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SC SUPREME COURT

THE STATE OF SOUTH CAROLINA
In the Supreme Court

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

Appellate Case No.: 2016-001089
Unpublished Opinion No. 2016-UP-127

James B. Neff, Employee, Petitioner,

v.

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

RETURN TO PETITION FOR A WRIT OF CERTIORARI

Nicolas L. Haigler
SC Bar No.: 76684
Sowell Gray Stepp & Laffitte, LLC
1310 Gadsden Street
Post Office Box 11449
Columbia, South Carolina 29211
(803) 929-1400
Attorney for Respondents

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STATEMENT OF THE CASE

This is a workers' compensation appeal by James B. Neff ("Petitioner") from Opinion No. 2016-UP-127 of the South Carolina Court of Appeals filed on March 2, 2016, and the Order of the Court of Appeals denying the Petition for Rehearing, filed on April 22, 2016, which thereby affirmed the Decision and Order of the Full Commission Appellate Panel ("Appellate Panel") filed on December 3, 2014. The Decision and Order of the Appellate Panel served to unanimously reverse the Decision and Order of the Hearing Commissioner. Specifically, the Appellate Panel found the Petitioner's non-compliance constitutes an independent intervening cause of his current left clavicle and neurological conditions and, therefore, denied him further benefits under the Workers' Compensation Act. The Appellate Panel also awarded the Respondents credit for all temporary total disability benefits paid after October 11, 2012.

It is undisputed that the Petitioner suffered an injury by accident to his left wrist, left elbow, neck, ribs, concussion and left clavicle within the course and scope of his employment on April 12, 2012, resulting from an explosion on his job. The Respondents thereafter provided medical care and treatment for all body parts listed above with William L. Lehman, Jr., M.D., being the initial and primary authorized treating physician. It is also undisputed the Petitioner reached maximum medical improvement with regard to the injuries to his left wrist, left elbow, neck, and ribs on May 30, 2012, with no permanent impairment sustained to any of these body parts. (R. p. 202, l. 2-p. 206, l. 5).

Dr. Lehman subsequently performed a surgical repair of the 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 later testified the fracture appeared to be partially healing with the hardware and plate still intact. (R. p. 212, lines 18-19). Dr. Lehman nonetheless advised the Petitioner 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 Petitioner to use the sling until he was instructed otherwise. (R. p. 209, lines 4-7).

On October 11, 2012, Dr. Lehman reported the Petitioner “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 Petitioner Dr. Lehman reported “he is not protecting his left shoulder or arm whatsoever.” (R. p. 306). Importantly, an x-ray of the Petitioner’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, “[Petitioner] 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 [Petitioner] regarding his non-adherence to protocol and his non-compliance.” (R. p. 307).

Dr. Lehman subsequently testified he would not have recommended the Petitioner 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 Petitioner’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 Petitioner'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).

In February and June of 2013, the Petitioner was evaluated at the request of his attorney by Shadley Schiffern, M.D. Dr. Schiffern initially testified 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). 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). However, Dr. Schiffern then testified he was not provided the x-ray scans to review prior to or during his evaluations of the Petitioner, although he testified reviewing the scans was 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).

In addition, Dr. Schiffern conceded the Petitioner admitted to him violations of the restrictions placed on him by Dr. Lehman. (R. p. 179, lines 15-19). Dr. Schiffern further confirmed the Petitioner did not disclose during either his February or June of 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 Petitioner 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 admitted that such activities by the Petitioner “certainly could have” caused the plate to break, agreeing with Dr. Lehman on the issue. (R. p. 178, lines 1-5). Finally, Dr. Schiffern admitted it is difficult to give the opinions he initially gave if he did not review the x-rays or reports referencing deer hunting prior to rendering his opinions. (R. p. 184, lines 8-24).

ARGUMENT

I. THE COURT OF APPEALS CORRECTLY DETERMINED SUBSTANTIAL EVIDENCE SUPPORTED THE DECISION THAT MEDICAL NON-COMPLIANCE RESULTED IN AN INDEPENDENT INTERVENING CAUSE OF CLAIMANT’S CURRENT LEFT CLAVICLE AND NEUROLOGICAL CONDITIONS.

The seminal issue in this matter is whether substantial evidence supports the determination of the Court of Appeals that the Petitioner’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. Importantly, the Petitioner does not identify any reasons generally of the character which will be considered by this Court. *See* App. Ct. Rule 242(b).

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). 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 Petitioner now submits the Court of Appeals committed reversible error based primarily on two limited assertions. First, the Petitioner asserts he is being unfairly penalized for volunteering his participation in the "deer hunting activity". *See App. Pet.*, p. 4. In fact, the Petitioner maintains the Court "should be more concerned with the underlying cause of the injuries" than the intervening cause of his current medical condition. *See App. Pet.*, p. 6. This assertion has absolutely no factual or legal basis and should not be considered by this Court.

The Petitioner then asserts, after attempting to provide a limited comparative analysis of the evidence, specifically portions of Dr. Lehman's deposition testimony, that the evidentiary findings are based upon surmise and conjecture. *See App. Pet.*, pp. 5-6. Importantly, the Petitioner does not dispute the finding 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 Petitioner's assertion is predicated upon an incomplete review and disregard of the credible deposition testimony of Dr. Lehman and Dr. Schiffern. In fact, the Petitioner does not even provide this Court

with Dr. Lehman's opinion as to the cause of the break of the plate. The Petitioner also conveniently and completely fails to address the relevance of any of the medical records submitted by the parties or the hearing testimony of the Petitioner himself, both of which unequivocally constitute substantial evidence to support the determination of the Court of Appeals. Instead of addressing the evidence outlined above, which is paramount to understanding the affirmation by the Court of Appeals, the Petitioner simply maintains the carefully selected testimony of Dr. Lehman and the refuted opinion of Dr. Schiffenrath outweighth other evidence in the record. This is the fatal flaw in the Petitioner's argument.

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

The Petitioner provides this Court with a purported summary of the relevant testimony of Dr. Lehman supporting the reasons, other than the Petitioner's admitted non-compliance with medical treatment, for the possible failure of the plate. However, the Petitioner never addresses the critical report of Dr. Lehman from October 11, 2012, and avoids the actual medical conclusion of Dr. Lehman as it pertains to the cause of the failure of the plate.

By way of brief background, Dr. Lehman performed a surgical repair of the Petitioner's left clavicle fracture in July of 2012 and, in subsequent evaluations, reported the clavicle had begun to heal. (R. p. 212, lines 18-19; pp. 294, 300). Despite the progress, Dr. Lehman advised the Petitioner 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). Dr. Lehman further instructed the Petitioner to use the prescribed sling until he was instructed otherwise. (R. p. 209, lines 4-7).

On October 11, 2012, Dr. Lehman reported the Petitioner “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 Dr. Lehman reported “[Petitioner] is not protecting his left shoulder or arm whatsoever.” (R. p. 306). Importantly, an x-ray of the Petitioner’s clavicle on that date 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 Petitioner never addresses the relevance of his report.

In addition, Dr. Lehman testified he would not have recommended the Petitioner 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; testified the Petitioner’s non-compliance “was certainly a factor” in the plate breaking; and most importantly testified to a reasonable degree of medical certainty that the Petitioner’s use of his rifle and failure to use his sling caused the plate in his shoulder to break. (R. p. 215, line 8-p. 216, line 8; p. 218, lines 8-10; p. 222, lines 3-10; p. 222, line 20-p. 223, line 8). None of this testimony has been addressed by the Petitioner.

In sum, Dr. Lehman reported the left clavicle was healing prior to the discovery of the breakage, confirmed his instructions to the Petitioner 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 Petitioner’s current left clavicle condition was the non-compliance. These undisputed facts

constitute the substantial evidence to support the affirmation by the Court of Appeals and the denial of the Petition by this Court.

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 only other factual citation by the Petitioner is the initial testimony of Dr. Schiffern's regarding the issue of non-compliance. *See* App. Pet., p. 5. Despite being the Petitioner's self-selected medical expert, the Petitioner cites to no other testimony or records of Dr. Schiffern. In addition, the Petitioner fails to in any way address the flaws with Dr. Schiffern's opinions as identified by the Full Commission and affirmed by the Court of Appeals, specifically that the opinions and testimony of Dr. Schiffern were predicated upon a lack of information, the Petitioner'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 Petitioner'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 Petitioner, 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 reason for the apparent discrepancy can be easily explained by Dr. Schiffern's testimony that was not provided the x-ray scans to review prior to or during his evaluations of the Petitioner, although Dr. Schiffern 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 undisputed non-compliance was discovered. (R. p. 183, lines 4-13). This Court is now 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. The only reasonable answer is the testimony is misplaced.

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

On February 18, 2013, Dr. Schiffern conducted his initial evaluation of the Petitioner and noted the Petitioner 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 Petitioner'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 Petitioner again did not address or dispute this compelling evidence in his Petition.

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

Dr. Schiffern also admitted the Petitioner 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 Petitioner 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 Respondents have already confirmed that Dr. Schiffern did not review the important x-ray scans or 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 Petitioner's non-compliance or the deposition testimony of Dr. Lehman confirming the Petitioner's non-compliance was more likely than not the cause of the Petitioner'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 Respondents submit the Petitioner'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 (prior to the deposition) of the Petitioner'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 was correctly affirmed by the Court of Appeals.

II. PETITIONER'S APPEAL REGARDING HIS NEUROLOGICAL CONDITION HAS BEEN ABANDONED.

The Petitioner raises as part of the question for review whether substantial evidence supported the Court of Appeal's decision as it pertains to the continued compensability of his neurological condition. However, the Petitioner has failed to brief, argue, or cite to this Court any legal authority to support his assertion. It is well-established that a Petitioner's failure to provide an argument or any supporting legal authority renders the issue abandoned on appeal. *First Sav. Bank v. McLean*, 314 S.C. 361, 444 S.E.2d 513 (1994).

As such, the appeal as it pertains to the Petitioner's alleged neurological condition should be abandoned as a matter of law.

CONCLUSION

Based upon the foregoing, the Respondents respectfully request the Supreme Court of South Carolina to deny the Petition for a Writ of Certiorari.

Respectfully submitted,

SOWELL GRAY STEPP & LAFFITTE, L.L.C.

By: 

Nicolas L. Haigler, Esquire
SC Bar No.: 76684
1310 Gadsden Street
Post Office Box 11449
Columbia, South Carolina 29211
(803) 929-1400

Attorneys for Respondents

Columbia, South Carolina

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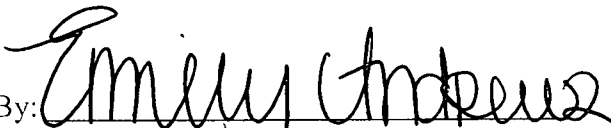
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Holdings, Inc., Carrier, Respondents.

PROOF OF SERVICE

I certify that I have served the Return to Petition for a Writ of Certiorari on James E. Neff by depositing a copy in the United States Mail, postage prepaid, on June 21, 2016, addressed to the claimant's attorney of record, Everett Hope Garner, Esquire, Holler, Dennis, Corbett, Ormond, Plante & Garner, 1777 Bull Street at Laurel, Post Office Box 11006, Columbia, SC 29211.

By: 

Emily S. Andrews
Sowell Gray Stepp & Laffitte, LLC
1310 Gadsden Street
Post Office Box 11449
Columbia, South Carolina 29211