural consequence which flows from a compensable injury unless the result of an independent or intervening cause sufficient to break the chain of causation is compensable."

Sanders v. Wal-Mart Stores, 666 S.E.2d 297, 300 (Ct. App. 2008).

In the present case, the Appellate Panel reversed the Hearing Commissioner who had concluded in his analysis of whether Claimant's alleged non-compliance resulted in an intervening accident which caused the plate to break included multiple factors. The Hearing Commissioner proceeded to conduct an analysis of each point of contention in this regard. He determined absolutely that the "foundational fact" was that Claimant had suffered an injury by accident which resulted in a broken left clavicle and no intervening event sufficient to break the chain of causation had occurred.

The Appellate Panel completely and utterly ignored this foundational fact and embarked on a misguided quest to find

support for their apparently preordained position to determine that such an intervening break in the chain of causation had occurred. In doing so, the Appellate Panel completely mischaracterized and excerpted out of context the evidence and testimony supplied by both Dr. Lehman and Dr. Schiffern.

Dr. Lehman stated that the bone was widely separated and biologic difficulty was a factor (in the failure) (Rec. p. 230). Dr. Lehman could only state that alleged non-compliance was a factor but could not apportion it as being the most proximate - most important factor (Rec. p. 266). Dr. Schiffern who was the upper extremity specialist to whom Dr. Lehman deferred - testified specifically that regardless of what Claimant did or didn't do compliance wise the bone was not healing expressing his opinion to a reasonable degree of medical certainty that any such activity (deer hunting) did not cause the non-union (Rec. p. 192).

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

specifically know what caused the non-union which was due to a number of factors (Rec. p. 249).

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

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

The Appellate Panel found moreover that Dr. Lehman testified to a reasonable degree of medical certainty more likely than not

that the Claimant's non-compliance with treatment specifically deer hunting and not using his sling caused the plate in his clavicle to break resulting in his current condition. The exact discourse in Dr. Lehman's deposition is as follows:

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

A. I thought it was certainly a factor.

Q. Ok?

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

(Rec. p. 218, lines 8-25-p. 219 line 1)

Dr. Lehman further testified referring to the deer hunting "well I guess the positioning in order to hold the rifle, and the recoil those are the only factors that I'm really familiar with. I'm not really a deer hunter I don't know what caliber rifle was used and how many shots were taken and so forth." In other

words, he cannot state that anything happened which may have contributed to the problem. Dr. Schiffern testified to a reasonable degree of certainty that "deer hunting" was not a cause of the problem which was bound to occur anyway.

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

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

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

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

A. That's with the plate broken?

Q. Correct.

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

Q. More likely than not?

A. Yes.

Dr. Lehman's testimony further stated:

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

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

Q. I'll try to rephrase it.

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

(Rec. p. 223, lines 9-p. 224, line 6)

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

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

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

Q. And you referred earlier in your testimony that you knew this was going to be a difficult case. What did you mean by that?

A. Well the bone was widely separated. The bone fragments were widely separated, suggesting there was some scar tissue or muscle interposition in the bone ends. Again, as I also mentioned, it's unusual to have a clavicle non-union. The reasons for those aren't clear, but there seems to be some biologic difficulty in getting bones to heal in such circumstances. So, that was another factor. And there was also a gap, basically in the bone which had to be made up. Using bone graft is just not the ideal material used to get rapid fracture healing. It's much better if you can get the native bones to abut, one against the other.

(Rec. p. 230, lines 9-25)

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

A. No. Not completely, no.

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

A. Yes.

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

A. No.

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

A. Yes.

(Rec. p. 231, lines 1-13)

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

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

A. No.

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

A. That's correct.

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

A. Correct.

Q. Do you know when deer season begins?

A. Well, I think it varies by county, but I think it usually starts around December sometime. Of

course it depends on whether you're using a bow and arrow or musket and that sort of thing.

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

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

Q. What if I told you that the hunting season for using a gun started on October 1st? Would you be aware of that one way or another?

A. No.

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

A. Yes.

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

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

Q. And that would make a difference as to how much pressure he was putting on the injury and what he

was actually doing. It's not the fact that he was hunting - - It's would be the physical activities that he actually engaged in. Would that be fair?

A. Yes.

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

A. That's correct.

(Rec. p. 232, lines 14-p.234, line 11)

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

Q. If a steel plate had been used would it have broken in your opinion?

A. That would require some conjecture, but it certainly would be stronger and would less likely break.

Q. You also referred to a bone stimulator being a factor that you recommended in healing; is that correct?

A. Yes.

Q. At what point did you recommend that Mr. Neff start using a bone stimulator?

A. As we discussed before, he'd only been using it briefly at the time of these visits. But, I do remember that I had requested the bone stimulator a significant time prior to it's actual arrival or being used. There was at least some delay in

getting authorization for its use.

Q. That delay wasn't Mr. Neff's responsibility, was it?

A. No.

Q. Whose responsibility was it?

A. Well, we have to go through the adjuster usually.

Q. Did you write a written prescription for the bone stimulator? I'm going to show you this document.

A. Yes.

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

A. Yes.

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

A. Yes.

Q. Was it the one you wanted?

A. No.

(Rec. p. 234, lines 18-p. 236, line 15)

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

A. Yes.

Q. And the breakage of the plate?

A. Yes.

(Rec. p. 238, lines 7-11)

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

A. Played a role, yes.

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

A. Yes.

(Rec. p. 240, lines 15-21)

A. I felt that it would be prudent to send him to an upper extremity specialist ie., Dr. Schiffern who ideally would - well, potentially do a better job than I could about getting this healed without any further delay.

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

A. No.

(Rec. p. 241, lines 20-p. 242, line 2)

(Rec. p. 243) regarding the procedure being difficult:

Q. You said that the procedure was difficult in this case due to his large size, with very little neck. As well as concerns about his underlying respiratory status. You further say perhaps a stainless steel plate would provide less potential

for breakage and perhaps shortening of clavicle to get better bony apposition would be prudent. So, those are two things that had not been done up until that point; is that correct?

A. Yes sir.

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

A. Yes.

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

A. Yes.

(Rec. p. 249, line 6) further indication of the speculative nature of opinions -

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

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

(Rec. p. 254, line 4) Ultimate irony "I'll object" (by defense attorney), that calls for speculation as to whether he used it every day. He has no idea about that (all speculation).

(Rec. p. 254) Further widening the spectrum of potential

causes of the failure:

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

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

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

A. Yes.

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

A. Yes.

(Rec. p. 255):

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

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

A. Yes possibly.

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

A. No.

(Rec. p. 265) Further equivocation

Q. By defense attorney - Is it fair to say the most likely reason for the issue that you saw in October was his non-compliance?

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

(Rec. p. 268)

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

A. No.

The laborious preceding discussion is globally illustrative of the complete uncertainty in regard to the reason for the breakage of the plate in this case. The only certainty in this

case is that Jimmy Neff suffered a devastating work related injury in the form of a violent explosion which shattered his collar bone and inflicted severe neurological injury which has still not been addressed because of the carrier's stonewalling and recalcitrance.

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

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

requested by the treating physician thus engaging in a pattern of conduct designed to obstruct and delegitimize a legitimate workers' compensation claim.

Also, Claimant's testimony is replete with irrational and inappropriate comments, such as "it would probably be easier if I hadn't been blown up and had a severe concussion and my head don't (sic) work." (Rec. p. 96, lines 10-12):

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

A. No. Get away from me." (Rec. p. 112, lines 11-12).

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

CONCLUSION

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

(1940).

In the present case, the findings of the Commission Appellate Panel in regard to a break in the chain of causation because of some allegation of vague non-compliance are completely and clearly erroneous in view of the reliable, probative and substantial evidence of record and constitute an abuse of discretion and error of law because the factual conclusions are without evidentiary support Fontaine v. Peitz, 354 S.E.2d 565 (1987). The underlying foundational fact is that Claimant suffered a horrific work related injury and there is not a scintilla of evidence that he suffered any intervening accident, injury or occurrence which caused his ultimate condition. All we have here is speculation that some undefined episode of hunting might have been one of the multiple potential causes of this failure.

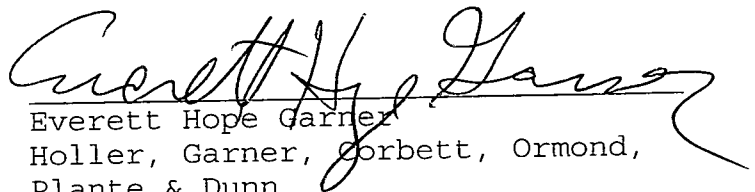
It would be different if Claimant were in a car accident or had experienced some other definitive occurrence but here the Appellate Panel clearly engaged in speculation beyond the scope of medical opinion and in direct contravention of the remedial purposes of the Act. In doing so they have created a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

accident breaking the chain of causation. In this case, the Appellate Panel has created an insurmountable burden for a Claimant to maintain the integrity of the situation and get the needed treatment occasioned by his work related injuries.

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

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

Respectfully submitted,



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August 11, 2015

THE STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

APPEAL FROM
SOUTH CAROLINA WORKERS' COMPENSATION COMMISSION

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

WCC NO. 1203594
Appellate Case No. 2014-002611

James B. Neff Employee/Appellant

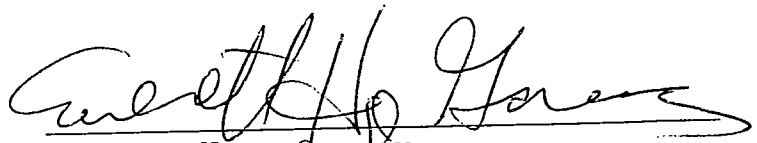
v.

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

CERTIFICATE OF COUNSEL

The undersigned certifies that this Final Brief complies
with Rule 211(b), SCACR.

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THE STATE OF SOUTH CAROLINA
In the Court of Appeals

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SC Court of Appeals

APPEAL FROM THE APPELLATE PANEL OF THE
SOUTH CAROLINA WORKERS' COMPENSATION COMMISSION

Appellate Case No.: 2014-002611
W.C.C. File No.: 1203594

James B. Neff, Employee, Appellant,

v.

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

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STATEMENT OF THE CASE

This is a workers' compensation appeal by James B. Neff ("Claimant" or "Appellant") from the Decision and Order of the Full Commission Appellate Panel ("Full Commission"), filed on December 3, 2014, which unanimously reversed the Decision and Order of the Hearing Commissioner. This brief is submitted by Lear's Welding & Fabrication, Inc., and Bridgefield Casualty Insurance Company c/o Summit Holdings, Inc. ("Defendants" or "Respondents") in response to the Claimant's appeal.

This claim was before the South Carolina Workers' Compensation Commission pursuant to the Form 50 filed by the Claimant on June 17, 2013, and the Form 21 filed by the Defendants on June 19, 2013. It is the position of the Claimant that he is entitled to additional causally-related medical treatment and/or evaluation for his left clavicle and head as such treatment will tend to lessen his period of disability; and continued temporary total disability benefits until such time as he reached maximum medical improvement (MMI).

It is the position of the Defendants that the Claimant's current problems, both orthopedic and neurological, are not causally-related to his admitted accident but are the result of non-compliance with medical treatment and/or an intervening cause(s). The Defendants assert the medical non-compliance and/or intervening cause(s) occurred on or before October 11, 2012, and that the Claimant is not entitled to any benefits under the Act after this date. Moreover, the Defendants request a credit for temporary total disability benefits paid after October 11, 2012. In addition, Defendants contend the Claimant has not sustained any causally-related permanent partial disability with regard to any of his compensable injuries under Section 42-9-30. Finally, the Defendants requested the Hearing Commissioner to make a determination as to the credibility of the Claimant.

The Hearing in this matter was held on November 14, 2013, in Rock Hill, South Carolina, before Commissioner Gene McCaskill ("Hearing Commissioner"). By way of Decision and Order filed on April 17, 2014, the Hearing Commissioner determined the Claimant sustained compensable injuries to his left wrist, left elbow, neck, ribs, concussion and left clavicle; has reached MMI for his left wrist, left elbow and neck as of October 11, 2012, with no permanent partial disability sustained to these body parts; has not reached MMI with regard to his left clavicle and head (concussion); that the Claimant's current medical problems are not the result of an intervening accident/cause and/or non-compliance with medical treatment; that the Claimant is entitled to additional medical treatment which will tend to lessen his period of disability, including treatment with Dr. Schiffen and a neurological evaluation and treatment with a physician of the Defendants' choosing; that the Claimant's testimony was lacking in credibility and unbelievable; and that temporary total disability benefits shall continue until such time as the Claimant reaches MMI.

The Defendants timely appealed the Decision and Order to the Full Commission. By way of Decision and Order filed on December 3, 2014, the Full Commission unanimously reversed the Decision and Order of the Hearing Commissioner. Specifically, the Full Commission found the Claimant's non-compliance constitutes an independent intervening cause of his current left clavicle and neurological conditions and, therefore, denied him further benefits under the Act. The Full Commission also awarded the Defendants credit for all temporary total disability benefits paid after October 11, 2012. The Claimant has now timely appealed to this Court.

STANDARD OF REVIEW

The Administrative Procedures Act ("APA") governs review of decisions of the South Carolina Workers' Compensation Commission by the Court of Appeals. S.C. CODE ANN. § 1-23-380 (Supp. 2006); *Lark v. Bi-Lo, Inc.*, 276 S.C. 130, 136, 276 S.E.2d 304, 307 (1981). Under the APA, the decisions of the South Carolina Workers' Compensation Commission may be reversed, modified, or remanded if substantial rights of the appellant have been prejudiced because the administrative findings, inferences, conclusions, or decisions are affected by error of law. S.C. CODE ANN. § 1-23-380(A)(6)(d)(Supp. 2006).

Furthermore, decisions of the Workers' Compensation Commission may be reversed, modified or set aside if unsupported by reliable, probative, or substantial evidence on the whole record. *Ellis v. Spartan Mills*, 276 S.C. 216, 218, 277 S.E.2d 590, 591 (1981); *Lark*, supra.; S.C. CODE ANN. § 1-23-380(A)(6)(e). "Substantial evidence is 'not a mere scintilla of evidence, nor the evidence viewed blindly from one side of the case, but is evidence which, considering the record as a whole, would allow reasonable minds to reach the conclusion the administrative agency reached in order to justify its action.'" *Etheredge v. Monsanto Co.*, 349 S.C. 451, 562 S.E.2d 679 (Ct. App. 2002)(quoting *Miller v. State Roofing Co.*, 312 S.C. 452, 454, 441 S.E.2d 323, 324-25 (1994)); *Broughton v. South of the Border*, 336 S.C. 488, 495, 520 S.E.2d 634, 637 (Ct. App. 1999). As the South Carolina Supreme Court observed,

a decision of the Workers' Compensation Commission will not be overturned by a reviewing court unless it is clearly unsupported by substantial evidence in the record. Substantial evidence is evidence which, considering the record as a whole, would allow reasonable minds to reach the conclusion that the administrative agency reached to justify its action. Quantitatively, substantial evidence is something less than the weight of the evidence.

Howell v. Pac. Columbia Mills, 291 S.C. 469, 471, 354 S.E.2d 384, 385 (1987)(internal citations omitted). Finally, a decision may be reversed or modified if arbitrary or capricious or characterized by abuse of discretion or clearly unwarranted exercise of discretion. S.C. CODE ANN. § 1-23-380(A)(6)(f).

ARGUMENT

I. **THE DETERMINATION THAT THE CLAIMANT'S MEDICAL NON-COMPLIANCE RESULTED IN AN INDEPENDENT INTERVENING CAUSE OF HIS CURRENT LEFT CLAVICLE CONDITION IS SUPPORTED BY SUBSTANTIAL EVIDENCE.**

The seminal issue in this matter is whether substantial evidence supports the determination of the Full Commission that the Claimant's admitted non-compliance with authorized medical treatment constitutes an independent intervening cause sufficient to break the chain of causation between his current left clavicle and neurological conditions and his compensable accident of April 12, 2012. It is well-established in South Carolina that "every natural consequence that flows from a compensable injury is also compensable unless the consequence is the result of an independent, intervening cause sufficient to break the chain of causation." *Whitfield v. Daniel Constr. Co.*, 266 S.C. 37, 40-41, 83 S.E.2d 460, 462 (1954); see also 1 Arthur Larson & Lex K. Larson, *Larson's Workers' Compensation Law* § 10.01, 10-1 (2010) (when the primary injury arises out of and in the course of employment, every natural consequence that flows from the injury likewise arises out of the employment, unless it is the result of an independent, intervening cause attributable to the Claimant's own intentional conduct). Importantly, an independent intervening accident may be established through circumstantial evidence which "need not reach such a degree of certainty as to exclude every reasonable or possible conclusion other than that reached." *Whitfield*, 266 S.C. at 43, 83 S.E.2d 463-64.

The Claimant now asserts the Full Commission ignored and misstated the "actual" testimony of Dr. Lehman to reach their "apparently preordained position" regarding the most likely cause of the Claimant's condition. See App. Br., p. 6. The Claimant goes to great lengths, citing numerous carefully selected excerpts from Dr. Lehman's deposition, to support his position that his admitted non-compliance was not the proximate cause of his current condition. The Claimant then asserts that Dr. Lehman's opinions are speculative and could not be stated to a reasonable degree of medical certainty. In addition, the Claimant submits the Full Commission failed to appreciate the testimony of Dr. Schiffern that the Claimant's clavicle was not healing prior to break of the plate regardless of whether he happened to be deer hunting.

Importantly, however, the Claimant does not dispute the finding of the Full Commission that he was completely non-compliant with the post-surgery medical instructions given to him by Dr. Lehman, nor does he dispute the ways in which he was non-compliant. Moreover, the Defendants contend the assertions by the Claimant are predicated upon an incomplete review and disregard of the credible deposition testimony of Dr. Lehman and Dr. Schiffern. Instead of addressing why the Full Commission did not rely upon the testimony of these doctors as offered by the Claimant, which is critical to understanding the decision of Full Commission, the Claimant simply submits the testimony as though it were ignored. This is the fatal flaw in the Claimant's argument.

In addition, the Claimant conveniently and completely failed to address the relevance of the compelling medical records submitted by the parties and the incredible hearing testimony of the Claimant himself, both of which unequivocally constitute substantial evidence to support the determination of the Full Commission. Accordingly, the Defendants maintain that when the

evidence in record is considered in its entirety, substantial evidence is present to support of determination of the Full Commission.

A. **Dr. Lehman's Medical Records And Testimony Confirm The Claimant's Non-Compliance Proximately Caused His Current Condition.**

The Claimant asserts Dr. Lehman could not state to a reasonable degree of medical certainty (more likely than not) the cause of the plate breakage and, therefore, the Full Commission erred in giving greater weight to his testimony. As noted by the Supreme Court in *Whitfield*, proving an independent intervening accident requires only circumstantial evidence, not testimony stated to a reasonable degree of medical certainty. *Whitfield*, 266 S.C. at 43, 83 S.E.2d 463-64. In this case, the Claimant has not only misstated the burden of proof, but the evidence in the record as well. Nonetheless, the Full Commission's determination of the independent intervening cause of Claimant's current left clavicle condition is supported by not only circumstantial evidence, but medical evidence stated to a reasonable degree of medical certainty.

Dr. Lehman performed a surgical repair of the Claimant's left clavicle fracture in July 2012 and, on August 2, 2012, reported after reviewing an x-ray that "[t]he gap at the nonunion is less than I would have expected." (R. p. 294). Dr. Lehman reported on September 14, 2012, that x-rays of the clavicle showed "a comminuted piece of the fracture at this point which seems to be incorporating perhaps a little bit." (R. p. 300). Dr. Lehman testified the fracture appeared to be partially healing with the hardware and plate still intact. (R. p. 212, lines 18-19). Despite the progress, Dr. Lehman advised the Claimant to continue to exercise "extreme protection" of the clavicle to prevent non-union of the fracture post-surgery. (R. p. 295; p. 208, lines 20-23).

In fact, Dr. Lehman instructed the Claimant to use the sling until he was instructed otherwise. (R. p. 209, lines 4-7).

On October 11, 2012, Dr. Lehman reported the Claimant "still is not in the sling and admits to not using it. He told my assistant that he had been out deer hunting." (R. p. 306). During his examination of the Claimant Dr. Lehman reported "he is not protecting his left shoulder or arm whatsoever." (R. p. 306). Importantly, an x-ray of the Claimant's clavicle for the first time since surgery revealed a broken plate. (R. p. 306; p. 216, lines 21-22). At the conclusion of his report, Dr. Lehman noted, "Mr. Neff has been completely non-compliant with treatment ever since the surgery, not using his sling, going deer hunting, etc., despite my concerns voice[d] day one regarding the potential of continued non-union and fracture of the plate. I have admonished Mr. Neff regarding his non-adherence to protocol and his non-compliance." (R. p. 307). The Claimant never addresses the relevance of his report in his Brief. Defendants assert this report is very compelling and certainly constitutes, when considered with the prior evidence of healing, substantial evidence to support an independent intervening cause of the Claimant's left clavicle condition. In addition, the deposition testimony of Dr. Lehman when considered objectively further supports this assertion.

Dr. Lehman testified at length regarding the significance of the Claimant's non-compliance. Specifically, Dr. Lehman testified he would not have recommended the Claimant deer hunt and/or use a rifle during his recovery from surgery, and was not aware prior to October 11, 2012, that he was doing so. (R. p. 215, line 8-p. 216, line 8). Dr. Lehman also testified "it would take considerable force . . . or repetitive force, I guess, in order to break a plate such as that." (R. p. 217, lines 3-5). Dr. Lehman then testified the Claimant's non-compliance "was certainly a factor" in the plate breaking, and then proceeded to testify to a reasonable degree of

medical certainty that the Claimant's use of his rifle and failure to use his sling caused the plate in his shoulder to break. (R. p. 218, lines 8-10; p. 222, lines 3-10; p. 222, line 20-p. 223, line 8). Like the critical report from October 11, 2012, the Claimant never addresses or disputes the relevance of this testimony.

In sum, Dr. Lehman reported the left clavicle was healing prior to the discovery of the breakage, confirmed his instructions to the Claimant regarding protecting the arm and the Claimant's subsequent "complete" non-compliance with the instructions, and testified to a reasonable degree of medical certainty, i.e. more likely than not, that the cause of the Claimant's current left clavicle condition was the non-compliance. As such, the determination of the Full Commission that the Claimant's non-compliance with medical instructions constitutes the direct intervening cause of his current condition is supported by substantial evidence.

B. **Dr. Schiffern's Opinions Are Without Credibility As They Were Predicated Upon A Lack Of Information And Are Inconsistent With The Indisputable Evidence In The Record.**

The Claimant submits the Full Commission mistakenly afforded greater weight to the medical records and deposition testimony of Dr. Lehman as opposed to that of Dr. Schiffern, as Dr. Schiffern is the "upper extremity specialist to whom Dr. Lehman deferred." See App. Br., p. 7. The Claimant then cites Dr. Schiffern's testimony that the Claimant's non-compliance had a limited impact on the failure of the hardware as the "bone wasn't healing" as compelling evidence for this Court to consider. (R. p. 192, line 11). Despite being the Claimant's self-selected medical expert, the Claimant cites to no other testimony or records of Dr. Schiffern. In addition, the Claimant fails to in any way address the flaws with Dr. Schiffern's opinions as expressed by the Full Commission, specifically that the opinions and testimony of Dr. Schiffern were predicated upon a lack of information, the Claimant's failure to disclose pertinent facts to

Dr. Schiffern, and Dr. Schiffern's admitted failure to review the evidence actually provided to him.

1. Dr. Schiffern admits his opinion and testimony regarding the alleged lack of healing of the clavicle is incorrect and, therefore, unreliable.

The Claimant's argument for reversal is based in part upon Dr. Schiffern's testimony that the non-compliance had a limited impact on the failure of the hardware as the "bone wasn't healing." (R. p. 192, line 11; p. 178, lines 17-18). Though not mentioned by the Claimant, Dr. Schiffern further testified that the "gap never really changed that I can tell from [Dr. Lehman's] records over the next three months until the plate broke." (R. p. 149, lines 7-9; p. 421). Of course, this testimony of Dr. Schiffern is contrary to the testimony and medical records of Dr. Lehman. The Defendants assert, and the Full Commission agreed, that the reason for the discrepancy in these opinions is the fact that Dr. Schiffern did not review the actual x-ray scans prior to rendering his opinions.

Dr. Schiffern testified he was not provided the x-ray scans to review prior to or during his evaluations of the Claimant, although he testified reviewing the scans would have been important. (R. p. 160, line 24-p. 162, line 3). Dr. Schiffern was then asked about the report of Dr. Lehman from September 14, 2012, *a report he testified he reviewed*, wherein Dr. Lehman reported the x-ray revealed the Claimant's clavicle was healing. (R. p. 170, lines 4-6). Dr. Schiffern admitted that the report was inconsistent with his testimony as to whether the bone was healing. (R. p. 170, lines 11-23; p. 183, lines 14-23). Dr. Schiffern consequently admitted that since he did not review the x-ray scan he would have to rely on Dr. Lehman's interpretation that the clavicle was healing just prior to October 11, 2012, when the non-compliance was discovered. (R. p. 183, lines 4-13).

The Defendants are without an explanation as to how Dr. Schiffern could provide the testimony he did without reviewing the x-ray or the reports of Dr. Lehman, both of which indicate the bone was in fact healing. Regardless, the decision of Full Commission to give greater weight to the opinions of Dr. Lehman is certainly supported by substantial evidence.

2. Claimant admitted non-compliance to Dr. Schiffern.

On February 18, 2013, Dr. Schiffern conducted his initial evaluation of the Claimant and noted the Claimant reported that he “wore a sling for 4 weeks” after surgery, and “once he came out of the sling (after four weeks) he started back to some use of the left arm.” (R. p. 410). The Claimant’s admission in the report is per se evidence that he violated the restrictions provided to him by Dr. Lehman, a fact actually confirmed by Dr. Schiffern in his deposition. (R. p. 179, lines 15-19). The Claimant again did not address or dispute this compelling evidence in his Brief.

3. Dr. Schiffern was unaware the Claimant was deer hunting.

Dr. Schiffern also admitted the Claimant did not disclose during either his February 2013 or June 2013 evaluation that he was deer hunting just prior to his plate breaking in October 2012. (R. p. 173, lines 9-16; pp. 408-412). Dr. Schiffern testified he would not have allowed the Claimant to conduct such activities due to the risk that such activities would cause the plate to break, and would deem such activities medical non-compliance. (R. p. 174, line 10-p. 175, line 8). Dr. Schiffern then testified as follows:

Q: And could that, according to Dr. Lehman, could that non-compliance have caused his plate to break.

A: It certainly could have.

Q: You don’t disagree with that testimony [of Dr. Lehman]?

A: I don't, no.

(R. p. 178, lines 1-5).

4. Dr. Schiffern admits he may not have reviewed the deposition testimony and October 11, 2012 report of Dr. Lehman, rendering his opinions and testimony misleading and unreliable.

The Defendants have already confirmed that Dr. Schiffern did not review the important x-ray scans or the Dr. Lehman's corresponding report from September 14, 2012. However, the most critical admission by Dr. Schiffern, especially in light of his testimony, is that he may not have reviewed the October 11, 2012 report of Dr. Lehman documenting the Claimant's non-compliance or the deposition testimony of Dr. Lehman confirming the Claimant's non-compliance was more likely than not the cause of the Claimant's current condition. (R. p. 184, lines 5-11). The testimony proceeded as follows:

Q: You didn't know about the deer hunting before, at least you didn't read the deer hunting part in the notes?

A: No.

Q: Is it fair to say that it's difficult to give opinions, such as D and A [in the affidavit] - - if you didn't actually review all of the records?

A: That's fair.

Q: Would you agree that it's difficult to give opinions as to what the most probably cause of the failure was without reviewing all the records and reviewing the actual x-ray scans, which you weren't provided? Do you agree with that?

A: That's fair.

Q: Is that a yes?

A: Yes.

(R. p. 184, lines 8-24).

The Defendants submit the Claimant's reliance upon the medical opinions and testimony of Dr. Schiffern is misplaced. In fact, Dr. Schiffern's testimony confirms his opinions were rendered without having read the medical reports and deposition testimony he reported and testified he reviewed. His testimony also confirms he did not review the actual x-ray scans which, contrary to his opinion, show the clavicle be healing prior to the report of October 11, 2012. Finally, his testimony establishes he was never advised of the Claimant's admitted non-compliance with medical treatment. Accordingly, the opinions of Dr. Schiffern were correctly afforded less weight by the Full Commission, and this decision is supported by substantial evidence in the record.

C. Claimant's Testimony Also Supports His Admitted Non-Compliance With The Medical Instructions From Dr. Lehman Caused His Current Clavicle Condition.

The final piece of this intervening accident analysis is the Claimant's own admission of medical non-compliance. It is undisputed that the Claimant went deer hunting between the appointments with Dr. Lehman on September 14, 2012, and October 11, 2012. (R. p. 90, line 21-p. 91, line 2). The Claimant proudly admitted performing this activity during both his deposition and Hearing testimony. The Claimant testified he shot his hunting gun (thirty ought six or powder rifle) twice using only his right arm, amazingly killing a deer on both occasions. (R. p. 92, lines 10-23; p. 99, lines 2-25). The Claimant proceeded to advise the Hearing Commissioner upon questioning that "no one told me I could not hunt." (R. p. 99, lines 19-20). Interestingly and conversely, the Claimant admitted in his deposition that he stopped deer hunting because a neighbor told him his activities were being investigated. (R. p. 274, lines 22-25). The Claimant denied giving this deposition testimony during the initial Hearing. (R. p. 116, line

5-p. 118, line 8). Of course, if the Claimant did not feel as though hunting was a potential threat to his recovery, he would not have stopped when alerted by a neighbor.

The Claimant then proceeded to deny that Dr. Lehman ever told him to wear his sling after surgery. (R. p. 108, lines 3-13). The Claimant later retracted this testimony and admitted he was only required to wear the sling until September 14, 2012, when he testified Dr. Lehman told him to remove it. (R. p. 109, line 15-p. 110, line 1). Of course this is contrary to the aforementioned reports and testimony of Dr. Lehman who confirmed the Claimant should have been wearing the sling through his appointment on October 11, 2012. (R. p. 213, lines 11-15). In addition, the Claimant testified that Dr. Schiffert's report that he stopped using the sling two or three weeks before the September 2012 visit "[is] a lie." (R. p. 114, lines 5-12). This testimony is not only inconsistent, but questions the opinions of the same physician the Claimant asked to provide an expert opinion.

Accordingly, the Claimant's admission of performing activities impliedly forbidden by Dr. Lehman, and his inconsistent and implausible testimony regarding the clear medical instructions provided to him by Dr. Lehman, constitute additional substantial evidence to support the finding of the Full Commission that his non-compliance caused the plate to break thereby resulting in his current condition.

II. FULL COMMISSION PROPERLY FOUND THE CLAIMANT WAS NOT ENTITLED TO FURTHER NEUROLOGICAL TREATMENT.

A. Claimant's Arguments Are Conclusory And Should Be Deemed Abandoned On Appeal.

The Claimant has failed to cite any legal authority to this Court to support his arguments for reversing the decision of the Full Commission as it pertains to an intervening cause of his neurological condition and, therefore, has abandoned his appeal as a matter of law.

It is well-established by our appellate courts that conclusory arguments, or arguments which fail to cite any supporting legal authority, are deemed abandoned on appeal. *Pack v. Department of Transportation*, 381 S.C. 526, 673 S.E.2d 461 (Ct. App. 2009) (citing *Mulherin-Howell v. Cobb*, 362 S.C. 588, 608 S.E.2d 587 (Ct. App. 2005); see also *First Sav. Bank v. McLean*, 314 S.C. 361, 444 S.E.2d 513 (1994)). In the matter at bar, the Claimant contends the findings of the Full Commission are “fallacious” and cites to this Court numerous reasons, none of which are supported by any legal authority or citations to the record. They are simply conclusory arguments. The Claimant then proceeds to accuse the Defendants of “obstructionism” without citing one piece of evidentiary support for the accusation. Again, this is simply a conclusory argument. As such, the appeal should be abandoned as a matter of law.

B. The Determination That The Alleged Current Neurological Condition Is The Result Of An Independent Intervening Cause Is Supported By Substantial Evidence.

The Full Commission found the Claimant's non-compliance with medical treatment extended beyond his left clavicle injury to his failure to comply with the instructions provided by the medical providers treating his purported neurological condition. In fact, the Claimant directly violated the medical instructions provided by his medical providers, which likely resulted in his current neurological condition, if any. The Full Commission applied this circumstantial evidence and found the violation resulted in an intervening cause sufficient to break the chain of causation between the accident and his alleged current neurological problems. *Whitfield*, 266 S.C. at 43, 83 S.E.2d 463-64 (An independent intervening accident may be established through circumstantial evidence which “need not reach such a degree of certainty as to exclude every reasonable or possible conclusion other than that reached.”). This determination is supported by substantial evidence.

On July 23, 2012, Dr. Hemanth Rao diagnosed the Claimant with post-concussive syndrome with symptoms of vertigo and memory loss, and requested him return for additional treatment, if necessary, after he completed surgery for his orthopedic injuries. (R. pp. 394-395). On August 27, 2012, the Claimant reported to Dr. Trevor Goldberg, an ear, nose and throat specialist with complaints of ringing in his ears. (R. p. 403). Dr. Goldberg noted that Claimant has a history of industrial noise exposure and recreational gunfire with and without using hearing protection. (R. p. 406). Dr. Goldberg diagnosed the Claimant with tinnitus and instructed him to "avoid loud noise exposure and wear hearing protection in noisy environments." (R. p. 405). On September 24, 2012, Dr. Rao reported the Claimant was continuing to have problems with memory loss. (R. p. 401). Three weeks later, the Defendants discovered the Claimant's medical non-compliance. (R. pp. 306-307).

During the Hearing, the Claimant unequivocally admitted he did not wear hearing protection as instructed by Dr. Goldberg during the alleged two occasions he was hunting from in September and October of 2012. (R. p. 128, lines 8-12). It stands to reason that firing a gun without hearing protection is problematic for a person allegedly dealing with post-concussive syndrome, hence the reason the Claimant was prohibited from doing so by his treating physician. Moreover, it is again inequitable to intentionally and grossly violate clear medical restrictions and then request additional medical treatment to treat the same condition which necessitated the restrictions.

Accordingly, the unequivocal and specific instructions of Dr. Golberg as well as the testimony of the Claimant constitute substantial evidence to support the finding of the Full Commission that the Claimant's non-compliance likely produced an intervening cause of his current alleged neurological condition sufficient to break the chain of causation.

C. Further Neurological Treatment Is Not Supported By Medical Evidence.

Section 42-15-60 provides that an employer is required to authorize medical treatment for "a period not exceeding ten weeks from the date of an injury . . . and for an additional time as in the judgment of the commission will tend to lessen the period of disability as evidenced by expert medical evidence stated to a reasonable degree of medical certainty." S.C. CODE ANN. § 42-15-60. In the matter at bar the Claimant has failed to provide any medical evidence stated to a reasonable degree of medical certainty that additional neurological treatment will tend to lessen his period of disability. In fact, the Claimant does not even argue to the contrary, but only cites to the Court two instances of inappropriate testimony by the Claimant, which the Claimant summarily rationalizes as the result of some neurological injury. This of course does not constitute expert medical evidence as required by Section 42-15-60.

The Defendants assert that the most relevant medical evidence regarding the status of the Claimant's neurological condition is provided by Dr. Schiffern, who evaluated his neurological status during an examination of the Claimant on June 20, 2013. By way of background, Dr. Schiffern reported during his initial evaluation on February 18, 2013, that the Claimant was still experiencing hearing problems; vision problems and dizziness. (R. pp. 411-412). However, on June 20, 2013, none of these problems were reported and, in fact, Dr. Schiffern noted the Claimant was no longer having dizziness. (R. p. 409). Again, the Claimant has not provided contemporaneous or more recent medical evidence to the contrary. Accordingly, the determination the Claimant is not entitled to additional neurological treatment under Section 42-15-60 is supported by substantial evidence.

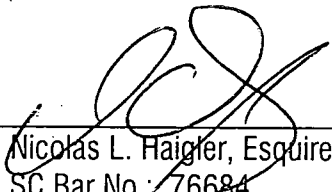
CONCLUSION

Based upon the foregoing, the Defendants respectfully request the Court of Appeals to affirm the Decision and Order of the South Carolina Workers' Compensation Commission.

Respectfully submitted,

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By: _____


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July 24, 2015

THE STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

APPEAL FROM
SOUTH CAROLINA WORKERS' COMPENSATION COMMISSION

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

WCC NO. 1203594
Appellate Case No. 2014-002611

James B. Neff Employee/Appellant

v.

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

APPELLANT'S FINAL REPLY BRIEF

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REPLY TO ARGUMENTS

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

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

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

able to get the native bones to abut (Rec. P. 231, lines 1-31) and this problem was subsequently compounded by the decision not to use a stainless steel plate and the carrier's failure to provide the requested bone stimulator and delay in providing any bone stimulator.

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

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

the effect of routine living activities. Dr. Lehman specifically states that the bones were widely separated and a gap existed that had to be made up (Rec. p. 230, lines 10-25). Also, the breakage of the plate occurred only after months of obstruction of treatment by the carrier and the uncontroverted continuation of the "gap." Before any alleged non-compliance bone simply didn't heal and the gap remained; therefore, any non-compliance was not even relevant much less the proximate cause of the failure nor an intervening cause of Claimant's condition.

Respondent engages in semantic gamesmanship in a full fledged effort to extract testimony out of context and apply a favorable spin. A vivid example of this is a purported quotation from Dr. Lehman's deposition (Rec. p. 222, lines 3-10) which the doctor supposedly states that Claimant's use of his rifle and failure to use his sling caused the plate in his shoulder to break. The actual exchange involved the use of the term "could" not the term "did." This is simply illustrative of Respondent's repeated distortion of the testimony and evidence so as to comport with the Appellate Panel's ill conceived decision.

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

Panel's findings were conclusory and totally without evidentiary support. The Respondent completely ignores the Neurological Institute records (Rec. p. 394-402) which refer to Claimant's neurological condition encompassing continuing memory loss at the time of his last visit on September 24, 2012.

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

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

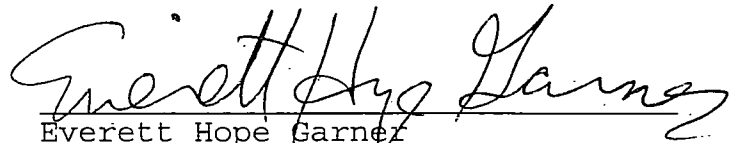
SUMMARY

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

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

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

Respectfully Submitted,



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