

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM SOUTH CAROLINA
WORKERS' COMPENSATION COMMISSION

RECEIVED

Commissioners Melody L. James, T. Scott Beck, and Aisha Taylor JUN 19 2017

SC Court of Appeals

W.C.C. File No. 0908371

Timothy Hannah, Employee, Claimant Respondent,

v.

MJV, Inc./Butler Trucking, Employer, and
Palmetto Timber S.I. Fund c/o
Walker, Hunter & Associates, Inc., Carrier, ... Appellants.

RECORD ON APPEAL

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FULL COMMISSION APPELLATE PANEL

AMENDED DECISION AND ORDER

OF THE

SOUTH CAROLINA WORKERS' COMPENSATION COMMISSION

WCC FILE NO.0908371

TIMOTHY HANNAH,)
)
 EMPLOYEE)
 CLAIMANT/APPELLANT,)
)
 MJV, INC/BUTLER TRUCKING,)
)
 EMPLOYER,)
)
 PALMETTO TIMBER S. I. FUND)
 C/O WALKER, HUNTER &)
 ASSOCIATES, INC.)
)
 CARRIER,)
 DEFENDANTS/RESPONDENTS.)
)

**Full Commission Appellate Panel Review held in
Columbia, South Carolina, on November 17, 2015
per notices timely and properly served upon all
parties of interest.**

**Full Commission Appellate Panel Decision and
Order filed July 6, 2016**

APPEARANCES: W. E. Jenkinson, III, Esquire of Kingstree, South Carolina
representing the Claimant/Appellant.

Defendants/Respondents represented by R. Mark Davis,
Esquire, of Charleston, South Carolina

STATEMENT OF THE CASE

The parties were heard by Commissioner Gene McCaskill on September 25, 2014 in Conway, South Carolina. On July 2, 2015 the Hearing Commissioner issued the following Order:

1. Claimant did not suffer an injury by accident to his low back arising out of and occurring in the course of his employment;
2. Claimant is at maximum medical improvement for his cervical spine and left arm/elbow; Claimant is not entitled to any disability or wage loss under § 42-9-10, 42-9-20, 42-9-30, for his cervical spine and/or left arm/elbow;
3. Defendants are not responsible for payment of past, present, or future medical bills for treatment rendered by Dr. James Brennan;
4. Defendants are not responsible for and Claimant is not entitled to future medical treatment for his cervical spine, left arm, or low back.

Within the statutory period, counsel for Claimant filed an Application for Review in the case setting forth questions for appeal, copies of which were furnished to all interested parties prior to oral argument presented before the Full Commission Appellate Panel on November 17, 2015.

All proper testimony has been taken, together with all documentary evidence, and oral arguments have been delivered by to the individual members of the Full Commission Appellate Panel and the case has since been under study and consideration.

By Appeal. Claimant respectfully submitted the following questions asserting that the Hearing Commissioner erred in the following:

1. Did the Hearing Commissioner err in Finding of Fact No. 4 which in part states, "Using the 6th addition of the AMA Guides there should be no impairment to his cervical spine.

To make this determination I did use the Cervical Spine Regional Grid. His functional history is two grade above the clinical studies and physical examination, so it is considered unreliable. I did use the physical examination and clinical studies to calculate his final impairment, which as noted above, is zero." the error being that Dr. Bethea is the treating physician for the Claimant's elbow and not his cervical spine; Dr. Bethea did not see the Claimant's MRI which would have been conclusive of injury to the Claimant's cervical spine nor did he rely upon the findings and conclusions of Dr. Triana, the authorized doctor for the cervical spine injury?

2. Did the Hearing Commissioner err in Finding of Fact No. 5 which states, "Dr. Bethea signed a Form 14B on February 10, 2010, which reads, 'Based on the AMA Guidelines, the claimant has sustained a 0% medical impairment to cervical spine injured body part(s) and a 0% medical impairment to left elbow other affected body part(s)."; the error being that the evidence as well as well the testimony of the authorized treating physician for the cervical spine found on the date and for months thereafter the Claimant could not return to work and was in need of a surgical procedure for his cervical spine?
3. Did the Hearing Commissioner err in Finding of Fact No. 6 which states, "per the Form 14B Physician's Statement, the Claimant is able to return to work without restriction"; the error being that the evidence as well as well the testimony of the authorized treating physician for the cervical spine found on the same date and for months thereafter the Claimant could not return to work and was in need of a surgical procedure for his cervical spine?
4. Did the Hearing Commissioner err in Finding of Fact No. 7 which states, "Per the Form 14B, the Claimant will not need future medical care related to his or her work related

injury or illness on a reasonable degree of medical certainty (more likely than not)"; the error being that the authorized treating physician for the cervical spine, Dr. Triana, found at the same time that the Claimant needed a surgical procedure for the cervical spine as documented by MRIs and other diagnostic testing which had not been seen by Dr. Bethea?

5. Did the Hearing Commissioner err in Finding of Fact No. 16 which states, "S.C. Code Ann. §42-15-60 gives the employer the authority to select the treating physician"; the error being that this statute in no way precludes the Claimant from asserting a permanent impairment and a resulting rating as well as compensation?
6. Did the Hearing Commissioner err in Finding of Fact No. 19 which states "When the Claimant chose to proceed on his own, he took himself out from under the Workers' Compensation Act"; the error being that the Claimant still had a right to assert he had a permanent injury and resulting impairment for which he was entitled to compensation under the Workers' Compensation Act?
7. Did the Hearing Commissioner err in Finding of Fact No. 22 in finding that the Claimant had reached maximum medical improvement from his neck injury based upon the statement of Dr. Bethea; the error being Dr. Bethea was the treating physician for the elbow and not the cervical spine; the authorized physician for the cervical spine was Dr. Triana who as of late April (three months later) 2011 found that based upon CT scans and his care and treatment the Claimant was in need of future medical care and treatment including surgery and continued to keep him out of work?
8. Did the Hearing Commissioner err in Finding of Fact No. 23 which states, "Based on a review of the evidence as a whole, the Claimant is at MMI for his cervical spine and left

arm/elbow as of 02/10/10 (sic 2011), the date Dr. Bethea completed the Form 14B"; the error being that there was no credible evidence and testimony that the Claimant had reached MMI based on the documentation and testimony of the treating physician Dr. Triana who continued treatment to the cervical spine?

9. Did the Hearing Commissioner err in Finding of Fact No. 26 which states, "Claimant did not suffer any permanent partial disability of the back (cervical spine) as a result of this workers' compensation claim"; the error being that the evidence presented, particularly, that of the treating physician for the cervical spine, Dr. Triana, and the CT scans demonstrated the need for surgery and permanent partial disability of the cervical spine?
10. Did the Hearing Commissioner err in Finding of Fact No. 28 which states, "Claimant is not entitled to TTD benefits"; the error being that the Claimant was entitled to TTD benefits after the surgical procedure performed by Dr. Brennan on May 2013 for a period of three months based upon the evidence presented?
11. Did the Hearing Commissioner err in Finding of Fact No. 30 which states, "Claimant is not entitled to future medical treatment under Dodge or any other statute, regulation, or case governing the provision of medical benefits under S.C. Workers' Compensation Act"; the error being if the commission finds Claimant is entitled to an impairment rating for his cervical spine compensation resulting, Claimant would be entitled to the insertion of Utica-Mohawk language in any final order?
12. Did the Hearing Commissioner err in ordering "Claimant is at MMI for his cervical spine..."; the error being that the evidence presenting, particularly that of Dr. Triana, his authorized treating physician for the cervical spine, and Dr. Brennan establish the

Claimant was not at MMI for the cervical spine until three months following the surgery performed by Dr. Brennan in 2013?

13. Did the Hearing Commissioner err in ordering "Claimant is not entitled to any disability or wage loss under §42-9-10, 42-9-20, 42-9-30. for his cervical spine...": the error being that the evidence undisputedly shows the Claimant does have a permanent impairment and subsequently right to compensation under the provisions of the Workers' Compensation Act?

In Appellate review, the Full Commission Appellate Panel, shall pursuant to S.C. Code Ann. §42-17-50 review the award, weigh the evidence as presented at the initial hearing and, if good grounds be shown therefore, make its own Findings of Fact and reach its own Conclusions of Law consistent with or inconsistent with those of the Hearing Commissioner. This scope of review of the Full Commission is not limited. The Commission can, like the Single Commissioner, consider all of the evidence and reach its own Findings of Fact and Conclusions of Law. Green v. Raybestos-Manhattan, Inc., 250 S.C. 58, 64, 156 S.E.2d 318, 321 (1967).

It is well-established that the Full Commission is the ultimate fact finder in Workers' Compensation cases and is not necessarily bound by the Single Commissioner's Findings of Fact. Id. 58, 64. The Full Commission is empowered to make its own Findings of Fact and to reach its own Conclusions of Law consistent or inconsistent with those of the Single Commissioner. Id. The final determination of witness credibility and the weight to be accorded evidence is reserved to the Full Commission. Id.

After careful review of the instant case, the Commission, by unanimous vote, has determined to Affirm in part Reverse in part the Hearing Commissioner's Decision and Order as set forth below.

FULL COMMISSION APPELLATE PANEL REASONING

The Claimant/Appellant presented the Full Commission Appellate Panel with multiple grounds for review asserting the Hearing Commissioner erred in numerous Findings of Fact and Conclusions of Law. After a careful review of the evidence, we have determined that we reverse in part the Single Commissioner's Decision and Order, particularly Findings of Fact number 19 which states "When the Claimant chose to proceed on his own, he took himself out from under the Workers' Compensation Act" and number 21 "Proceeding on his own, the Claimant abandoned his recourse under the Workers' Compensation Act".

The Single Commissioner found the Defendants provided treatment for the Claimant's neck before he reached maximum medical improvement prior to February 2, 2010, the date of the Form 14B completed by Dr. Bethea. The Single Commissioner held that if the Claimant wished to pursue additional treatment for the neck, that pursuit would have to have been under the provisions of the Act for the Defendants to be held financially responsible. Since the Claimant sought treatment on his own, without advising his attorney or requesting treatment from the Defendants, the Single Commissioner found that the Claimant abandoned his recourse under the Act. Based on this holding the Single Commissioner concluded that the Claimant was not entitled to any disability for his cervical spine. Defendants are not responsible for the payment of past, present or future medical bills for treatment rendered by Dr. James Brennan, and Defendants are not responsible for any future medical treatment.

It is uncontested that the Claimant suffered an injury to his cervical spine in a work related accident. The Claimant had an initial hearing related only to his low back pain which he prevailed before the Single Commissioner and was reversed by the Full Commission in 2011. Subsequently, Claimant signed a Form 17 in the fall of 2011. Thereafter he continued to have

problems with his neck hurting and sought medical care and treatment using his wife's insurance. His family practitioner referred him to Dr. Brennan, a neurosurgeon in Florence, who ordered a new MRI which revealed significant disc bulge at C6-7 and as a result Dr. Brennan operated on the Claimant's neck, performing a fusion. Dr. Brennan continued to treat the Claimant through the end of 2012 and released him with an impairment rating of 28% of the cervical spine.

Defendant has raised the defense of res judicata and collateral estoppel. We find that these defenses do not apply because the subject matter is not the same as in the prior litigation which was adjudicated based upon the lumbar spine not the cervical spine. Likewise the defendant raised the Doctrine of Laches which we do not find applies because the Claimant was not negligent and unreasonable in his explanation of the length of time under the circumstances of his claim. Further, there is no finding of material prejudice as required by the Doctrine of Laches.

Of particular concern is the finding of the Single Commissioner that when the Claimant chose to proceed on his own he took himself out from under the Workers' Compensation Act and abandoned his recourse under the Act. This finding relied upon §42-15-60 as precluding the Claimant from receiving unauthorized medical benefits.

Nowhere does §42-15-60 preclude a Claimant from independently obtaining a rating from a non-treating physician and receiving an unauthorized evaluation from said physician. Claimant and employee often each secure ratings for presentation to the Commission and the employer does not pay for the rating secured by the Claimant in this situation. Further, Claimant requested that the employer be liable for the cost of care with Dr. Brennan and additional temporary total payments during the recovery. The denial of this request does not require and should not lead to the denial of the award of permanency based on the findings of Dr. Brennan.

The evidence is uncontroverted that the treatment rendered by Dr. Brennan is the treatment which is being recommended by Dr. Triana when he was the authorized treating physician. Brennan found a 28% impairment to the cervical spine which according to his opinion, to a reasonable degree of medical certainty is a result of the injury sustained by the Claimant in the accident of July 14, 2009.

AMENDMENTS TO ORIGINAL ORDER AND DECISION OF THE FULL

COMMISSION:

The Appellate Panel of the Full Commission issued a Decision and Order in this case on February 23, 2016.

On February 29, 2016 the Defendants filed a "Motion for Reconsideration." The Defendants requested that the Commission reconsider Defendants' credit for overpayment of Temporary Total Disability benefits from the period of February 10, 2010 through August 16, 2011. The Defendants also requested that the Commission reconsider the findings and conclusion that Claimant suffered 28% permanent partial disability to the cervical spine, and amend the Appellate Panel Order dated February 23, 2016 to reflect those changes. The Defendants further requested that the Commission amend the Order to reflect that the Act provides for disability awards for the "back" and not specific segments of the spine, e.g., "cervical spine."

The Claimant in response filed a reply on March 11, 2016 asserting that the Temporary Total Disability payments were properly paid because the Claimant was entitled to payment under the Order of the single Commissioner through the hearing of the Full Commission on July 25, 2011. The Claimant further asserts that he suffered an unquestioned injury to the cervical spine in the roll-over accident of his 18-wheeler vehicle, which was well documented from the time of his injury, that the injury in fact did occur and a fusion resulted which in turn caused a

28% impairment to his cervical spine.

The Defendants' Motion for Reconsideration is granted in part and denied in part. The request for credit for overpayment is denied. The Defendants' request that the Commission reconsider the permanent partial disability award is denied. The Defendants' request for the award of permanent partial disability to be termed as an award to the back as provided by the Act is granted.

This Order amends the Findings of Fact and Conclusions of Law to reflect the disposition of the Motion for Reconsideration as follows:

FINDINGS OF FACT:

1. Claimant suffered permanent injury to his cervical spine and using the 6th Edition of the AMA Guidelines, Claimant suffered a 28% impairment to his back.
2. S.C. Code Ann. §42-15-60 in no way precludes the Claimant from asserting a permanent impairment and resulting rating as well as compensation.
3. When the Claimant chose to proceed on his own he did not take himself out from under the Workers' Compensation Act and the Claimant had a right to assert he had a permanent injury and resulting impairment for which he was entitled to compensation under the Workers' Compensation Act.
4. The Claimant did suffer permanent partial disability of the back as a result of the injuries sustained in this work related accident.
5. The Claimant has reached MMI for the injuries sustained in this work related accident.
6. The Defendants are not entitled to a credit for Temporary Total Disability benefits paid to the Claimant during the period of February 10, 2010 through August 16, 2011.

CONCLUSIONS OF LAW:

1. Claimant has sustained a 28% permanent partial disability to the back based upon a fusion of C6-7 and the Claimant's testimony.
2. S.C. Code Ann. §42-15-60 which gives the employer the authority to select the treating physician does not preclude the Claimant from asserting a permanent impairment and resulting rating as well as compensation.
3. When the Claimant chose to proceed on his own he did not take himself out from under the Workers' Compensation Act. The Claimant still had a right to assert he had a permanent injury and resulting impairment for which he was entitled to compensation under the Workers' Compensation Act.
4. The Claimant did suffer a permanent partial disability of the back as a result of his Workers' Compensation claim and the evidence presented, particularly that of the treating physician of the cervical spine, Dr. Triana, and the CT scans, demonstrated the need for surgery and permanent partial disability of the back.
5. Based upon a disability to the back of 28%, the Claimant is entitled to 84 weeks of compensation at the rate of \$381.32 per week for a total of \$32,030.88, said payments to be made in a lump sum to be calculated in accordance with Regulation 67-1605.
6. The Claimant has reached MMI for the injuries sustained in this work related accident.
7. This lump sum is made for payment which shall continue for the balance of the life of the Claimant and thus, through payment in a lump sum shall be reached by the payment of attorney fees in the amount of \$10,570.19 and costs in the amount of \$7,627.44.
8. The Claimant's attorney in his Form 61 has waived the costs leaving the attorney fees at \$10,570.19 and the Claimant will receive \$21,460.69.

9. The lump sum is compensation for permanent impairment that will affect the Claimant for the rest of his life.

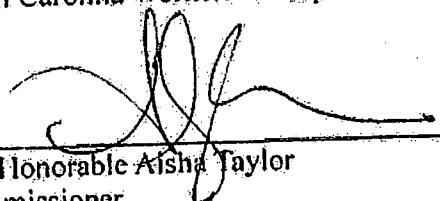
10. The Claimant's remaining life expectancy from August 31, 2011, (the date of the Form 17) the date of the last payment of salary benefits, is 348 months. Therefore, even though paid in a lump sum, the Claimant's benefits shall be considered to be \$61.66 per month for 348 months.

IT IS SO ORDERED!


The Honorable Melody L. James, Chair
Commissioner
South Carolina Workers' Compensation Commission

WE CONCUR:


The Honorable T. Scott Beck
Commissioner
South Carolina Workers' Compensation Commission


The Honorable Aisha Taylor
Commissioner
South Carolina Workers' Compensation Commission

CERTIFICATE OF SERVICE

This is to certify that the undersigned has on this date served a copy of this order in the above entitled action upon all parties to this case by sending an electronic copy hereof by electronic mail addressed to the attorneys for said parties; or if there is an unrepresented party(ies), by depositing a copy hereof, postage paid in the United States mail, first class, addressed to the unrepresented party(ies) and to the attorney(s) for the represented party(ies).

By Eugenia Hollmon on July 6, 2016

FULL COMMISSION APPELLATE PANEL

DECISION AND ORDER

OF THE

SOUTH CAROLINA WORKERS' COMPENSATION COMMISSION

WCC FILE NO.0908371

TIMOTHY HANNAH,)
)
 EMPLOYEE)
 CLAIMANT/APPELLANT)
)
 MJV, INC/BUTLER TRUCKING,)
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 EMPLOYER,)
)
 PALMETTO TIMBER S. I. FUND)
 C/O WALKER, HUNTER &)
 ASSOCIATES, INC.)
)
 CARRIER,)
 DEFENDANTS/RESPONDENTS.)
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**Full Commission Appellate Panel Review held in
Columbia, South Carolina, on November 17, 2015
per notices timely and properly served upon all
parties of interest.**

**Full Commission Appellate Panel Decision and
Order filed February 23rd, 2016**

APPEARANCES: W. E. Jenkinson, III, Esquire of Kingstree, South Carolina
representing the Claimant/Appellant.

Defendants/Respondents represented by R. Mark Davis,
Esquire, of Charleston, South Carolina

STATEMENT OF THE CASE

The Hearing Commissioner heard the parties on September 25, 2014 in Conway, South Carolina. On July 2, 2015 the Hearing Commissioner issued the following Order:

1. Claimant did not suffer and injury by accident to his low back arising out of and occurring in the course of his employment;
2. Claimant is at maximum medical improvement for his cervical spine and left arm/elbow; Claimant is not entitled to any disability or wage loss under § 42-9-10, 42-9-20, 42-930, for his cervical spine and/or left arm/elbow;
3. Defendants are not responsible for payment of past, present or future medical bills for treatment rendered by Dr. James Brennan;
4. Defendants are not responsible for and Claimant is not entitled to future medical treatment for his cervical spine, left arm, or low back.

Within the statutory period, counsel for Claimant filed an Application for Review in the case setting forth their reasons, copies of which were furnished to all interested parties prior to oral argument presented before the Full Commission Appellate Panel on November 17, 2015.

All proper testimony has been taken. As such, together with all documentary evidence, has been delivered by oral argument to the individual members of the Full Commission Appellate Panel and has since been under study and consideration.

By Appeal, it is respectfully submitted that the Hearing Commissioner erred in the following:

1. Did the Hearing Commissioner err in Finding of Fact No. 4 which in part states, "Using the 6th addition of the AMA Guides there should be no impairment to his cervical spine.

To make this determination I did use the Cervical Spine Regional Grid. His functional history is two grade above the clinical studies and physical examination, so it is considered unreliable. I did use the physical examination and clinical studies to calculate his final impairment, which as noted above, is zero.”; the error being that Dr. Bethea is the treating physician for the Claimant’s elbow and not his cervical spine; Dr. Bethea did not see the Claimant’s MRI which would have been conclusive of injury to the Claimant’s cervical spine nor did he rely upon the findings and conclusions of Dr. Triana, the authorized doctor for the cervical spine injury.

2. Did the Hearing Commissioner err in Finding of Fact No. 5 which states, “Dr. Bethea signed a Form 14B on February 10, 2010, which reads, ‘Based on the AMA Guidelines, the claimant has sustained a 0% medical impairment to cervical spine injured body part(s) and a 0% medical impairment to left elbow other affected body part(s).”; the error being that the evidence as well as well the testimony of the authorized treating physician for the cervical spine found on the date and for months thereafter the Claimant could not return to work and was in need of a surgical procedure for his cervical spine.
3. Did the Hearing Commissioner err in Finding of Fact No. 6 which states, “per the Form 14B Physician’s Statement, the Claimant is able to return to work without restriction”; the error being that the evidence as well as well the testimony of the authorized treating physician for the cervical spine found on the date same date and for months thereafter the Claimant could not return to work and was in need of a surgical procedure for his cervical spine.
4. Did the Hearing Commissioner err in Finding of Fact No. 7 which states, “Per the Form 14B, the Claimant will not need future medical care related to his or her work related

injury or illness on a reasonable degree of medical certainty (more likely than not)"; the error being that the authorized treating physician for the cervical spine, Dr. Triana, found at the same time that the Claimant needed a surgical procedure for the cervical spine as documented by MRIs and other diagnostic testing which had not been seen by Dr. Bethea.

5. Did the Hearing Commissioner err in Finding of Fact No. 16 which states, "S.C. Code Ann. §42-15-60 gives the employer the authority to select the treating physician"; the error being that this statute in no way precludes the Claimant from asserting a permanent impairment and an resulting rating as well as compensation?
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7. Did the Hearing Commissioner err in Finding of Fact No. 22 in finding that the Claimant had reached maximum medical improvement from his neck injury based upon the statement of Dr. Bethea; the error being Dr. Bethea was the treating physician for the elbow and not the cervical spine; the authorized physician for the cervical spine was Dr. Triana who as late as April (three months later) 2011 found that based upon CT scans and his care and treatment the Claimant was in need of future medical care and treatment including surgery and continued to keep him out of work?
8. Did the Hearing Commissioner err in Finding of Fact No. 23 which states, "Based on a review of the evidence as a whole, the Claimant is at MMI for his cervical spine and left

arm/elbow as of 02/10/10 (sic 2011), the date Dr. Bethea completed the Form 14B"; the error being that there was no credible evidence and testimony that the Claimant had reached MMI based on the documentation and testimony of the treating physician Dr. Triana who continued treatment to the cervical spine?

9. Did the Hearing Commissioner err in Finding of Fact No. 26 which states, "Claimant did not suffer any permanent partial disability of the back (cervical spine) as a result of this workers' compensation claim"; the error being that the evidence presented, particularly, that of the treating physician for the cervical spine, Dr. Triana, and the CT scans demonstrated the need for surgery and permanent partial disability of the cervical spine?
10. Did the Hearing Commissioner err in Finding of Fact No. 28 which states, "Claimant is not entitled to TTD benefits"; the error being that the Claimant was entitled to TTD benefits after the surgical procedure performed by Dr. Brennan on May 2013 for a period of three months based upon the evidence presented?
11. Did the Hearing Commissioner err in Finding of Fact No. 30 which states, 'Claimant is not entitled to future medical treatment under Dodge or any other statute, regulation, or case governing the provision of medical benefits under S.C. Workers' Compensation Act"; the error being if the commission find Claimant is entitled to an impairment rating for his cervical spine compensation resulting, Claimant would be entitled to the insertion of Utica-Mohawk language in any final order.
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Claimant was not at MMI for the cervical spine until three months following the surgery performed by Dr. Brennan in 2013.

13. Did the Hearing Commissioner err in ordering "Claimant is not entitled to any disability or wage loss under §42-9-10, 42-6-20, 42-9-30, for his cervical spine..."; the error being that the evidence undisputedly shows the Claimant does have a permanent impairment and subsequently right to compensation under the provisions of the Workers' Compensation Act.

In Appellate review, the Full Commission Appellate Panel, shall pursuant to S.C. Code Ann. §42-17-50 reviews the award, weighs the evidence as presented at the initial hearing and, if good grounds be shown, therefore, make its own Findings of Fact and reach its own Conclusions of Law consistent with or inconsistent with those of the Hearing Commissioner. This scope of review of the Full Commission is not limited. The Commission can, like the Single Commissioner, consider all of the evidence and reach its own Findings of Fact and Conclusions of Law. Green v. Raybestos-Manhattan, Inc., 250 S.C. 58, 64, 156 S.E.2d 318, 321 (S. C. 1967).

It is well-established that the Full Commission is the ultimate fact finder in Workers' Compensation cases and is not necessarily bound by the Single Commissioner' findings of fact. Id. 58, 64. The Full Commission is empowered to make its own Findings of Fact and to reach its own Conclusions of Law consistent or inconsistent with those of the Single Commissioner. Id. The final determination of witness credibility and the weight to be accorded evidence is reserved to the Full Commission. Id.

After careful review of the instant case, the Commission, by unanimous vote, has determined to **Affirm in part Reverse in part** the Hearing Commissioner's Decision and Order as set forth below.

FULL COMMISSION APPELLATE PANEL REASONING

The Claimant/Appellant presented the Full Commission Appellate Panel with multiple grounds for review asserting the Hearing Commissioner erred in numerous Findings of Fact and Conclusions of Law. After a careful review of the evidence, we have determined that we reverse in part the Single Commissioner's Decision and Order, particularly Findings of Fact number 19 which states "When the Claimant chose to proceed on his own, he took himself out from under the Workers' Compensation Act" and number 21 "Proceeding own his own, the Claimant abandoned his recourse under the Workers' Compensation Act".

The Hearing Commissioner found the Defendants provided treatment for the Claimant's neck before he reached maximum medical improvement prior to February 2, 2010, the date of the Form 14B completed by Dr. Bethea. The Single Commissioner held that if the Claimant wished to pursue additional treatment for the neck, that pursuit would have to have been under the provisions of the Act for the Defendants to be held financially responsible. Since the Claimant sought treatment on his own, without advising his attorney or requesting treatment from the Defendants, the Single Commissioner found that the Claimant abandoned his recourse under the Act. Based on this holding the Single Commissioner concluded that the Claimant was not entitled to any disability for his cervical spine, Defendants are not responsible for the payment of past, present or future medical bills for treatment rendered by Dr. James Brennan and Defendants are not responsible for any future medical treatment.

It is uncontested that the Claimant suffered an injury to his cervical spine in a work related accident. The Claimant had an initial hearing related only to his low back pain which he prevailed before the Single Commissioner and was reversed by the Full Commission in 2011. Subsequently, Claimant signed a Form 17 in the fall of 2011. Thereafter he continued to have

problems with his neck hurting and sought medical care and treatment using his wife's insurance. His family practitioner referred him to Dr. Brennan, a neurosurgeon on Florence, who ordered a new MRI which revealed significant disc bulge at C6-7 and as a result Dr. Brennan operated on the Claimant's neck, performing a fusion. Brennan continued to treat the Claimant through the end of 2012 and released him with an impairment rating of 28% of the cervical spine.

Defendant has raised the defense of res judicata and collateral estoppel. We find that these defenses do not apply because the subject matter is not the same as in the prior litigation which was adjudicated based upon the lumbar spine not the cervical spine. Likewise the defendant raised the Doctrine of Laches which we do not find applies because the Claimant was not negligent and unreasonable in his explanation of the length of time under the circumstances of his claim. Further, there is no finding of material prejudice as required by the Doctrine of Laches.

Of particular concern is the finding of the Single Commissioner that when the Claimant chose to proceed on his own he took himself out from under the Workers' Compensation Act and abandoned his recourse under the Act. This finding relied upon §42-15-60 as precluding the Claimant from receiving unauthorized medical benefits.

Nowhere does §42-15-60 preclude a Claimant from independently obtaining a rating from a non-treating and not authorized evaluation from his physician. Claimant and employee often each secure ratings for presentation to the Commission and the employer does not pay for the rating secured by the Claimant in this situation. Further, Claimant requested that the employer be liable for the cost of care with Dr. Brennan and additional temporary total payments during the recovery. The denial of this request does not require and should not lead to the denial of the award of permanency based on the findings of Dr. Brennan. The evidence is

uncontroverted that the treatment rendered by Dr. Brennan is the treatment which is being recommended by Dr. Triana when he was the authorized treating physician. Brennan found a 28% impairment to the cervical spine which according to his opinion, to a reasonable degree of medical certainty is a result of the injury sustained by the Claimant in the accident of July 14, 2009.

FINDINGS OF FACT:

1. Claimant suffered permanent injury to his cervical spine and using the 6th Edition of the AMA Guidelines, Claimant suffered a 28% impairment to his cervical spine.
2. SC Code Ann. §42-15-60 in no way precludes the Claimant from asserting a permanent impairment and resulting rating as well as compensation.
3. When the Claimant chose to proceed on his own he did not take himself out from under the Workers' Compensation Act and the Claimant had a right to assert he had a permanent injury and resulting impairment for which he was entitled to compensation under the Workers' Compensation Act.
4. The Claimant did suffer permanent partial disability of the cervical spine as a result of the Workers' Compensation claim.
5. The Claimant has reached MMI for the injuries sustained in this work related accident.

CONCLUSIONS OF LAW:

Based on the foregoing, and the documented evidence submitted by the respective parties pursuant to the Administrative Procedures Act, the Findings of Fact and Conclusions of Law of the Single Commissioner are affirmed except as to the following Conclusions of Law which we reverse:

1. Claimant has sustained a 28% permanent partial disability to the cervical spine based

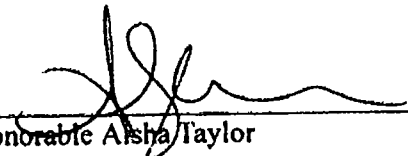
upon a fusion of C6-7 and the Claimant's testimony.

2. SC Code Ann. §42-15-60 which gives the employer the authority to select the treating physician does not preclude the Claimant from asserting a permanent impairment and resulting rating as well as compensation.
3. When the Claimant chose to proceed on his own he did not take himself out from under the Workers' Compensation Act. The Claimant still had a right to assert he had a permanent injury and resulting impairment for which he was entitled to compensation under the Workers' compensation Act.
4. The Claimant did suffer a permanent partial disability of the cervical spine as a result of his Workers' Compensation claim and the evidence presented, particularly that of the treating physician of the cervical spine, Dr. Triana, and the CT scans, demonstrated the need for surgery and permanent partial disability of the cervical spine.
5. Based upon the rating of Dr. Brennan to the cervical spine of 28% Claimant is entitled to 84 weeks of compensation at the rate of \$381.32 per week for a total of \$32,030.88, said payments to be made in a lump sum calculated to be in accordance with Regulation 67-1605.
6. The Claimant has reached MMI for the injuries sustained in this work related accident.
7. This lump sum is made for payment which shall continue for the balance of the life of the Claimant and thus, through payment in a lump sum shall be reached by the payment of attorney fees in the amount of \$10,570.19 and costs in the amount of \$7,627.44.
8. The Claimant's attorney in his Form 61 has waived the costs leaving the attorney fees at \$10,570.19 and the Claimant will receive \$21,460.69.
9. The lump sum is compensation for permanent impairment that will affect the Claimant

for the rest of his life.

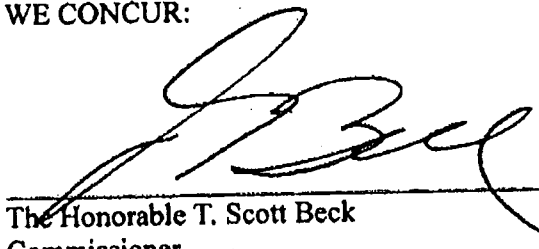
10. The Claimant's remaining life expectancy from August 31, 2011 (the date of the Form 17) the date of the last payment of salary benefits is 348 months. Therefore even though paid in a lump sum the Claimant's benefits shall be considered to be \$61.66 per month for 348 months.

IT IS SO ORDERED!

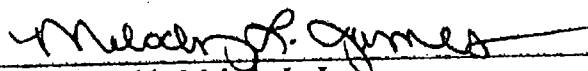


The Honorable Aisha Taylor
Commissioner
South Carolina Workers' Compensation Commission

WE CONCUR:



The Honorable T. Scott Beck
Commissioner
South Carolina Workers' Compensation Commission



The Honorable Melody L. James
Commissioner
South Carolina Workers' Compensation Commission

CERTIFICATE OF SERVICE

This is to certify that the undersigned has on this date served a copy of this order in the above entitled action upon all parties to this case by sending an electronic copy hereof by electronic mail addressed to the attorneys for said parties; or if there is an unrepresented party(ies), by depositing a copy hereof, postage paid in the United States mail, first class, addressed to the unrepresented party(ies) and to the attorney(s) for the represented party(ies).

By Kim Falls on February 23, 2016

SOUTH CAROLINA WORKERS' COMPENSATION COMMISSION

W.C.C. FILE NO: 0908371

TIMOTHY HANNAN,

Employee,

Claimant,

vs.

MJV/BUTLER TRUCKING INC.,

Employer,

AND

PALMETTO TIMBER S.I. FUND c/o
WALKER, HUNTER & ASSOCIATES,
INC.,

Carrier,

Defendants.

DECISION AND ORDER

DATE OF HEARING:

Hearing held in Conway, S.C. on September 25, 2014.

APPEARANCES:

Claimant appeared and represented by W.E. Jenkinson, III,
Esquire of Jenkinson, Jarrett & Kellahan, PA of Kingstree,
South Carolina.

Defendants represented by R. Mark Davis, Esquire of
McAngus Goudelock & Courie, L.L.C. of Charleston,
South Carolina.

PURPOSE OF THE HEARING: To determine all issues as set forth in Forms 50 and 51.

COMMISSIONER:

Commissioner Gene McCaskill

FILED:

July 2, 2015

STIPULATIONS

Counsel for all parties stipulated to the following issues:

1. The purpose of the hearing is to determine the issues set forth in the hearing notice and Remand on Issues as set forth by Full Commission Order.
2. Notice of the hearing was timely and properly served on all parties.
3. Jurisdiction and venue are proper.
4. The APA submissions of both Claimant and Defendants, and the Commissions' file were made part of the record with the exception of any self-serving declarations or unstipulated medical reports.

APA SUBMISSIONS

Claimant's APA Submissions

APA#		DATES	PAGES
1.	Timothy Hannah Timeline Factual/Procedural History 2009- 2014	9/11/2014	1-2

Defendant's APA Submissions

APA#	DOCTOR	PRACTICE	DATES	PAGES
1.		Georgetown Memorial Hospital	07/14/09 to 11/23/09	1-21
2.		Doctors Care	07/21/09 to 09/09/09	22-32
3.		Next Step Rehabilitation Services	07/29/09 to 09/17/09	33-59
4.	James F. Bethea, M.D.	Columbia Orthopaedic Specialists, LLC	12/04/09 to 12/10/10	60-66
5.		Providence Hospital	12/22/09	67-68
Ex. A	Form 17		08/31/11	69
Ex. B	S.C. Court of Appeals' Decision		09/26/12	70-72

APA#	DOCTOR	PRACTICE	DATES	PAGES
Ex. C	South Carolina Workers' Compensation Commission's Decision and Order		11/5/13	73-89

STATEMENT OF THE CASE

This matter stems from an 18-wheeler rollover accident which occurred on July 14, 2009. Claimant sustained an intervening accident on August 25, 2009 when he fell on some steps at his home and hit his face on a railing. The first MRI of Claimant's cervical spine was not taken until three weeks after the August 25, 2009 incident.

Claimant's injury to his cervical spine and left elbow were uncontested. Claimant's alleged injury to his lumbar spine was first tried resulting in a ruling in favor of Claimant. This decision was appealed and in July, 2011, this ruling was reversed by the Full Commission and the lumbar spine was found not to be included. This decision was then appealed to the Court of Appeals and in late August, 2012, the Court affirmed the decision of the Full Commission.

Claimant signed a Form 17 stopped his disability checks. Claimant was originally treated by orthopedist Dr. Triana who provided epidurals in the neck. Dr. Triana had found that Claimant could not go back to work because of his injuries to his low back and cervical spine, noting C5-6. Dr. Bethea performed a surgical procedure on his elbow and on January 6, 2010, released Claimant at MMI with a 0% impairment rating on his cervical spine. In June, 2012, after being placed at MMI, given a 0% impairment rating, and through his own private insurance carrier, Claimant underwent a C6-7 fusion to the cervical spine performed by Dr. Brennan. Claimant admits he never asked permission or authorization for this surgery. During a deposition of Dr. Brennan it was pointed out that Dr. Triana had referenced C5-6 for his rating,

yet the fusion occurred at C6-7. It is Claimant's, and Dr. Brennan's position that Dr. Triana misspoke when referring to C5-6. Defendants argue Dr. Brennan interpreting Dr. Triana's thinking or meaning. Claimant's attorney admits he did not know of the surgery and filed for a change of condition. Defendant's contend that the order of the Full Commission from June 25, 2011, Conclusion of Law Number 6, states "We conclude that the claimant received all proper medical care that would tend to lessen his period of disability." Defendants contend this portion of the Order was never appealed and is still good law. Further, Defendants contend that Claimant was implicitly found to be at maximum medical improvement in that Order and, short of that, would bar Defendants from being held responsible for the Claimant's fusion surgery and associated costs.

Claimant received benefits from the date of accident on July 14, 2009 through August 16, 2011, for a period of 84 weeks. Credit for overpayment was preserved at the initial hearing by order of Commissioner Wilkerson.

On January 18, 2013, a hearing in this matter was held to determine if Employer/Carrier is required to pay compensation and whether Employer/Carrier is entitled to a credit for overpayment of TTD. A further issue to be determined was whether or not Claimant is entitled to additional medical care and treatment for injuries to his cervical spine and whether Claimant had reached maximum medical improvement for his neck injury.

After the Decision and Order dated November 5, 2013 from Commissioner Roche was issued, Defendants appealed to the Full Commission. The hearing before the Full Commission was held on April 21, 2014, at which time Commissioner Roche's Order was reversed and vacated. The matter was remanded back to a single commissioner for determination on all issues set forth in Claimant's original Form 50, and Defendant's original Form 21.

EVIDENCE OF THE CASE

Claimant, Timothy Hannah

On July 14, 2009, Claimant was driving a load to Georgetown when the steering mechanism on his truck locked up and he lost control and the truck turned over (T. 21-22, ll. 21-1). He suffered injuries to his neck, chest, elbow and lower back (T. 22, ll. 5-6). Claimant is aware that the primary issue being addressed at the hearing is his cervical spine or neck injury. (T.22, ll. 7-11). Claimant was taken to Georgetown Memorial by ambulance and was treated for his neck and elbow. (T. 22-23, ll. 22-8). Claimant has not worked since the date of the accident (T. 23, ll. 9-13). He is receiving Social Security benefits (T. 24, ll. 2-5)

Following the accident, Claimant received treatment at Doctors Care through the workers' compensation carrier; he remained with Doctors Care until approximately September, 2009. (T. 25, ll. 2-12). After Doctors Care, Claimant treated with Dr. Triana, an orthopedic in Georgetown. He was sent there by Doctor's Care and first saw Dr. Triana in the latter part of 2009. (T. 25-26, ll. 13-4). Dr. Triana was helping claimant with his neck, elbow and low back (T. 26, ll. 15-24).

When Claimant was treating with Doctor's Care, he fell and hit his face. He did not injure his neck, back, shoulder or elbow during his fall. (T. 27, ll. 9-23). Claimant told Doctor's Care about the fall, but treated it himself. (T. 28, ll. 1-10). He also told his occupational therapist, and his physical therapist that he had fallen at home. (T. 56, ll. 18-25)

Claimant had an MRI ordered by Doctor's Care in September and another MRI ordered by Dr. Triana. The MRI ordered by Dr. Triana included his neck. (T. 28-29, ll. 14-3). Claimant had three injections in his back and in his neck in the Fall/Winter of 2009. (T. 29, ll. 13-24; T. 63,). He was then sent to Dr. Bethea by the Workers' Compensation carrier. (T. 30, ll. 2-12).

Claimant was satisfied with Dr. Triana's care. Dr. Triana kept Claimant out of work. (T. 30, ll. 13-19).

Claimant saw Dr. Bethea for the first time on December 6, 2009 and saw him for a total of three times. (T. 30-31, ll. 23-8). The first time was in Dr. Bethea's office, the second time, he had surgery on his elbow, and the third time, Claimant was released by Dr. Bethea. (T. 31, ll. 9-19). The records show that Dr. Bethea had Dr. Triana's records and was familiar with them, that claimant was also seen by Dr. Grant and had three cervical epidural injections which Dr. Bethea knew of, that Claimant had not returned to work, and he had not been released by Dr. Triana. (T. 32, ll. 1-18; T. 58, ll. 3-6). Claimant is not aware that Dr. Bethea looked at his cervical MRI. (T. 58, ll. 7-9). Claimant told Dr. Bethea he had pain and reported to him that his pain was 9/10. (T. 32, ll. 19-24). Claimant was hurting in his neck and back. (T. 32-33, ll. 25-1).

Claimant has never had any injury to his neck, back, or elbow, has never been to a doctor because of neck or back pain, has never been injured where he hurt his neck or back, and has never had neck pain before. (T. 33, ll. 5-15). Claimant told this to Dr. Bethea who asked Claimant to turn his head to the left and right, back and forth and did no other tests on Claimant's neck. (T. 33-34, ll. 18-8). Claimant told Dr. Bethea about his elbow and on December 22 had outpatient surgery. (T. 34, 16-24). Claimant's elbow is not bothering him now and Claimant agrees that Dr. Bethea did a pretty good job on treating him for his elbow. (T. 62, ll. 4-18). On December 4, Dr. Bethea told Claimant he was well and put him at maximum medical improvement. (T. 35, 2-5). Dr. Bethea had not previously told Claimant he was at maximum medical improvement, except for the care of his elbow, prior to this. (T. 36, ll. 4-8). Dr. Bethea told Claimant he wanted to see the MRIs that Dr. Triana had done, gave Claimant Darvocet and some other pain medication and then Claimant had the surgery. (T. 36, ll. 9-17). Claimant's last

visit with Dr. Bethea was on January 6, 2010 (T. 36-37, ll. 18-3). Dr. Bethea did not treat Claimant's neck or back (T. 37, ll. 7-9). Claimant told Dr. Bethea he still had neck and back pain, that he couldn't walk very far, and that he wasn't taking pain medication. (T. 37, ll. 13-21). Dr. Bethea asked Claimant to move his head back and forth, up and down again, and Claimant told Dr. Bethea that when he bent his head to the left it was more uncomfortable; Dr. Bethea didn't say thing. (T. 37-38, ll. 22-7). The first and second time, the tests for his neck took just a few minutes, no other kind of tests to check his neck were done. Claimant asked Dr. Bethea for some pain medication for his neck and back and was given a prescription for 60 Darvocet (T. 38-39, ll. 9-15). Dr. Bethea did not tell Claimant to come back and they did not discuss Claimant going back to work. (T. 39, ll. 16-25).

Claimant returned to Dr. Triana and saw him three times, the last time before May. (T. 40, ll. 7-24). Claimant had seen the doctor's records and knew Dr. Triana's records for April 28, 2010 indicated he needed neck surgery. Claimant testified he would have liked to, but did not have the neck surgery. (T. 41-42, ll. 11-1). Dr. Triana gave Claimant excuses from work and Claimant was given a work excuse the last time he saw Dr. Triana in April. Claimant has not been back to work since then. (T. 42, ll. 6-18).

On July 30, 2010, Claimant had a hearing regarding his low back. At that time he was receiving benefits. (T. 42, ll. 19-25). In January, 2011, Commissioner Roche ruled in Claimant's favor, and he continued to get benefits. (T. 43, ll. 1-5). Commissioner Roche's decision was appealed and reversed by the Full Commission on July 25, 2011. Claimant appealed to the Court of Appeals. (T. 43, 6-14). After the Full Commission ruled against Claimant, he went to his attorney's office and was shown a Form 17. He signed the Form 17 in front of his attorney, after consulting with his attorney. (T. 43, ll. 15-23; T. 54-55, ll. 20-1, 19-20). Claimant signed it

because he lost the case on his back and he wanted to stop the checks. He felt that since he lost on July 25, he was no longer entitled to the checks so he signed the paper. (T. 43-44, ll. 25-16). Claimant does not remember seeing on the form his signed that he was able to return to work on February 10, 2010. He didn't really pay much attention to the form, read some of it, but not all. He signed the paper because he wanted to stop the checks. He realized he could be liable to receive checks when it wasn't his money. (T. 44-45, ll. 17-8; T. 55, 14-18)

The next time Claimant was in his attorney's office was about a year and a half later, in 2012. (T. 45, ll. 19-24). At that time, Claimant told his attorney news his attorney had not heard before and as a result of that conversation, signed an affidavit which was submitted to the Commission for the second hearing before Commissioner Roche on a change of circumstance. (T. 46, ll. 13-23). The affidavit explains that Claimant filed the case, talked about his care and treatment, appointments with Dr. Triana, and the change of treatment to Dr. Bethca. In paragraph 9, the affidavit indicates that Claimant's neck started getting worse and he sought medical treatment. (T. 47-48, ll. 5-1). Claimant never told his attorney this. (T. 48, ll. 2-4).

After Claimant signed the Form 17, in the fall of 2011, he went to Choppee Medical Center in Georgetown and starting seeing a family doctor because his neck and back were hurting. (T. 48, ll. 10-21). He saw Dr. Daniels and treated with him for about six months. (T. 49, ll. 2-4). Dr. Daniels referred Claimant to Dr. Brennan, a neurosurgeon in Florence, because Dr. Daniels could do nothing more for Claimant's neck and back; Dr. Brennan was a specialist. (T. 49, ll. 9-20). Dr. Brennan treated Claimant's neck. (T. 49-50, ll. 21-2). Claimant used his wife's Insurance for this medical treatment. (T. 50, ll. 3-9).

The second time Claimant saw Dr. Brennan, he had a new MRI. As a result of that MRI, in early June, 2012, Dr. Brennan operated on Claimant's neck. (T. 50, ll. 10-19). Dr. Brennan

continued to treat Claimant through the end of 2012 and then released him. (T. 50-51, ll. 23-2). About the time Claimant went to see his attorney, his condition leveled off and he had reached maximum medical improvement in his neck. That was the last time Dr. Brennan saw Claimant. (T. 51, ll. 3-13). Dr. Brennan performed a fusion on Claimant's neck which helped his condition. His pain level has been pretty level since. (T. 51, ll. 15-21).

At the July, 2010 hearing, Claimant's testified that he could "deal with the neck. It doesn't bother me as bad as my back." (T. 52, ll. 6-24; T. 58, ll. 24-25). Claimant also testified that his neck was "about the same" after his release from Dr. Bethea until it worsened in the fall of 2011. (T. 59, ll. 5-9). When his neck got worse, Claimant went to see Dr. Daniels and was prescribed morphine, codeine, and prednisone which he took until he went to see Dr. Brennan. (T. 52-53, ll. 25-13). Dr. Brennan performed a C6-7 anterior cervical discectomy. (T. 53, ll. 14-16).

In 2011, Claimant had an IME for his back and neck in connection with his disability case. (T. 53, ll. 17-25). As a result of this IME, he was placed on disability. (T. 54, ll. 1-3)

Claimant's neck pain was stable and worsened in the fall of 2011. (T. 59, ll. 10-12). He began receiving social security benefits in May, 2011. (T. 60, ll. 2-4). Claimant had been approved for social security before his neck had worsened. (T. 60, ll. 11-14)

Claimant had his neck surgery on June 5, 2012. (T. 60, ll. 22-25). In February, 2010 he signed a document saying he could return to work. (T. 61, ll. 8-10). Two years and four months later after he agreed he could return to work, he had cervical spine surgery. (T. 61, ll. 11-14). Claimant never asked for permission or approval from his employer or the workers' compensation carrier to treat with Dr. Brennan or prior to having the surgery. (T. 61-62, ll. 15-3).

FINDINGS OF FACT

1. The Claimant suffered admitted injuries in a work-related accident to his neck and left elbow arising out of and within the course and scope of his employment on July 14, 2009.
2. The Defendants provided medical care and treatment through Georgetown Memorial Hospital, Dr. Mark E. Triana and Dr. James F. Bethca among others.
3. In his medical note of December 4, 2009, Dr. Bethca writes, "IMPRESSION: Neck Pain. Left Shoulder Pain. Infection Left Elbow. Lower Back Pain. DISPOSITION: It appears to me that he is at maximum medical improvement except for further care to his left elbow injury." (Note: The Lower Back/Lumbar Spine is not before me.)
4. In his medical note of January 6, 2010, Dr. Bethca writes, "The patient is seen back following his left olecranon bursa surgery at Providence December 22nd... As far as his left elbow is concerned, I think that he has reached maximum medical improvement... I also believe that he is at maximum medical improvement from his neck injury. Using the 6th edition of the AMA Guides there should be no impairment to his cervical spine. To make this determination I did use the Cervical Spine Regional Grid. His functional history is two grades above the clinical studies and physical examination, so it is considered unreliable. I did use the physical examination and clinical studies to calculate his final impairment, which as noted above, is zero."
5. Dr. Bethca signed a Form 14B on February 10, 2010, which reads, "Based on the AMA Guidelines, the claimant has sustained a 0% medical impairment to cervical spine injured body part(s) and a 0% medical impairment to left elbow other affected body part(s).
6. Per the Form 14B Physician's Statement, the Claimant is able to return to work without restriction.

7. Per the Form 14B, the Claimant will not need future medical care related to his or her work related injury or illness based on a reasonable degree of medical certainty (more likely than not).

8. The Claimant and the Employer's Representative executed a Form 17 on August, 31, 2011.

9. There was an earlier hearing in this case in which the single hearing commissioner found the lumbar spine to be compensable (01/13/11). That Order was appealed and the Appellant Panel of the Full Commission reversed the single hearing commissioner (07/25/11). The appellant panel order was appealed to the S.C. Court of Appeals which affirmed the Appellant Panel of the Full Commission (09/26/12).

10. During the time the case was on appeal, the Claimant - without the knowledge of the Defendants or his own attorney - sought treatment from Dr. James Brennan of Florence Neurosurgery and Spine for chronic neck pain.

11. Dr. Brennan was deposed twice for this case on 05/01/13 and 06/26/13. I have read both of those depositions.

12. Dr. Brennan performed cervical spine fusion surgery on the Claimant at C6-7.

13. The Claimant met with his attorney on January 3, 2013, for the first time since the appellant panel order of July 25, 2011.

14. This revelation from the Claimant lead to a new round of pleadings and other hearing before a single commissioner. The ruling of the single commissioner was appealed. The Appellant Panel of the Full Commission reversed and remanded the case for a hearing *de novo*.

15. The first and most important issue I must consider is the cervical spine fusion surgery the Claimant had without the knowledge of the Defendants or even his own attorney.

16. S.C. Code Ann. § 42-15-60 gives the employer the authority to select the treating physician.

17. Specific language, the last sentence of § 42-15-60(A), states when the employee can choose to treat on his own. That language reads, "If in an emergency, on account of the employer's failure to provide medical care as specified in this section, a physician other than provided by the employer is called to treat the employee, the reasonable cost of the service must be paid by the employer, if ordered by the Commission."

18. None of those elements were met here.

19. When the Claimant chose to proceed on his own, he took himself out from under the Workers' Compensation Act.

20. The Defendants have provided treatment for the neck. If the Claimant wished to pursue additional treatment for the neck, that pursuit would have had to have been under the provisions of the Act for the Defendants to be held financially responsible.

21. Proceeding on his own, the Claimant abandoned his recourse under the Workers' Compensation Act.

22. As to the issue of whether Claimant has reached maximum medical improvement (MMI), Dr. Bethea says in his medical note of 01/06/10, "As far as his left elbow is concerned, I think that he has reached maximum medical improvement...I also believe that he is at maximum medical improvement from his neck injury."

23. Based on a review of the evidence as a whole, the Claimant is at MMI for his cervical spine and left arm/elbow as of 02/10/10, the date Dr. Bethea completed the Form 14B.

24. As to a change of condition, S.C. Code Ann. § 42-17-90 is titled "Review of award on change of condition". The decision in this case has been vacated so there cannot be a

review of award when it has been vacated for a hearing de novo. Therefore, a review of award in this case cannot exist at this time.

25. Claimant did not suffer a compensable injury by accident arising out of his employment to his low back (lumbar spine).

26. Claimant did not suffer any permanent partial disability of the back (cervical spine) as a result of this workers' compensation claim.

27. Claimant did not suffer any permanent partial disability of the left arm (left elbow) as a result of this workers' compensation claim.

28. Claimant is not entitled to TTD benefits.

29. As to the credit sought by the Defendants, per S.C. Code Ann. § 42-9-210, a credit is to, "be deducted from the amount to be paid as compensation." Since there is no compensation in this case, none exists from which to deduct a credit.

29. Defendants are not liable for, nor responsible for, payment of any past, present or future medical bills of Dr. James Brennan.

30. Claimant is not entitled to future medical treatment under Dodge or any other statute, regulation, or case governing the provision of medical benefits under the S.C. Workers' Compensation Act.

CONCLUSIONS OF LAW

It is concluded under the South Carolina Worker's Compensation Act in § 42-1-10 S.C. Code of Laws, et. seq., that:

1. Section 42-1-160 governs injuries by accident arising out of and in the course of employment.

2. Claimant sustained injuries to his cervical spine and left elbow on July 14, 2009, which is uncontested. Claimant alleges additional injury to his lumbar spine.

3. Section 42-9-260 governs the payment of temporary total disability benefits.
4. Section 42-15-60 governs medical treatment and supplies to be furnished.
5. Section 42-1-140 governs average weekly wage.
6. Section 42-9-210 governs amounts to be deducted from the amount to be paid as compensation.
7. Section 42-17-90 governs change of condition claims.

ORDER

IT IS HEREBY ORDERED,

Claimant did not suffer an injury by accident to his low back arising out of and occurring in the course of his employment;

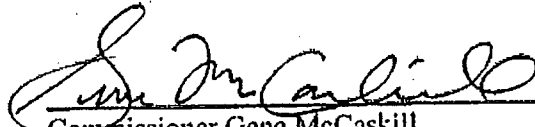
Claimant is at maximum medical improvement for his cervical spine and left arm/elbow;

Claimant is not entitled to any disability or wage loss under §§ 42-9-10, 42-9-20, 42-9-30, for his cervical spine and/or left arm/elbow;

Defendants are not responsible for payment of past, present or future medical bills for treatment rendered by Dr. James Brennan;

Defendants are not responsible for and Claimant is not entitled to future medical treatment for his cervical spine, left arm, or low back.

AND IT IS SO ORDERED.



Commissioner Gene McCaskill

CERTIFICATE OF SERVICE

This is to certify that the undersigned has on this date served a copy of this order in the above entitled action upon all parties to this case by sending an electronic copy hereof by electronic mail addressed to the attorneys for said parties; or if there is an unrepresented party(ies), by depositing a copy hereof, postage paid in the United States mail, first class, addressed to the unrepresented party(ies) and to the attorney(s) for the represented party(ies).

By Kellie Lindler on July 2, 2015

**APPELLATE PANEL
DECISION AND ORDER
OF THE
SOUTH CAROLINA WORKERS' COMPENSATION COMMISSION
W.C.C. FILE NO.: 0908371**

TIMOTHY HANNAH,

**EMPLOYEE,
CLAIMANT/RESPONDENT,**

vs.

MJV/BUTLER TRUCKING, INC.,

EMPLOYER,

AND

**PALMETTO TIMBER S.I. FUND C/O
WALKER, HUNTER & ASSOCIATES,
INC.**

**CARRIER,
DEFENDANTS/APPELLANTS.**

Appellate Panel Review held in Columbia, South Carolina,
on April 21, 2014 per notices timely and properly served
upon all parties of interest.

Appellate Panel Decision and Order filed
July 17th, 2014

APPEARANCES: Defendants/Appellants represented by R. Mark Davis, Esquire,
of Charleston, South Carolina.

Claimant/Respondent represented by W.F.
Jenkinson, III, Esquire, of Kingstree, South Carolina.

STATEMENT OF THE CASE

The parties were heard by Commissioner Andrea Roche on January 18, 2013, in Myrtle Beach, South Carolina. On December 5, 2013, the Hearing Commissioner issued the following Order:

1. The Claimant's Motion and Form 50 for continued medical treatment by Dr. Mark Triana and Dr. James J. Brennan is granted. These causally-related medical costs shall be paid by the carrier.
2. The Claimant is entitled to temporary total disability benefits from the date of his cervical spine surgery on June 6, 2012 until September 1, 2012.
3. The Judicial Division shall set a supplemental hearing to determine permanent disability and the applicability of future medical costs under Dodge.

Within the statutory period, counsel for Defendants filed an Application for Review in the case setting forth their reasons, copies of which were furnished to all interested parties prior to oral argument presented before the Appellate Panel on April 21, 2014.

All proper testimony has been taken. As such, together with all documentary evidence, has been delivered by oral argument to the individual members of the Appellate Panel and has since been under study and consideration.

By Appeal, it is respectfully submitted that the Hearing Commissioner erred in the following:

1. Did the Hearing Commissioner err in allowing the hearing to proceed on January 18, 2013, on any issue outside of the Form 21, when the hearing was properly set upon a Form 21 only, and the Amended Form 50 was not

served until ten (10) days before the hearing and sent to defense counsel's wrong address, when such error is in violation of Defendants due process rights?

2. Did the Hearing Commissioner err in allowing submission of medical reports from Dr. James Brennan into the record when Defendants had no notice of Dr. Brennan's treatment before receipt of the pre-hearing brief on January 14, 2013, when such error is in violation of Defendants due process rights?
3. Did the Hearing Commissioner err in Finding of Fact No. 3, by consolidating the Claimant's late Form 50 request with the previously scheduled Form 21 hearing, when such is against the greater weight and preponderance of the substantial evidence in the record and is based upon erroneous legal conclusions?
4. Did the Hearing Commissioner err in Finding of Fact No. 6, that the Claimant continued with neck pain from the date of accident through the hearing date of January 18, 2013, and that Claimant "was having problems" when Dr. Bethea released Claimant on January 6, 2010, when such is against the greater weight and preponderance of the substantial evidence in the record and is based upon erroneous legal conclusions?
5. Did the Hearing Commissioner err in Finding of Fact No. 8, that Dr. Brennan opined to a reasonable degree of medical certainty that Claimant's need for neck surgery was "proximately" cause by the admitted work accident, when such is against the greater weight and

preponderance of the substantial evidence in the record and is based upon erroneous legal conclusions?

6. Did the Hearing Commissioner err in Finding of Fact No. 9, that the record "clearly supports" the Claimant had not reached maximum medical improvement for the neck, as opined by Dr. Bethea, and supports that the surgery by Dr. Brennan was causally-related to the work injury, when such is against the greater weight and preponderance of the substantial evidence in the record and is based upon erroneous legal conclusions?
7. Did the Hearing Commissioner err in Finding of Fact No. 11, that the Claimant had not reached maximum medical improvement for the cervical spine and is entitled to causally-related medical treatment with Dr. Triana and Dr. Brennan, when such is against the greater weight and preponderance of the substantial evidence in the record and is based upon erroneous legal conclusions?
8. Did the Hearing Commissioner err in Finding of Fact No. 12, that Claimant's treatment for his neck, subsequent to his release from care by Dr. Bethea, and recommended by Dr. Triana or Dr. Brennan was necessary as directly and proximately the result of his injuries sustained in the course and scope of his employment on July 14, 2009, when such is against the greater weight and preponderance of the substantial evidence in the record and is based upon erroneous legal conclusions?
9. Did the Hearing Commissioner err in Finding of Fact No. 13, that based upon depositions of Dr. Brennan that Claimant reached maximum medical

improvement in March of 2013, and that Claimant is entitled to temporary total disability benefits from the date of the cervical surgery on June 6, 2012 until September 1, 2012, when such is against the greater weight and preponderance of the substantial evidence in the record and is based upon erroneous legal conclusions?

10. Did the Hearing Commissioner err in concluding as a matter of law that the Claimant had not reached maximum medical improvement until March 2013, when such is against the greater weight and preponderance of the substantial evidence in the record and is based upon erroneous legal conclusions?
11. Did the Hearing Commissioner err in concluding as a matter of law that the Claimant reached maximum medical improvement from all conditions causally related to the injury of July 14, 2009 based upon "42-9-620", when no such statutory section exists?
12. Did the Hearing Commissioner err in ordering that the medical treatment provided by Dr. Triana and Dr. Brennan be paid by Defendants, when such is against the greater weight and preponderance of the substantial evidence in the record and is based upon erroneous legal conclusions?
13. Did the Hearing Commissioner err in ordering the Claimant entitled to temporary total disability benefits from the date of the cervical surgery on June 6, 2012 until September 1, 2012, when such is against the greater weight and preponderance of the substantial evidence in the record and is based upon erroneous legal conclusions?

14. Did the Hearing Commissioner err in failing to find that Claimant reached maximum medical improvement following release from Dr. Bethea on January 6, 2010?
15. Did the Hearing Commissioner err in failing to address the temporary total disability credit owed to Defendants after the Claimant signed a Form 17 on August 31, 2011, affirming he could return to work on February 10, 2010?

In Appellate review, the Appellate Panel, shall, pursuant to S.C. Code Ann. § 42-17-50 review the award, weigh the evidence as presented at the initial hearing and, if good grounds be shown therefore, make its own Findings of Fact and reach its own Conclusions of Law consistent with or inconsistent with those of the Hearing Commissioner. The scope of review of the Full Commission is not limited. The Commission can, like the Single Commissioner, consider all of the evidence and reach its own findings of fact and conclusions of law. Lowe v. Am-Can Transport Services, Inc., 283 S.C. 534, 324 S.E.2d 87 (Ct. App. 1984).

It is well-established that the Full Commission is the ultimate fact finder in workers' compensation cases and is not necessarily bound by the Single Commissioner's findings of fact. Green v. Raybestos-Manhattan, Inc., 250 S.C. 58, 64, 156 S.E.2d 318, 321 (S.C. 1967). See also Muir v. C.R. Bard, Inc., 336 S.C. 266, 281, 519 S.E. 2d 583, 591 (Ct. App. 1999). The Full Commission is empowered to make its own findings of fact and to reach its own conclusions of law consistent or inconsistent with those of the Single Commissioner. Id. The final determination of witness credibility and the weight to be accorded evidence is reserved to the Full Commission. Id.

After careful review of the instant case, the Commission, by unanimous vote, has determined to **VACATE** the Hearing Commissioner's Order *in toto* and **REMAND** the matter to the Jurisdictional Commissioner for consideration of issues raised in the Form 21, the Form 50, and Form 51. Thus, the Hearing Commissioner's Order, including any and all Findings of Fact and Conclusions of Law are **VACATED**.

APPELLATE PANEL REASONING

As noted above, Defendants/Appellants presented the Appellate Panel with multiple grounds for review, asserting the Hearing Commissioner erred in numerous Findings of Fact and Conclusions of Law. After careful review of all the evidence, we have determined that Defendants/Appellants were denied adequate notice of all the issues that were eventually decided by the Hearing Commissioner on January 18, 2013, denied an adequate opportunity for a hearing on January 18, 2013, the right to introduce evidence on all of the issues on January 18, 2013, and the right to confront and cross-examine witnesses on January 18, 2013. As a result, they were substantially prejudiced in violation of their procedural due process rights. The violation of procedural due process rights permeates the entire Decision and Order of the Hearing Commissioner.

Procedural due process "is flexible and calls for such procedural protections as the particular situation demands." Jones v. SC Dept. of Health & Env'tl Contr., 384 S.C. 295, 316, 682 S.E.2d 282, 294 (Cl. App. 2009). Due process "requires (1) adequate notice; (2) adequate opportunity for a hearing; (3) the right to introduce evidence; and (4) the right to confront and cross-examine witnesses." Clear Channel Outdoor v. City of Myrtle Beach, 372 S.C. 230, 235, 642 S.E.2d 565, 567 (2007). The fundamental requirement of due process is the opportunity to be heard at a meaningful time and in a meaningful manner. S.C. Dep't. of Soc. Servs. v. Becks.

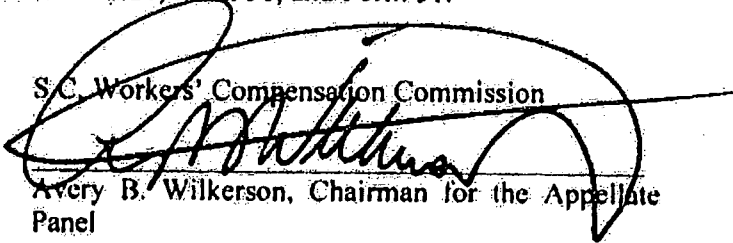
325 S.C. 243, 246, 481 S.E.2d 703, 705 (1997). S.C. Code Ann. § 1-23-320(A) requires administrative agencies to afford all parties "an opportunity for hearing after notice of not less than thirty days" Administrative agencies also must afford parties an opportunity "to respond and present evidence on all issues involved." S.C. Code Ann. § 1-23-320(E). Finally, the South Carolina Constitution provides that administrative agencies must provide "due notice and an opportunity to be heard ..." S.C. Const. art. I, § 22.

It is undisputed that 30 days' notice was not given to Defendants/Appellants of a "Form 50" hearing, and the issues that coincide with that filing. In fact, there was no "Form 50" set for hearing on January 18, 2013, and references to the "Form 50" in the Decision and Order are simply unexplainable. Moreover, issues that could arise only on a proper "Form 50" were addressed by the Hearing Commissioner without adequate (or any) notice to Defendants/Appellants. Defendants/Appellants were led to believe that nothing other than their Form 21 issues would be ruled upon on January 18, 2013. There was no adequate notice here, and Defendants/Appellants were substantially prejudiced as a result.

Based upon the foregoing, and the documentary evidence submitted by the respective parties pursuant to the Administrative Procedures Act, and the Commission's file relative to this claim, **WE, THE APPELLATE PANEL, VACATE THE ORDER IN ITS ENTIRETY.**

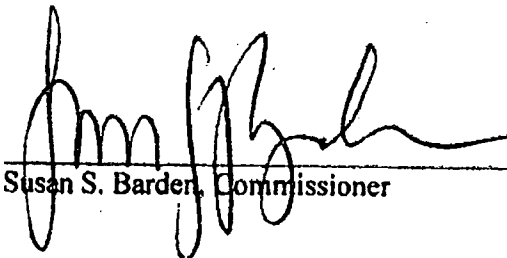
IT IS HEREBY ORDERED that the Decision and Order of the Hearing Commissioner is **VACATED** in its entirety and that this case is **REMANDED** to the Jurisdictional Commissioner to consider issues raised on the Form 21, Form 50, and Form 51.

S.C. Workers' Compensation Commission


Avery B. Wilkerson, Chairman for the Appellate Panel



T. Scott Beck, Commissioner



Susan S. Barden, Commissioner

CERTIFICATE OF SERVICE

This is to certify that the undersigned has on this date served a copy of this order in the above entitled action upon all parties to this case by sending an electronic copy hereof by electronic mail addressed to the attorneys for said parties; or if there is an unrepresented party(ies), by depositing a copy hereof, postage paid in the United States mail, first class, addressed to the unrepresented party(ies) and to the attorney(s) for the represented party(ies).

By Kim Falls on July 17, 2014.

**THIS OPINION HAS NO PRECEDENTIAL VALUE. IT SHOULD NOT BE
CITED OR RELIED ON AS PRECEDENT IN ANY PROCEEDING
EXCEPT AS PROVIDED BY RULE 268(d)(2), SCACR.**

**THE STATE OF SOUTH CAROLINA
In The Court of Appeals**

Timothy J. Hannah, Employee, Claimant, Appellant,

v.

MJV/Butler Trucking, Inc., Employer, and Palmetto
Timber S.I. Fund c/o Walker, Hunter & Associates, Inc.,
Carrier, Respondents.

Appellate Case No. 2011-197631

Appeal From the Appellate Panel
South Carolina Workers' Compensation Commission

Unpublished Opinion No. 2012-UP-535
Submitted September 4, 2012 – Filed September 26, 2012

AFFIRMED

W.E. Jenkinson, III, of Jenkinson Jarrett & Kellahan, PA,
of Kingstree, for Appellant.

Mark Davis and Andrew Scott Luadzers, of McAngus
Goudelock & Courie, LLC, of Charleston, for
Respondent.

PER CURIAM: Timothy J. Hannah appeals the ruling of the Appellate Panel of the South Carolina Workers' Compensation Commission (the Appellate Panel) denying compensation for a low back/lumbar spine injury, arguing (1) the Appellate Panel's finding that his lumbar spine injury is not causally related to the admitted accident is not supported by substantial evidence, (2) the Appellate Panel erred in failing to consider his lumbar spine injury in combination with his other compensable injuries resulting from the work related accident, or alternatively to consider whether the accident aggravated a pre-existing spinal condition as required by *Bartley v. Allendale County School District*, 392 S.C. 300, 709 S.E.2d 619 (2011), (3) the Appellate Panel's rulings that he has received all proper medical care that will tend to lessen his period of disability and is not entitled to medical treatment or other benefits for his lumbar spine injury are not supported by substantial evidence and are contrary to controlling legal precedent, and (4) the Appellate Panel's reliance on Respondent's interpretation of evidence impermissibly sanctions employer/insurer "doctor shopping," which was condemned in *Risinger v. Knight Textiles*, 353 S.C. 69, 577 S.E.2d 222 (Ct. App. 2002). We affirm¹ pursuant to Rule 220(b), SCACR, and the following authorities:

1. As to whether the Appellate Panel erred in finding no causal relation between Hannah's lumbar spine injury and the admitted accident: *Nettles v. Spartanburg Sch. Dist. # 7*, 341 S.C. 580, 586, 535 S.E.2d 146, 149 (Ct. App. 2000) (holding this court must affirm the Appellate Panel's decision unless it is "'clearly erroneous' in view of the substantial evidence on the whole record." (citations omitted)); *Lark v. Bi-Lo, Inc.*, 276 S.C. 130, 136, 276 S.E.2d 304, 307 (1981) ("a judgment upon which reasonable men might differ will not be set aside").
2. As to whether the Appellate Panel erred in finding Hannah was not entitled to medical treatment for his lumbar spine injury: *Nettles*, 341 S.C. at 586, 535 S.E.2d at 149 (holding this court must affirm the Appellate Panel's decision unless it is "'clearly erroneous' in view of the substantial evidence on the whole record." (citations omitted)).
3. As to the remaining issues: *Stone v. Roadway Express*, 367 S.C. 575, 582, 627 S.E.2d 695, 698 (2006) ("Only issues raised and ruled upon by the [Appellate Panel] are cognizable on appeal.").

¹ We decide this case without oral argument pursuant to Rule 215, SCACR.

AFFIRMED.

HUFF, THOMAS, and GEATHERS, JJ., concur.

BEFORE THE
SOUTH CAROLINA WORKERS' COMPENSATION COMMISSION

TIMOTHY HANNAH,	)	WCC FILE NO.0908371
	)	
EMPLOYEE/CLAIMANT,	)	
	)	
MJV, INC/BUTLER TRUCKING,	)	
	)	
EMPLOYER,	)	DECISION AND ORDER
	)	
PALMETTO TIMBER FUND	)	
	)	
INSURANCE CARRIER,	)	
	)	
DEFENDANTS.	)	
	)	

HEARING: Held in Georgetown, South Carolina on July 30, 2010.

APPEARANCES: Claimant represented by W. E. Jenkinson, III, Esquire of Jenkinson, Jarrett & Kellahan, P.A., of Kingstree, South Carolina.

Defendants represented by R. Mark Davis, Esquire, of McAngus Goudelock & Courie, LLC, of Columbia, South Carolina.

PURPOSE OF HEARING: To determine the issues set forth on the Hearing Notice, those being the issues contained in the Forms 50, 51 and 21. To determine if the employer/carrier may stop payment and if so to determine if the Claimant is entitled to any other benefits.

DECISION AND ORDER: Andrea C. Roche, SC Workers' Compensation Commissioner.

FILED: January 13, 2011

APA SUBMISSIONS

The following records were submitted without objection to the Administrative Procedures Act:

1. Records of Georgetown Memorial Hospital, Joseph Gammel, M. D. dated July 14, 2009, consisting of 24 pages;
2. Records of Doctors Care, Robert E. Kimpton, M.D., dated July 21, 2009 through September 9, 2009, consisting of 13 pages;
3. Records of Next Step Rehab of Georgetown, SC, Thomas Howard, M. D., dated July 29, 2009 through September 17, 2009, consisting of 42 pages;
4. Records of Carolina Orthopaedic Specialists, Mark E. Triana, M.D., dated September 30, 2009 through February 25, 2010, consisting of 7 pages;
5. Records of Georgetown Memorial Hospital, Patricia R. Grant, M.D., dated October 9, 2009 through October 12, 2009, consisting of 5 pages;
6. Records of Columbia Orthopaedic Specialist, LLC, James F. Bethea, M.D., dated December 4, 2009 through January 6, 2009, consisting of 12 pages;
7. Records of Sisters of Charity Providence Hospital, James F. Bethea, M.D., dated December 22, 2009, consisting of 43 pages;
8. Records of Carolina Orthopaedic Specialist, Mark E. Triana, M.D., dated April 28, 2010, consisting of 2 pages; and

9. Deposition of Mark E. Triana, M.D., dated March 31, 2010, consisting of 69 pages;
10. Deposition of Tim Sauer, dated July 27, 2010;
11. Deposition of James F. Bethea, MD, dated June 2, 2010.

STIPULATIONS

Counsel for all parties stipulated at the hearing to the following issues:

1. The purpose of this hearing is to determine issues set forth on forms 50, 51 and 21.
2. Notice of the hearing was timely and properly served upon all parties at interest.
3. Venue set in Georgetown County is proper.
4. The average weekly wage and compensation rate are \$571.95 and \$381.32, respectively.
5. The Claimant contends an accident arising out of and in the course of his employment on July 14, 2009, and therefore the South Carolina Workers' Compensation Commission has jurisdiction of this case.
6. The file and the Commissioner's notes, saving all self-serving declarations were made a part of the record.

STATEMENT OF THE CASE

The matter is before the Commission on Form 21 and 51 from the Employer/Carrier and Form 50 from the Claimant. The issues to be determined by

the Commission are if the Employer/Carrier may stop payment to the Claimant; whether the Claimant has reached MMI; whether the Claimant is entitled to additional medical treatment; whether Claimant is entitled to medical care and treatment for injuries to his low back; whether the Claimant suffered any permanent disability and the extent of any permanent disability; and whether the Employer/Carrier is entitled to a credit for overpayment of TTD. The Claimant received benefits from the date of the accident on July 14, 2009, thru the date of the hearing on July 30, 2010.

CONTENTIONS OF THE PARTIES

The Claimant asserts injury to his cervical spine and left arm in an admitted, work-related accident on July 14, 2009. Claimant further asserts injury to lumbar spine/low back for which he needs medical treatment.

The Employer/Carrier admits injury to the left arm and cervical spine [form 58] and asserts Employee reached maximum medical improvement on January 6, 2010. Defendants request credit for an overpayment of temporary total disability beyond January 6, 2010, and ask the Workers' Compensation Commission to issue an award for disability consistent with the impairment rating.

EVIDENCE OF THE CASE

The Claimant was initially treated at Georgetown Memorial Hospital on July 14, 2009, immediately after the accident. The Claimant was then followed at Doctor's Care by Dr. Robert E. Kimpton from July 21, 2009 through September 9, 2009, where he was treated for neck strain and left elbow contusion. It was also

noted that the Claimant's right leg "gave out" on him the day before his August 26th appointment and he complained of lower back pain.

The Claimant was followed by Dr. Mark E. Triana of Carolina Orthopaedic Specialist from September 30, 2009 through February 25, 2010. Dr. Triana treated the Claimant for neck and back pain, including lower back pain, and left upper extremity pain. Dr. Triana's records show cervical and lumbar disc disease, significant desiccation of the L4-5 disc with some facet arthritis with small protrusion of the disc on the left side which correlates with the Claimant's neuroforaminal narrowing on the left and Claimant's left leg pain. On October 9, 2009, the Claimant was seen by Dr. Patricia Grant at Georgetown Memorial Hospital for pain management. Dr. Grant performed a series of three epidural steroid shots on the Claimant; the first was received on October 12th, the second was performed on November 2nd, and the third on November 23rd.

In Dr. Triana's deposition, he testified that the Georgetown Memorial Hospital ER records note contusions to the upper-body and the abdomen wall; scans were ordered of his abdomen, which included Hannah's lumbar spine (Depo. page 10, lines 9-19). When Dr. Triana first saw the Claimant on September 30th, 2009, there was a complaint made of low back pain (page 21, line 14); there was no history of previous injury or pain in the lumbar spine (page 22, lines 10-16). Claimant had pain in his low back and could not lift, push, crawl or ride in a vibrating vehicle (page 23, line 20 thru page 24, line 7).

Additionally, Dr. Triana testified to a reasonable degree of medical certainty that the MRI of Claimant's spine obtained in October, 2009 noted a small, broad

based protrusion at L4-5; this type of protrusion of the disc is consistent with trauma (page 26, lines 5-21). Additionally, he opined to a reasonable degree of medical certainty that the complaints and findings with respect to Hannah's lumbar spine were caused by the accident of July 14th, 2009 (page 20, lines 13-23). Triana testified to a reasonable degree of medical certainty that Hannah will need additional pain medication, medical treatment and epidural steroid injections as a result of his injury (page 31, lines 14-22).

On cross-examination, Dr. Triana equivocated on several opinions; however, after carefully reviewing the Doctor's Care notes of August 28th, 2009 in which Mr. Hannah was complaining of his low back and that his leg had been giving out on him causing him to fall, he concluded based upon a reasonable degree of medical certainty that Mr. Hannah suffered an injury to his lumbar spine as a result of the accident of July 14th, 2009 (Depo. page 57, line 19 thru page 58, line 11).

The Claimant saw Dr. James F. Bethea of Columbia Orthopaedic Specialist on December 4, 2009 who also treated the Claimant for neck pain, left shoulder pain, left elbow pain and low back pain. Dr. Bethea concluded that the Claimant had reached MMI, except for further care for his injured elbow which had an infection and required an incision and drainage, which was done on December 22, 2009. In Dr. Bethea's report dated January 6, 2010, he assigned 0% impairment to the cervical spine and left elbow, which he further confirmed in his deposition on January 2, 2010. Dr. Bethea gave the opinion that the Claimant had reached maximum medical improvement as to the injuries to his left elbow and cervical spine.

LAY TESTIMONY

The court took lay testimony from the Claimant, Timothy Hannah, who testified that during the course of his employment he was driving a tractor and trailer on July 14, 2009 which ran off of the road and turned onto its side. As a result of the accident, Claimant states that he suffered an injury to his head when he struck the window of the vehicle; he also suffered an injury to his neck, left shoulder and left elbow. Additionally, he testified that in the accident he injured his lumbar spine, however, due to the many contusions to his upper body, he felt pain from the top of his head down to his thigh as a result of the accident.

Hannah testified that three to four weeks after the accident and after the contusions to his upper body began resolving and he attempted to resume normal activity, he determined that he had definite low back pain. He testified that in late August, a little over a month after the accident, he was going downstairs and his leg gave out, causing him to fall forward and strike his face on a railing. He complained to his Doctor's Care physician several days later that his lower back was causing him problems and weakness in his leg which caused him to fall.

As a result of his complaints at Doctor's Care, the treating physician, Robert E. Kempton, referred him to Dr. Mark E. Triana of Carolina Orthopaedic Specialists of Georgetown to determine the nature and extent of the injury.

Hannah testified that he told Dr. Triana of his problem and that no one would treat his back because the Workers' Compensation carrier refused to acknowledge that it was an injury sustained in the accident. Likewise, when he was referred to James F. Bethea, orthopedic specialist in Columbia, by the carrier,

he complained of his low back injury; however, the primary reason he was being treated by Dr. Bethea was for treatment to his left elbow laceration which had to be surgically repaired. Bethea did not treat his lumbar spine, but, he did give him pain medication.

As of the date of the hearing, Claimant testified that he continued to have continuous back pain, could not ride long distances or do any meaningful activities that were work related and requested that he receive further medical care and treatment for his injuries sustained in the accident.

The Court also considered the deposition of Tim Sauera, private investigator who made a video of the claimant attempting to observe repairs being made to a vehicle. After consideration, the Court determined that the video did not demonstrate any strenuous activity of the Claimant or any work being done by the Claimant other than observation of something going on under the hood of a vehicle for a few minutes. The video did not demonstrate that the Claimant was not impaired as he described.

FINDINGS OF FACT

Based on the testimony and the evidentiary submissions, I hereby find as follows:

1. The Claimant injured his left elbow and cervical spine in the accident on July 14, 2009. He alleged that the accident also resulted in lumbar spine injury, a claim I find supported by the greater weight of the evidence; including the medical records and deposition of Dr. Mark Triana.

2. The Form 21 hearing was consolidated with Claimant's Form 50 requesting additional medical treatment and treatment for lumbar spine injury.
3. The Claimant is 52 years of age.
4. The Claimant's job with the Employer was truck driver.
5. The Claimant has not reached maximum medical improvement.
6. Claimant is to receive medical treatment as recommended by Dr. Triana for lumbar spine.
7. Claimant's average weekly wage is \$571.95, yielding a compensation rate of \$381.32.
8. Claimant is credible in his description of the further symptoms from this injury and that his description is supported by the medical reports of Dr. Triana.
9. The further symptom which I find is supported by the greater weight of the evidence and is proximately caused by the injury on July 14, 2009, is pain to the lower back or lumbar spine for which there should be further evaluation and treatment.
10. Claimant should receive medications/treatment as prescribed or recommended by Dr. Triana as the need for this is directly and proximately the result of the injury sustained in the course and scope of employment on July 14, 2009.

APPLICABLE LAW

South Carolina Workers' Compensation law provides benefits to an injured worker based on the extent of injury, the combination of the injuries and the

reduction in the earning capacity of the injured worker. In this case, the worker Timothy Hannah has sustained an injury to his left elbow, cervical spine and lumbar spine.

"Maximum medical improvement is a term used to indicate that a person has reached such a plateau that in the physician's opinion there is no further medical care or treatment which will lessen the degree of impairment." *O'Banner v. Westinghouse Electric Corp.*, 319 SC 24, 28; 459 S.E. 2d 324, 327 (Ct. App. 1995) In this matter, Dr. Triana's report there are other conditions arising from the accident on July 14, 2009 which have not been evaluated and treated so as to reach maximum medical improvement.

CONCLUSIONS OF LAW

Accordingly, as provided in S. C. Code Section 42-17-40, as amended to date, it is the determination of this Commissioner that:

1. Under Section 42-1-130, the claimant was a covered employee on July 14, 2009 and under section 42-1-140, the Defendant-employer was a covered Employer under the Act.
2. Under Section 42-1-160, the Claimant sustained an injury by accident arising out of and in the course of his employment.
3. Under Section 42-15-60, the claimant has received the proper medical care that will tend to lessen the period of disability and continues to need medical care which will tend to lessen the period of disability.

4. Under Section 42-9-620, Claimant has not reached maximum medical improvement from all conditions causally related to his injury on July 14, 2009.
5. That Claimant's limitations of the lumbar spine are causally related to the accident of July 14, 2009, and should be treated and evaluated.

ORDER

NOW THEREFORE, IT IS ORDERED that the:

1. Defendants Form 21, request for stop payment is hereby denied.
2. The Claimants motion and Form 50 for continued medical treatment by Dr. Mark Triana is granted.

IT IS SO ORDERED.

No hearing costs are assessed in this instance.


Commissioner Andrea C. Roche

CERTIFICATE OF SERVICE

This is to certify the undersigned has this date served this order in the above entitled action upon all parties to this cause by sending an electronic copy hereof by electronic mail addressed to the attorney or attorneys for said parties or by depositing a copy hereof, postage paid, in the United States certified mail addressed to any unrepresented party.

January 13, 2011

By: Barbara Cheeseboro, Administrative Assistant to Commissioner Roche

**APPELLATE PANEL
DECISION AND ORDER
OF THE
S.C. WORKERS' COMPENSATION COMMISSION
W.C.C. FILE NO. 0908371**

TIMOTHY J. HANNAH,

**EMPLOYEE,
CLAIMANT/RESPONDENT,**

vs.

MJV/BUTLER TRUCKING, INC.,

EMPLOYER,

AND

**PALMETTO TIMBER S.I. FUND C/O
WALKER, HUNTER & ASSOCIATES, INC.,**

**CARRIER,
DEFENDANTS/APPELLANTS.**

Appellate Panel Review held in Columbia, South
Carolina, on March 22, 2011, per notices timely
And properly served upon all parties of interest.

Appellate Panel Decision and Order Filed:

7/25/11

APPEARANCES: Claimant/Respondent represented by W. E. Jenkinson, III, Esquire,
Kingstree, South Carolina

Defendants/Appellants MJV/Butler Trucking Inc. and Palmetto Timber
S.I. Fund c/o Walker, Hunter & Associates, Inc. represented by R. Mark
Davis, Esquire, Charleston, South Carolina

STATEMENT OF THE CASE

This claim involves a 52 year-old man employed by Butler Trucking, who alleges he was injured at work on July 14, 2009, when the truck he was driving rolled over and came to rest on the driver's side. Claimant initially alleged injuries to his cervical spine and left elbow. Defendants filed a Form 21 dated February 2, 2010 seeking to stop payment of temporary benefits based upon the authorized treating physician's finding that Claimant reached maximum medical improvement for injuries to his cervical spine and left elbow. Initially, a hearing was scheduled for April 22, 2010. During a lengthy pre-hearing conference before the Hearing Commissioner, Claimant alleged a lumbar spine injury which was not pleaded on his Form 50. In an effort to avoid bifurcation of the issues of the claim, the Hearing Commissioner ordered a continuance to allow Claimant to file a Form 50 adding Claimant's lumbar spine as an alleged body part so that all issues could be heard together in a single hearing. A hearing was ultimately set for July 30, 2010, to determine the issues as set forth on Forms 21, 50 and 51.

Claimant contended he suffered an injury by accident arising out of and occurring in the course of his employment on July 14, 2009. Claimant alleged that as a result of this accident he injured his cervical spine, left elbow, and lumbar spine which was in turn affecting his legs. Claimant asserted he had not reached maximum medical improvement and requested a finding that the symptoms in his lumbar spine and corresponding problems radiating to both of his legs are found compensable, and that he was in need of additional medical treatment for his lumbar spine. In the alternative, Claimant contended that if his lumbar spine condition was deemed unrelated to the accident, it would be his position that his permanent disability exceeded any rating in the record.

Defendants admitted Claimant sustained injuries to his cervical spine and left elbow in a work related accident on July 14, 2009. Defendants denied Claimant injured his lumbar spine as a result of this accident. Defendants contended that the first mention of the lumbar spine in any of the medical records appeared after an unrelated fall at Claimant's home, and that any subsequent injury to Claimant's lumbar spine was a direct result of this unrelated fall. Alternatively, Defendants asserted the Claimant developed back problems as the result of a preexisting condition or a natural progression of a preexisting condition related to Claimant's age. Defendants requested a finding that Claimant had reached maximum medical improvement on January 6, 2010 and requested a credit for overpayment of temporary total disability benefits from that date.

In an Order dated January 13, 2011, the Hearing Commissioner determined Claimant's alleged injury of the lumbar spine was causally related to the accident of July 14, 2009. The Hearing Commissioner further ordered that Claimant had not reached maximum medical improvement from all conditions causally related to the July 14, 2009 accident, and that Claimant was entitled to additional medical care and treatment from authorized treating physician Dr. Mark Triana.

In reaching her Order, the Single Commissioner issued the following Findings of Fact and Conclusions of Law:

FINDINGS OF FACT

1. The Claimant injured his left elbow and cervical spine in the accident on July 14, 2009. He alleged that the accident also resulted in lumbar spine injury, a claim I find supported by the greater weight of the evidence; including the medical records and deposition of Dr. Mark Triana.
2. The Form 21 hearing was consolidated with Claimant's Form 50 requesting additional medical treatment and treatment for lumbar spine injury.

3. The Claimant is 52 years of age.
4. The Claimant's job with the Employer was truck driver.
5. The Claimant has not reached maximum medical improvement.
6. Claimant is to receive medical treatment as recommended by Dr. Triana for lumbar spine.
7. Claimant's average weekly wage is \$571.95, yielding a compensation rate of \$381.32.
8. Claimant is credible in his description of the further symptoms from this injury and that his description is supported by the medical reports of Dr. Triana.
9. The further symptom which I find is supported by the greater weight of the evidence and is proximately caused by the injury on July 14, 2009, is pain to the lower back or lumbar spine for which there should be further evaluation and treatment.
10. Claimant should receive medications/treatment as prescribed or recommended by Dr. Triana as the need for this is directly and proximately the result of the injury sustained in the course and scope of employment on July 14, 2009.

CONCLUSIONS OF LAW

Accordingly, as provided in S. C. Code Section 42-17-40, as amended to date, it is the determination of this Commissioner that:

1. Under Section 42-1-130, the claimant was a covered employee on July 14, 2009 and under section 42-1-140, the Defendant-employer was a covered Employer under the Act.
2. Under Section 42-1-160, the Claimant sustained an injury by accident arising out of and in the course of his employment.
3. Under Section 42-15-60, the claimant has received the proper medical care that will tend to lessen the period of disability and continues to need medical care which will tend to lessen the period of disability.
4. Under Section 42-9-260, Claimant has not reached maximum medical improvement from all conditions causally related to his injury on July 14, 2009.
5. That Claimant's limitations of the lumbar spine are causally related to the accident of July 14, 2009, and should be treated and evaluated.

Within the statutory period, counsel for the Defendants filed an Application for Review in the case setting forth his reasons for Appeal, copies of which were furnished to all interested parties prior to oral argument presented before the Appellate Panel on March 22, 2011.

By Appeal, it is respectfully submitted that the Hearing Commissioner erred in the following:

1. In finding as a fact that the Claimant injured his left elbow and cervical spine in the accident on July 14, 2009, and in finding that the accident also resulted in lumbar spine injury by relying upon the medical records and deposition of Dr. Mark Triana, when such is against the greater weight and preponderance of the substantial evidence in the record and is based upon erroneous legal conclusions?
2. In finding as a fact that the Claimant has not reached maximum medical improvement, when such is against the greater weight and preponderance of the substantial evidence in the record and is based upon erroneous legal conclusions?
3. In finding as a fact that the Claimant is to receive medical treatment as recommended by Dr. Triana for the lumbar spine, when such is against the greater weight and preponderance of the substantial evidence in the record and is based upon erroneous legal conclusions?
4. In finding as a fact that the Claimant is credible in his description of the further symptoms from this injury and that his description is supported by the medical reports of Dr. Triana, when such is against the greater weight and preponderance of the substantial evidence in the record and is based upon erroneous legal conclusions?
5. In finding as a fact that the symptom of lower back or lumbar spine pain was proximately caused by the injury on July 14, 2009, and there should be further evaluation and treatment, when such is against the greater weight and preponderance of the substantial evidence in the record and is based upon erroneous legal conclusions?
6. In finding as a fact that the Claimant should receive medications/treatment as prescribed or recommended by Dr. Triana as the need for this is directly and proximately the result of the injury sustained in the course and scope of employment on July 14, 2009, when such is against the greater weight and preponderance of the substantial evidence in the record and is based upon erroneous legal conclusions?
7. In finding that the Claimant has sustained an injury to his left elbow, cervical spine, and lumbar spine, when such is against the greater weight and preponderance of the substantial evidence in the record and is based upon erroneous legal conclusions?

8. In finding that in Dr. Triana's report there are other conditions arising from the accident of July 14, 2009, which have not been evaluated and treated so as to reach maximum medical improvement, when such is against the greater weight and preponderance of the substantial evidence in the record and is based upon erroneous legal conclusions?
9. In Conclusion of Law No. 3 that under § 42-15-60, Claimant continues to need medical care which will tend to lessen the period of disability, when such is against the greater weight and preponderance of the substantial evidence in the record and is based upon erroneous legal conclusions?
10. In Conclusion of Law No. 4 that "under § 42-9-620, the Claimant has not reached maximum medical improvement from all conditions causally related to his injury on July 14, 2009," when such is against the greater weight and preponderance of the substantial evidence in the record and is based upon erroneous legal conclusions and where the Workers' Compensation Act does not contain a Section 620 in Chapter 9 of the Act?
11. In Conclusion of Law No. 5 that Claimant's limitations of the lumbar spine are causally related to the accident of July 14, 2009, and should be treated and evaluated, when such is against the greater weight and preponderance of the substantial evidence in the record and is based upon erroneous legal conclusions?
12. By failing to address whether or not the Claimant had reached maximum medical improvement and suffered any disability for the body parts admitted by Defendants where Defendants properly and timely filed a Form 21?
13. In ordering that the Defendants' Form 21, Request for Stop Payment, is denied, when such is against the greater weight and preponderance of the substantial evidence in the record and is based upon erroneous legal conclusions?
14. In ordering that the Claimant's motion and Form 50 for continued medical treatment by Dr. Mark Triana is granted, when such is against the greater weight and preponderance of the substantial evidence in the record and is based upon erroneous legal conclusions?

During the Appellate review, the Appellate Panel, shall, pursuant to S.C. Code Ann. §42-17-50 (1985) review the award, weigh the evidence as presented at the initial hearing and, if good grounds be shown therefore, make its own Findings of Fact and reach its own Conclusions of Law consistent with or inconsistent with those of the Hearing Commissioner.

All proffered testimony has been taken and all medical evidence submitted. Such, together with all documentary evidence, has been delivered by oral argument to the individual members of the Appellate Panel and has since been under study and consideration.

After careful review of the instant case in its entirety, the Commissioners considered the matter and by a **MAJORITY REVERSE** the decision of the Single Commissioner regarding compensability of Claimant's lumbar spine/lower back injury. Commissioner Williams Affirms the decision of the Single Commissioner. Accordingly, the Appellate Panel has stated that the following Findings of Fact and Rulings of Law shall become the law of the case and therefore, the Decision and Order of the Hearing Commissioner is **REVERSED** with regard to compensability of Claimant's lumbar spine/lower back injury.

FINDINGS OF FACT

We find that the greater weight and preponderance of the evidence supports a Reversal of the Single Commissioner's Order finding Claimant sustained a compensable lumbar spine injury. Based on a review of the Commission file and the evidence presented in the parties' briefs and oral argument, the Appellate Panel Reverses the Single Commissioner's Order dated January 13, 2011 and makes the following Findings of Fact:

1. The parties are subject to and bound by the South Carolina Workers' Compensation Act.
2. The Claimant has an average weekly wage of Five Hundred Seventy-One dollars and 95/100 (\$571.95) with a corresponding compensation rate of Three Hundred Eighty-One dollars and 32/100 (\$381.32).
3. Claimant suffered an admitted work related accident on July 14, 2009 which resulted in injury to his cervical spine and left elbow.

4. Claimant alleged he suffered an injury to his lumbar spine on July 14, 2009, which was in turn affecting his legs.
5. Claimant was involved in an unrelated fall at home on August 25, 2009, wherein he fell on his steps at home striking his face against the hand rail.
6. The medical records are void of any mention of Claimant's low back pain or leg symptoms until August 26, 2009, one day after Claimant's unrelated fall at home, where a Doctors Care note indicates Claimant's "left leg 'gave out' at 5:30 yesterday and patient fell and hit right side of face on railing." (Defendants' APA p. 53).
7. Claimant never informed Dr. Triana about a fall he suffered on August 25, 2009. (Deposition of Dr. Triana p. 47, lines 12-20).
8. Dr. Triana testified that a disc protrusion, the type of injury to Claimant's back, could be caused by a variety of things, including a fall. (Deposition of Dr. Triana p. 47, lines 1-11).
9. Based upon two authorized visits and one unauthorized visit with the Claimant, and relying upon Claimant's historical account, Dr. Mark Triana causally related the Claimant's low back injury with his work related automobile accident. (Deposition of Dr. Triana p. 28, lines 13-25; p. 29, lines 1-16).
10. After learning of the Claimant's fall on August 25, 2009, Dr. Triana testified it would be very difficult to state with any amount of certainty the cause of the Claimant's disc protrusion. (Deposition of Dr. Triana p. 50, lines 18-25).
11. Dr. Triana acknowledged that after a review of all the attending facts he had much more doubt as to causation of Claimant's lumbar complaints. Dr. Triana testified, "I can't say

with a reasonable amount of medical certainty that [Claimant's back injury] was caused by his accident or his fall or whatever, no." (Deposition of Dr. Triana p. 53, lines 9-11).

12. Claimant's authorized treating physician, Dr. James Bethea has unequivocally stated that Claimant's alleged low back injury is not causally connected to Claimant's work related injury. (Deposition of Dr. Bethea, p. 26, l. 23- p. 27 l. 6).

13. The Appellate Panel finds that the Claimant has suffered compensable injuries to his cervical spine and left elbow only as a result of an accident on July 14, 2009.

14. The Appellate Panel further finds that the Claimant did not sustain a compensable injury to his low back/lumbar spine as a result of his July 14, 2009 work related accident.

15. Claimant was placed at maximum medical improvement for injuries to his cervical spine and left elbow on February 2, 2010, by his authorized treating physician, Dr. James Bethea.

16. Dr. Bethea opined that Claimant has sustained 0% medical impairment to the cervical spine and 0% medical impairment to his left elbow.

17. Claimant is not entitled to any future medical care, treatment, evaluation or medications for his lumbar spine/lower back.

CONCLUSIONS OF LAW

Under the South Carolina Workers' Compensation Act and other applicable law, it is the determination and conclusion of the Appellate Panel that:

1. The scope of review of the Full Commission is not limited. The Commission can, like the Single Commissioner, consider all of the evidence and reach its own findings of fact and conclusions of law. Lowe v. Am-Can Transport Services, Inc., 283 S.C. 534, 324 S.E.2d 87 (S.C. Ct. App. 1984).

2. The Full Commission is not necessarily bound by the Single Commissioner's findings of fact, and is empowered to make its own findings of fact and to reach its own conclusions of law consistent or inconsistent with those of the Single Commission. Green v. Raybestos-Manhattan, Inc., 250 S.C. 58, 64, 156 S.E.2d 318, 321 (S.C. 1967). See also Muir v. C.R. Bard, Inc., 336 S.C. 266, 281, 519 S.E. 2d 583, 591 (S.C. Ct. App. 1999).
3. Regulation 67-709 provides the procedures under which the Full Commission may review the decisions of a Single Commissioner, including the authority for full reversal and/or remand with further instructions.
4. Pursuant to S.C. Code Ann. §42-1-130, Claimant was an Employee at the time of the alleged work injury.
5. Pursuant to S.C. Code Ann. §42-1-160, Claimant suffered an injury by accident on July 15, 2009 to his cervical spine and left elbow.
6. Pursuant to S.C. Code Ann. §42-15-60, which governs the periods within which medical treatment shall be furnished, we conclude that the Claimant has received all proper medical care that will tend to lessen his period of disability.
7. Pursuant to S.C. Code Ann. §42-1-160, the Claimant did not sustain a compensable injury by accident to his low back/lumbar spine arising out of and in the course and scope of his employment with the Defendants on or about June 19, 2009.
8. Pursuant to S.C. Code Ann. §42-15-60, Claimant is not entitled to medical treatment and/or supplies, nor is Claimant entitled to any compensation or other benefits under the Act for his alleged low back/lumbar spine injury.
9. We conclude that the Claimant has not carried the requisite burden of proof, required under the South Carolina Workers' Compensation Act, to establish that the alleged low

back/lumbar spine injury, or any other body part, was causally connected to his admitted work related accident. See Clade v. Champion Laboratories, 330 S.C. 8, 496 S.E.2d 856 (1998) (The workers' compensation claimant has the burden of proving facts that show that the injury arose out of the employment, and an award of benefits must not rest on surmise conjecture or speculation); Mims v. Nehi Bottling Co., 218 S.C. 513, 63 S.E.2d 305 (1951) (The burden is upon the Claimant to prove facts which render the injury compensable).

ORDER

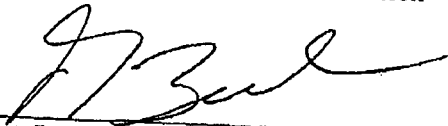
IT IS THEREFORE, ORDERED the Decision and Order of the Single Commissioner issued on January 13, 2011 is hereby REVERSED by a Majority of the Appellate Panel regarding compensability of Claimant's lumbar spine/lower back injury.

IT IS FURTHER ORDERED that the Claimant sustained a compensable injury by accident to the cervical spine and left elbow only on July 14, 2009, while in the course and scope of her employment with the Defendants.

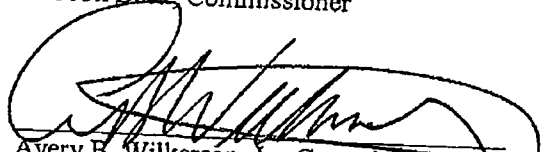
IT IS FURTHER ORDERED that the Claimant failed to carry his requisite burden of proof that he sustained a compensable injury by accident to his low back/lumbar spine in the July 14, 2009 accident

AND IT IS SO ORDERED.

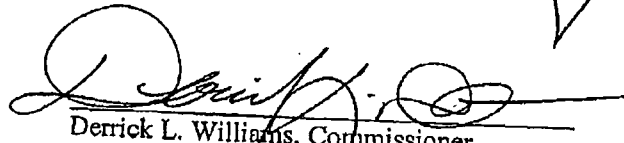
S.C. Workers' Compensation Commission


T. Scott Beck, Commissioner

Majority Reversal Concur:


Avery B. Wilkerson, Jr., Commissioner

Dissent:


Derrick L. Williams, Commissioner

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

This 25 day of July, 2011
By Valerie D. Deller

Administrative Assistant to the Commissioner

W. E. Jenkinson III
R. Mark Davis

South Carolina Workers' Compensation Comm.
1612 Marion Street • Post Office Box 1715
Columbia, South Carolina 29202-1715
(803) 737-5723
www.wcc.sc.gov



Physician's Statement

Claimant's Name: Timothy Hannah
Physician's Name: James F. Bethea MD
Practice/Clinic: Columbia Orthopaedic Specialists
Preparer's Name: _____
Phone: () _____

Employer's Name: MOV Inc/Butler Trucking
Insurance Carrier: Palmetto Timber SI Fund
SCWC File No: 0908371

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

Date of Injury or Illness: 7/14/09

Date of first office visit: 12-4-09 Date of last visit: 1-6-10

Diagnosis or nature of Injury or Illness: He turned over his truck July 14, 2009.

Body part(s) Injured: neck @ shoulder Body part(s) affected: Cervical spine @ elbow

☒ Elbow Date of Maximum Medical Improvement: _____

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

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

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

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

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

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

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

Treating Physician

J.F. Bethea MD C80989
Phone 803-808-8198
Fax 803-808-8178
Fed Tax ID 72-1523779

Date

2/10/10

9/07

14B

Physician's Statement



Jenkinson, Jarrett & Kellahan, PA

ATTORNEYS AT LAW

120 WEST MAIN STREET • POST OFFICE DRAWER 669 • KINGSTREE, SOUTH CAROLINA 29556
TELEPHONE (843) 355-2000 • FACSIMILE (843) 355-2010 • TOLL FREE 1-888-354-7417
E-MAIL: attorneys@jenkinsonlaw.com

W. E. Jenkinson, III
Ernest J. Jarrett
Jennifer R. Kellahan

M. Amanda Harrelson Shuler

April 8, 2010

VIA US MAIL & EMAIL

Commissioner Avery B. Wilkerson, Jr.
South Carolina Workers'
Compensation Commission
Division of Claims
Post Office Box 1715
Columbia, SC 29202-1715

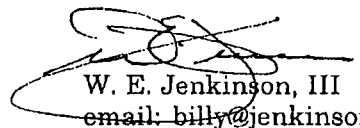
Re: Timothy Hannah v. MJV, Inc/Butler Trucking, Inc.
Date of Injury: July 14, 2009
WCC#: 0908371
Carrier File #: 0001-0593-09-0002

Dear Commissioner Wilkerson:

Please find enclosed herewith the Form 58 along with our Notice of Submission of Medical Records as Direct Evidence on Behalf of the Employee/Claimant. By copy of this letter to R. Mark Davis, attorney the employer and carrier, I am serving them with a copy of the same.

With kindest regards, I am

Very truly yours,



W. E. Jenkinson, III
email: billy@jenkinsonlaw.com

WEJ,III/ljs

Enclosure(s): as stated

Pc: Timothy Hannah
R. Mark Davis
McAngus Goudelock & Courie, LLC
PO Box 12519
Columbia, SC 29211



Claimant's Name: Timothy J. Hannah Employer's Name: MJV, Inc./Butler Trucking Inc.
Address: 532 E. Hwy 378 Address: PO Drawer 698
City: Johnsonville State: SC Zip: 29555 City: Georgetown State: SC Zip: 29442
Home Phone: (843) 493-6692 Work Phone: () - Carrier: Palmetto Timber SI Fund
Preparer's Name: W. E. Jenkinson, III Preparer's Phone #: (843) 355-2000
Jenkinson, Jarrett & Kellahan, PA

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

☒ Injury ☐ Illness ☐ Repetitive Trauma

1. Compensation Rate: 381.32 2. AWW: \$571.95 Date of Injury: 07/14/2009
3. Type of Injury and body part(s): Neck, left shoulder, left elbow and back.
4. Facts in controversy: a) Claimant has not reached MMI and needs further medical treatment; b) Claimant needs medical treatment for lumbar spine injury
5. Legal issues involved: See No 4 above
6. Unusual aspects: None
7. Witnesses (designate if expert):* The Claimant Timothy Hannah, 532 E. Hwy 378, Johnsonville, SC 29555
8. Exhibits: APA Exhibits and deposition of Mark E. Triana, D. O. dated March 31, 2010
9. Medical evidence (Indicate report pursuant to R.67-612; deposition or appearance):
APA Exhibits
10. Name, address, and specialty, if any, of the treating physician: James F. Bethea, M.D., Columbia Orthopaedic Specialists, LLC
1301 Taylor Street, Suite 3-O, Columbia, SC 29202-0306 and Mark E. Triana, D. O., Carolina Orthopaedic Specialists, 2185 N. Fraser
Street, Georgetown, SC 29440
11. Impairment rating(s); body part(s); physician and date of opinion: 0% Impairment, James F. Bethea, M.D. January 6, 2010
12. I am amending my Form 50/51 in the following manner: _____

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

Signature: [Signature]
Date of hearing: April 22, 2010

Email: Billy@jenkinsonlaw.com
Time needed for hearing: 60 minutes

On behalf of ☒ Claimant ☐ Employer

File this form and proof of service on the opposing party according to R.67-611 and R.67-212. Do not send medical reports.
* Commissioners reserve the right to admit expert witnesses at hearings.

South Carolina Workers' Compensation Commission

P.O. Box 1715 - 1333 Main Street, Suite 500

Columbia, South Carolina 29202-1715

(803) 737-5700

Timothy Hannah

Claimant's Name

SSN

356 Azalea Street

Johnsonville, South Carolina 29555

Address City State Zip

Home Phone #

Work Phone #

R. Mark Davis

Preparer's Name

WCC File #

0908371

Carrier File #

0001-0593-09-0002

Carrier Code #

SF827

Employer FEIN

MJV/Butler Trucking Inc.

Employer's Name

Post Office Box 1022

Georgetown, South Carolina 29440

Address City State Zip

Palmetto Timber St Fund c/o Walker, Hunter & Associates, Inc.

Insurance Carrier

(843) 576-2782

Phone Number

The date of injury reported on the Form 12A is: July 14, 2009

Check applicable section(s). The employer's representative requests a hearing to:

☒ I. Stop payment of compensation. Compensation payments are current as of February 9, 2010 and shall continue until otherwise ordered or until a Form 17 is signed by the claimant. A Form 17 was offered and refused on February 11, 2010.

The basis of the stop payment hearing is (check one):

☒ (a) The authorized health care provider states the claimant has reached maximum medical improvement.

☐ (b) The authorized health care provider states the claimant is able to return to the same or other suitable job and has assigned an impairment rating, if any, and the same or suitable job has been offered to the claimant.

☐ (c) The authorized health care provider states the claimant is unable to return to the same or other suitable job and has assigned an impairment rating, if any.

☐ II. Terminate temporary compensation suspended per R.67-505. Date suspended: _____

The basis for suspension of benefits is (check one):

☐ (a) The claimant refuses medical treatment.

☐ (b) The employer states the claimant is working, has worked for at least fifteen calendar days, and the claimant refuses to sign the Form 17. Requesting: ☐ Informal Conference ☐ Hearing

☒ III. Pay compensation in the amount of \$to be determined, based on the following grounds: To pay permanency for neck and/or left arm.

☒ IV. Request Credit for overpayment of temporary compensation.

☐ V. Reduce Payment of compensation from \$ _____ to \$ _____, based on the following grounds: _____

Compensation payments are current as of February 9, 2010 and shall continue until otherwise ordered or until a Form 17 is signed by the claimant.

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

Timothy Hannah
356 Azalea Street
Johnsonville, South Carolina 29555

South Carolina Workers' Compensation Commission
P. O. Box 1715
Columbia, SC 29202-1715

on the 29th day of April, 2010 by ☐ first class mail; ☐ personal service; ☒ certified mail.


Preparer's Signature

Attorney for Employer/Carrier
Title

April 29, 2010
Date

The claimant may respond by writing the preparer at the address above and filing a copy of the response with the Commission's Judicial Department at the address at the top of the form. Refer to R.67-208, R.67-211, R.67-505, R.67-601 - R.67-616. Questions about the use of this form should be directed to the Judicial Department at (803) 737-5675.

WCC FORM #21 REV. DATE 3/97

21

EMPLOYER'S REQUEST FOR HEARING

SC Workers' Compensation Commission

1333 Main Street, suite 500 • Post Office Box 1715
Columbia, South Carolina 29202-1715
(803)737-5723



WCC File #: 0908371

Carrier File #: 0001-0593-09-0002

Carrier Code #: SF827

Employer FEIN #

Timothy Hannah

Claimant's Name SSN

356 Azalea Street
Johnsonville, South Carolina 29555

Address City State Zip

(843) 433-4800

Home Phone #

R. Mark Davis

Preparer's Name

Work Phone #

McAngus Goudelock & Courie

Law Firm

MJV/Butler Trucking Inc.

Employer's Name

Post Office Box 1022
Georgetown, South Carolina 29440

Address City State Zip

Palmetto Timber S.I. Fund c/o Walker, Hunter & Associates,
Inc.

Insurance Carrier

(843) 576-2782

Phone Number

Date of Accident: 7/14/09

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

1. It is **admitted** that the employee sustained an injury on or about the date set forth in the application. The reasons for denial are: Inasmuch as the Claimant injured his cervical spine and left elbow. Allegations concerning the low back injury are denied; see No. 11 below.
2. It is **admitted** that both the employer and employee were subject to the Workers' Compensation Act at the time in question. The reasons for denial are: See No. 1 above.
3. It is **admitted** that the relationship of employer and employee existed at the time in question. The reasons for denial are: See No. 1 above.
4. It is **admitted** that at the time in question the employee was performing service growing out of and incidental to his employment. The reasons for denial are: See No. 1 above.
5. It is **admitted** that notice of injury was given to the employer. The reasons for denial are: See No. 1 above.
6. It is **denied** that the employee needs/is entitled to additional medical care as a result of the injury. The reasons for denial are: Claimant has reached maximum medical improvement pursuant to the authorized treating physicians.
7. It is **denied** that the employee is entitled to temporary total disability for the period(s) of: _____
8. It is **denied** that the employee is permanently disabled. The reasons for denial are: _____
9. It is **denied** that the employee has a serious disfigurement.
10. It is contended that an average weekly wage of **\$571.95** applies, according to attached accounting of employee's earnings as provided by law.
11. Further contentions or grounds of defense are: Defendants deny responsibility for any benefits concerning allegations of a lower back injury; Defendants assert the Claimant did not suffer any disability as a result of the accident; pre-existing condition; natural progression of a pre-existing condition; § 42-9-35; § 42-1-160; fraud; Defendants reserve the right to amend or supplement this response as investigation continues.
12. Estimated time needed for hearing: 30 minutes.

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

W.E. Jenkinson, III, Esquire
Jenkinson, Jarrett & Kellahan, PA
Post Office Drawer 669
Kingstree, South Carolina 29556

South Carolina Workers' Compensation Commission
P. O. Box 1715
Columbia, SC 29202-1715

on the 3rd day of June, 2010 by ☒ first class mail; ☐ personal service; ☐ certified mail.

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

Preparer's Signature _____ Attorney for Employer/Carrier mdavis@mgclaw.com
Title _____ Email _____

June 3, 2010
Date

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

South Carolina Workers' Compensation Commission

P.O. Box 1715 - 3333 Main Street, Suite 500

Columbia, South Carolina 29202-1715

(803) 737-5700

WCC File # 0908371

Carrier File # 0001-0593-09-0002

Carrier Code # SF827

Employer FEIN

Timothy Hannah

Claimant's Name

SSN

356 Azalea Street

Johnsonville, South Carolina 29555

Address City State Zip

(843) 433-4800

Home Phone

Work Phone #

R. Mark Davis

Preparer's Name

MJV/Butler Trucking Inc.

Employer's Name

Post Office Box 1022

Georgetown, South Carolina 29440

Address City State Zip

Palmetto Timber S.I. Fund c/o Walker, Hunter & Associates, Inc.

Insurance Carrier

(843) 576-2782

Phone Number

Request for Commission Review by: ☐ claimant ☒ employer (check one)

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

SEE ATTACHED

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

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

W.E. Jenkinson, III, Esquire
Jenkinson, Jarrett & Kellahan, PA
Post Office Drawer 669
Kingstree, South Carolina 29556

South Carolina Workers' Compensation Commission
P. O. Box 1715
Columbia, SC 29202-1715

on the 17th day of January, 2011 by ☒ first class mail; ☐ personal service; ☐ certified mail.

Preparer's Signature

Attorney for Employer/Carrier
TitleJanuary 17, 2011
DateCheck this box if you are not represented by an attorney. ☐

If the claimant appeals and is representing himself or herself, the Judicial Department will prepare the additional copies of this form and serve this form on the opposing party. R.67-701B. Otherwise, file the original and 4 copies of this form with the Judicial Department. The appeal must be postmarked no later than 14 days from the date of service of the Hearing Commissioner's decision. R.67-701 and R.67.205. Attach the filing fee to this form. Attach a Form 32 if you are unable to pay the filing fee. Refer to R.67-701 through R.67-711 for additional information.

WCC FORM #30 REV. DATE 3/97

30**REQUEST FOR COMMISSION REVIEW**

GROUND FOR REVIEW

Timothy Hannah v. MJV/Butler Trucking, Inc. and Palmetto Timber S.I. Fund c/o Walker,
Hunter & Associates, Inc.
WCC File No.: 0908371

1. Did the hearing Commissioner err in finding as a fact that the Claimant injured his left elbow and cervical spine in the accident on July 14, 2009, and in finding that the accident also resulted in lumbar spine injury by relying upon the medical records and deposition of Dr. Mark Triana, when such is against the greater weight and preponderance of the substantial evidence in the record and is based upon erroneous legal conclusions?
2. Did the hearing Commissioner err in finding as a fact that the Claimant has not reached maximum medical improvement, when such is against the greater weight and preponderance of the substantial evidence in the record and is based upon erroneous legal conclusions?
3. Did the hearing Commissioner err in finding as a fact that the Claimant is to receive medical treatment as recommended by Dr. Triana for the lumbar spine, when such is against the greater weight and preponderance of the substantial evidence in the record and is based upon erroneous legal conclusions?
4. Did the hearing Commissioner err in finding as a fact that the Claimant is credible in his description of the further symptoms from this injury and that his description is supported by the medical reports of Dr. Triana, when such is against the greater weight and preponderance of the substantial evidence in the record and is based upon erroneous legal conclusions?
5. Did the hearing Commissioner err in finding as a fact that the symptom of lower back or lumbar spine pain was proximately caused by the injury on July 14, 2009, and there should be further evaluation and treatment, when such is against the greater weight and preponderance of the substantial evidence in the record and is based upon erroneous legal conclusions?
6. Did the hearing Commissioner err in finding as a fact that the Claimant should receive medications/treatment as prescribed or recommended by Dr. Triana as the need for this is directly and proximately the result of the injury sustained in the course and scope of employment on July 14, 2009, when such is against the greater weight and preponderance of the substantial evidence in the record and is based upon erroneous legal conclusions?
7. Did the hearing Commissioner err in finding that the Claimant has sustained an injury to his left elbow, cervical spine, and lumbar spine, when such is against the greater weight and preponderance of the substantial evidence in the record and is based upon erroneous legal conclusions?

8. Did the hearing Commissioner err in finding that in Dr. Triana's report there are other conditions arising from the accident of July 14, 2009, which have not been evaluated and treated so as to reach maximum medical improvement, when such is against the greater weight and preponderance of the substantial evidence in the record and is based upon erroneous legal conclusions?
9. Did the hearing Commissioner err in Conclusion of Law No. 3 that under § 42-15-60, Claimant continues to need medical care which will tend to lessen the period of disability, when such is against the greater weight and preponderance of the substantial evidence in the record and is based upon erroneous legal conclusions?
10. Did the hearing Commissioner err in Conclusion of Law No. 4 that "under § 42-9-620, the Claimant has not reached maximum medical improvement from all conditions causally related to his injury on July 14, 2009," when such is against the greater weight and preponderance of the substantial evidence in the record and is based upon erroneous legal conclusions and where the Workers' Compensation Act does not contain a Section 620 in Chapter 9 of the Act?
11. Did the hearing Commissioner err in Conclusion of Law No. 5 that Claimant's limitations of the lumbar spine are causally related to the accident of July 14, 2009, and should be treated and evaluated, when such is against the greater weight and preponderance of the substantial evidence in the record and is based upon erroneous legal conclusions?
12. Did the hearing Commissioner err by failing to address whether or not the Claimant had reached maximum medical improvement and suffered any disability for the body parts admitted by Defendants where Defendants properly and timely filed a Form 21?
13. Did the hearing Commissioner err in ordering that the Defendants' Form 21, Request for Stop Payment, is denied, when such is against the greater weight and preponderance of the substantial evidence in the record and is based upon erroneous legal conclusions?
14. Did the hearing Commissioner err in ordering that the Claimant's motion and Form 50 for continued medical treatment by Dr. Mark Triana is granted, when such is against the greater weight and preponderance of the substantial evidence in the record and is based upon erroneous legal conclusions?

SOUTH CAROLINA WORKERS' COMPENSATION COMMISSION

W.C.C. FILE NO: 0908371

TIMOTHY HANNAH,

Employee,

Claimant,

vs.

MJV/BUTLER TRUCKING INC.,

Employer,

AND

PALMETTO TIMBER S.I. FUND C/O
WALKER, HUNTER & ASSOCIATES,
INC.

Carrier,

Defendants.

APPELLANTS' BRIEF TO THE
FULL COMMISSION

TO: SOUTH CAROLINA WORKERS' COMPENSATION COMMISSION AND W.B.
JENKINSON, III, ESQUIRE:

STATEMENT OF THE CASE

This claim involves a 52 year-old man employed by Butler Trucking, who alleges he was injured at work on July 14, 2009, when the truck he was driving rolled over and came to rest on the driver's side. Claimant alleged injuries to his cervical neck and left elbow. Defendants filed a Form 21 dated February 2, 2010 seeking to stop payment of temporary benefits based upon the authorized treating physician's finding that Claimant was at maximum medical improvement for injuries to his cervical neck and left elbow. Initially, a hearing was scheduled for April 22, 2010. During a lengthy pre-hearing conference Claimant alleged a lumbar spine injury which was not pleaded on his current Form 50. In an effort to avoid bifurcation of the issues of the claim, the

Hearing Commissioner ordered a continuance to allow Claimant to file a Form 50, adding the injury to Claimant's lumbar spine so that all issues may be heard together in a single hearing. A hearing was ultimately set for July 30, 2010, to determine the issues as set forth on Forms 21, 50 and 51.

A pre-hearing conference was held before the start of the hearing wherein the parties stated their positions. It was the Claimant's position that he suffered an injury by accident arising out of and occurring in the course of his employment on July 14, 2009. Claimant alleged that as a result of this accident he injured his cervical spine, left elbow, and lumbar spine which was in turn affecting his legs. Claimant asserted he had not reached maximum medical improvement and in particular requested a finding that the lumbar spine and corresponding problems radiating to both of his legs be found compensable and that he was in need of additional medical treatment for his lumbar spine. In the alternative, Claimant contended that if the lumbar spine was found not be related to the accident, it would be his position that his permanent disability far exceeded any rating in the record.

Defendants admitted Claimant sustained injuries to his cervical neck and elbow in a work related accident on July 14, 2009. Defendants denied that Claimant injured his lumbar spine as a result of this accident. Defendants contended that the first mention of the lumbar spine in any of the medical records appears after an unrelated fall at Claimant's home, and that any subsequent injury to Claimant's lumbar spine was a direct result of this unrelated fall. Alternatively, Defendants asserted the Claimant developed back problems as the result of a preexisting condition or a natural progression of a preexisting condition related to Claimant's age. Defendants requested a finding that Claimant had reached maximum medical improvement on January 6, 2010 and requested a credit for overpayment of temporary total disability benefits.

from that date.

In an Order dated January 13, 2011, the Hearing Commissioner determined that Claimant's alleged injury of the lumbar spine was causally related to the accident of July 14, 2009. The Hearing Commissioner further ordered that Claimant had not reached maximum medical improvement from all conditions causally related to the July 14, 2009 accident, and that Claimant was entitled to additional medical care and treatment from authorized treating physician Dr. Mark Triana.

On January 17, 2011, Defendants timely filed and served a Form 30 Request for Commission Review. Defendants attached fourteen specific Grounds for Review to the Form 30. Defendants now submit this Appellants' Brief in support of their position.

EVIDENCE OF THE CASE

The Claimant testified that on July 14, 2009, he was driving an 18-wheeler day cab for the Defendants hauling a load of gypsum from the Berkeley County power plant. Claimant attempted to make a right hand turn to manage a curve in the road, but could not straighten his steering wheel to come out of the curve. The steering wheel released causing Claimant to lose control of the 18-wheeler. The truck rolled and came to rest on the driver's side. (Hr. Tr. pp. 10-11). Claimant testified he was trapped in the cab as the steering wheel was pinned against his legs. (Hr. Tr. p. 12, lines 6-12). Claimant was taken to Georgetown Hospital for treatment. Claimant testified he told the physicians at Georgetown Hospital that his elbow and his neck were hurting him. (Hr. Tr. p. 14, lines 15-20). Medical records from Georgetown Memorial Hospital dated July 14, 2009, report Claimant sustained a cervical strain and left elbow contusion as a result of a motor vehicle accident. (Defendants' APA p. 36). Nowhere in the initial intake report is there mention of Claimant complaining of back pain or any indication that Claimant

sustained any type of injury to his back or legs. (Defendants' APA p. 40; Hr. Tr. p.43, lines 3-12). Claimant was treated for injuries to his head, a concussion, and contusions to his pelvis, prescribed Percocet, Oxycodone, and Hydrocodone and released that day. (Hr. Tr. p. 15, lines 7-21).

Claimant testified that Doctor's Care and his physical therapy treated only his left elbow and neck. (Hr. Tr. p. 23). Medical reports from Georgetown Memorial Hospital indicate that Claimant complained only of pain in his head, neck, abdomen, left shoulder, and left elbow. (Defendants' APA p. 42; Hr. Tr. p. 43, lines 13-24). Although a medical report, dated July 14, 2009, specifically lists "back, upper, mid-, and lower" as options for patients' location of pain these choices were not circled. (Defendants' APA p. 42; Hr. Tr. p. 43, lines 13-24). A diagram of the body from Georgetown Memorial Hospital shows the locations of Claimant's pain. There are no circles around Claimant's lower back. (Defendants' APA p. 43; Hr. Tr. p. 44, lines 1-8)

Medical records from Doctors Care dated July 21, 2009 through August 8, 2009, do not indicate any complaints of pain in or about Claimant's lower back. (Defendants APA p. 50-52, Hr. Tr. p. 46). Nor do any of the following physical therapy notes dated August 12, 2009 through August 20, 2009 mention Claimant's lower back. (Defendants APA pp. 12-17). Claimant made 11 physical and occupational therapy visits, one emergency room visit and four Doctor's Care visits without mention of any lower back pain or leg pain. (Defendants APAs, Deposition of Dr. Triana p. 45, 7-13; Hr. Tr. p. 48, lines 8-16).

Claimant testified that some time prior to August 26, 2009, his left leg gave out and he fell down the steps of his porch striking his face against the railing. (Hr. Tr. p. 17, lines 5-12). Claimant testified he first told Doctors Care that he was having back problems after his August 26, 2009, fall at home. Claimant never reported his left leg giving out on him to any of the

treating physicians or physical therapists prior to his at home fall of August 29, 2009. (Hr. Tr. p. 48, lines 2-19). In fact, Claimant's first reported back pain and leg weakness came on August 26, 2009 in Doctors Care report which indicates "[l]ower back pain since July/life" and "Yesterday tripped, hit right side of face." (Defendants APA p. 53; Hr. Tr. p. 47, lines 22-25, p. 48, lines 1-3). Although Claimant testified he informed the doctors that his left leg was giving him problems well before this first documentation, medical records indicate Claimant had not complained to any doctor of his purported left leg weakness at any time prior to the unrelated fall at his home. Claimant testified his medical providers did not pay him any attention. (Hr. Tr. p. 48, lines 8-16; p. 18, lines 5-10).

Claimant first saw Dr. Triana on September 30, 2009 and informed Dr. Triana at this first visit of his back pain. (Hr. Tr. p. 21). Dr. Triana's deposition was taken prior to the hearing and submitted as evidence. Dr. Triana testified that he was never informed by the Claimant that, just a few weeks prior to this initial visit, Claimant had fallen down some stairs at his house and struck his face on the railing. (Deposition of Dr. Triana, p. 47, lines 13-25; p. 48). Dr. Triana testified that a disc protrusion, similar to Claimant's, could be caused by a number of things including falling. (Deposition of Dr. Triana, p. 47, lines 1-11). Dr. Triana was also shown medical records where Claimant fails to make mention of any back or leg symptoms until August 26, 2009. (Deposition of Dr. Triana p. 40, lines 10-16; p. 49, lines 1-6). These back and leg complaints were made just one day after the Claimant's unrelated fall at home, but prior to Claimant's first visit with Dr. Triana. Dr. Triana testified that he relied on what the Claimant told him during their consultation as a basis for his diagnosis. (Deposition of Dr. Triana p. 45, lines 22-25). Dr. Triana testified that if the story the Claimant related to him is untrue or inaccurate then that would change his opinion. (Deposition of Dr. Triana p. 51, lines 1-4). In

fact, Dr. Triana testified that he now has much more doubt as to the causal relationship between Claimant's complaints and the admitted work accident, and recanted his previous diagnosis. (Deposition of Dr. Triana p. 51, lines 19-25; p. 52, lines 1-8). Dr. Triana testified at one point that he could no longer say within a reasonable degree of medical certainty that Claimant's back injury was caused by his work related accident. (Deposition of Dr. Triana p. 53, lines 4-11).

Claimant treated with authorized treating physician, Dr. James Bethea, for injuries to his cervical spine and left elbow. (Hr. Tr. pp. 26-27). On January 6, 2010, Dr. Bethea placed Claimant at maximum medical improvement from his neck injury as well as his left elbow contusion. Dr. Bethea assigned a 0% impairment rating to his cervical spine as well as his left elbow and released Claimant to full duty work without restrictions. (Defendants' APA pp. 59-60). Following Claimant's treatment with Dr. Bethea, he returned for treatment with Dr. Triana. Based upon Claimant's complaints, Dr. Triana gave Claimant work excuses not to return to work. (Hr. Tr. p. 28)

Claimant testified he is unable to go out and perform any outside tasks. The only activities Claimant testified he has done in the past since his accident is go to church, visits his children, and drive to the store and back. (Hr. Tr. p. 32, lines 20-25; p. 33). However, video surveillance reflected that Claimant was able to go out and perform mechanic work on a neighbor's car. (Defendants' Exhibit #1). Claimant testified that on the date of the video surveillance he drove to his brother-in-law's house to check on his brother-in-law's car. Claimant testified that he looked under the hood of the car, leaning over and bending, but did not perform any mechanical work on the car. (Hr. Tr. p. 34). Time Sauer, an investigator who conducted surveillance on the Claimant, testified regarding the contents of his report and the activities he viewed. Mr. Sauer testified that on May 8, 2010, he viewed Claimant leave his

home in his car and drive to where a white Cadillac was parked with its hood up. Claimant was seen bending, lifting, leaning and reaching under the hood of the car. (Deposition of Tim Sauer, p. 8, lines 2-22; Defendants' Exhibit #1). Claimant was also viewed lying on his back while working under the car and on his knees while working on the car. (Defendants' Exhibit #1). The Claimant was viewed performing these activities without any apparent pain, assisted walking devices, or limp. Claimant was viewed working on this white car for nearly two hours -- 11:01 a.m. to 12:55 a.m. (Deposition of Tim Sauer p. 12, Defendants' Exhibit #1).

STANDARD OF REVIEW

The scope of review of the Full Commission is not limited. The Commission can, like the Single Commissioner, consider all of the evidence and reach its own findings of fact and conclusions of law. Lowe v. Am-Can Transport Services, Inc., 283 S.C. 534, 324 S.E.2d 87 (Ct. App. 1984).

It is well-established that the Full Commission is the ultimate fact finder in workers' compensation cases and is not necessarily bound by the Single Commissioner's findings of fact. Green v. Raybestos-Manhattan, Inc., 250 S.C. 58, 64, 156 S.E.2d 318, 321 (S.C. 1967). See also Muir v. C.R. Bard, Inc., 336 S.C. 266, 281, 519 S.E. 2d 583, 591 (Ct. App. 1999). The Full Commission is empowered to make its own findings of fact and to reach its own conclusions of law consistent or inconsistent with those of the Single Commissioner. Id. The final determination of witness credibility and the weight to be accorded evidence is reserved to the Full Commission. Id.

ARGUMENT

I. THE HEARING COMMISSIONER ERRED IN FINDING AS FACT AND CONCLUDING AS A MATTER OF LAW THAT THE CLAIMANT INJURED HIS LUMBAR SPINE IN THE MOTOR VEHICLE ACCIDENT OF JULY 14, 2009.

To sustain an award under the Workers' Compensation Act, it must appear that the injury resulted from an accident which both "arose out of" and "in the course of" the employment. Williams v. South Carolina State Hospital, 254 S.C. 377, 140S.E.2d 601 (1965). The language "injury by accident arising out of an in the course of employment" requires not only that the injury occur within the period of employment, but also that it arise because of the employment as when the employment is a proximate cause. Lee v. Wentworth Mfg. Co., 240 S.C. 165, 125 S.E.2d 7 (1962). In the present case, the Claimant's injury was not causally related to his work accident on July 14, 2009, but rather was caused by an unrelated fall at home.

The emergency room report indicates that on July 14, 2009, Claimant was brought to Georgetown Memorial Hospital for injuries sustained in a motor vehicle accident. (Defendants' APA p. 36). This record indicates Claimant complained of left neck and left elbow pain. Claimant was diagnosed with a cervical neck strain and left elbow contusion, was treated and released home the same day. (Defendants' APA p. 36). The same intake report, dated July 14, 2009, specifically lists "back, upper, mid-, and lower" as options for patients' location of pain, however these choices were not circled. (Defendants' APA p. 42; Hr. Tr. p. 43, lines 13-24). A diagram of the body from Georgetown Memorial Hospital shows the locations of Claimant's pain indicated by circles around specific body parts. There are no circles around Claimant's lower back or leg. (Defendants' APA p. 43; Hr. Tr. p. 44, lines 1-8). On July 21, 2009, Claimant presented to Doctor's Care with his only complaints being pain in the left elbow and neck. (Defendants' APA p. 50). Again, on July 28, 2009, a Doctors Care report indicates

Claimant presented with complaints in his neck and left elbow without mentioning Claimant's left leg or lumbar spine. (Defendants' APA p. 51). Claimant continued to complain of pain in only his neck and elbow when he presented to Doctors Care on August 7, 2009. (Defendants' APA p. 52).

Claimant initially presented for physical therapy on July 29, 2009 with a diagnosis of a neck sprain and left elbow contusion. (Defendants' APA p. 1). On August 11, 2009 Claimant treated with Next Step Rehabilitation Services. There is no mention of any back pain or leg symptoms at this visit. In fact, Next Step Rehabilitation Services has a form they fill out that provides the therapists with a number of symptoms and body parts they refer to as "Problem List." This problem list includes a checkbox for the symptom of "Impaired Gait/Balance" which is unchecked. (Defendants' APA pp. 3-4). Claimant had "no new complaints" on August 20, 2009 when he treated with Next Step Rehabilitation Services. (Defendants' APA p. 17).

The medical record is void of any mention of Claimant's lumbar pain or leg symptoms until August 26, 2009, where a Doctors Care note indicates Claimant's "left leg 'gave out' at 5:30 yesterday and patient fell and hit right side of face on railing." (Defendants' APA p. 53). Claimant's initial indication of any lower back or leg symptoms came over six weeks after his work related motor vehicle accident. During those six weeks, Claimant had 11 physical and occupational therapy visits, one emergency room visit, and at least four Doctors Care visits without mentioning any lower back pain or left leg symptoms.

Furthermore, the testimonial evidence does not support a finding that Claimant sustained a low back injury that is causally connected to his work related automobile accident. Dr. Mark Triana had two authorized visits with the Claimant; one on September 30, 2009 and the other on October 29, 2009. (Defendants' Exhibit A). Dr. Triana initially testified that he could relate the

Claimant's low back injury to his work related automobile accident of July 14, 2009. Dr. Triana came to this conclusion after three visits with Claimant and based upon what Claimant related to him historically. (Deposition of Dr. Triana p. 28, lines 13-25; p. 29, lines 1-16). During Claimant's brief treatment with Dr. Triana, Claimant never informed him about the fall he had on August 25, 2009 where the Claimant fell down some stairs striking his head on the railing at home. (Deposition of Dr. Triana p. 47, lines 12-20). During cross-examination, Dr. Triana changed positions and concluded that with this new knowledge of Claimant's fall, and in light of the medical evidence reviewed, he could no longer say within a reasonable degree of medical certainty that Claimant's low back injury was caused by his work related automobile accident. (Deposition of Dr. Triana p. 53, lines 4-11). During re-direct, Dr. Triana was asked if he was 51% sure that Claimant's low back injury was caused by Claimant's work related automobile accident. Dr. Triana responded, "Yes, I - I would be leaning more likely toward his injury - his truck injury than his fall at home." (Deposition of Dr. Triana p. 57, lines 14-18).

Despite Dr. Triana's testimony, Claimant's authorized treating physician, Dr. James Bethea has unequivocally stated that Claimant's low back injury is not causally connected to Claimant's work related injury. (Deposition of Dr. Bethea, pp. 6-7; p. 26, lines 23-28; p. 27, lines 1-6). Dr. Bethea's opinion is supported by the greater weight and preponderance of the medical evidence which makes no mention of Claimant's purported leg symptoms or low back injury until after Claimant's unrelated fall at home.

The burden of proof applicable to a claim for Workers' Compensation benefits is the preponderance of the evidence. The Claimant must establish by a preponderance of the evidence the facts that will enable him or her to an award under the Workers' Compensation Act. *Walsh v. U.S. Rubber Company*, 120 S.E.2d 685 (1961); *Herndon v. Morgan Mills, Inc.*, 143 S.E.2d 376

(1965). Furthermore, an award may not rest on surmise, conjecture, or speculation and must be founded on evidence of sufficient substance to afford a reasonable basis for it. *Bundrick v. Powell's Garage and Wrecker Service*, 248 S.C. 496, 151 S.E.2d 437 (1966). For evidence to be substantial, it must not be viewed blindly from one side, but rather be a review of the record as a whole such that it would allow reasonable minds to reach the same conclusion the administrative agency reached. *Mullinax v. Winn-Dixie Stores, Inc.*, 458 S.E. 2d 76 (S.C. App. 1995).

Based upon the record as a whole, Claimant failed to establish, by a preponderance of the evidence, that he sustained a compensable low back workplace injury on July 14, 2009.

II. THE HEARING COMMISSIONER ERRED IN RELYING ON THE MEDICAL RECORDS OF DR. MARK TRIANA.

The hearing Commissioner found that the Claimant's lower back injury was causally related to Claimant's work related motor vehicle accident based upon the medical records and opinion of Dr. Mark Triana. (Finding of Fact #1, Decision and Order, January 13, 2011). When testimony of medical experts is relied upon to establish causal connection between accident and subsequent disability, the opinion of the expert must be at least that disability most probably resulted from the accidental injury. *Grice v. Dickerson, Inc.*, 241 S.C. 225, 127 S.E.2d 722 (1962). The deposition testimony of Dr. Mark Triana does not support the conclusion that his opinion regarding the causative effect of Claimant's lower back injury was stated within a reasonable degree of medical certainty, or that Claimant's injury most probably resulted from the accident, and therefore should not have been relied upon by the hearing Commissioner in order to find as fact that the Claimant's lower back injury resulted from his work related injury.

In order that medical testimony may have some probative value in establishing a causal relationship it is not enough for the doctors to say simply that the ailment in question might have resulted from the assigned cause, or that one could have brought about the other; they must go

further and testify at least that, taking into consideration all the attending data, it is their professional opinion the result in question most probably came from the cause alleged. Brady v. Sacony of St. Matthews, 232 S.C. 84, 101 S.E.2d 50 (1957). Therefore, in order for Dr. Triana's testimony to be probative on the issue of causation he must first consider all of the attending data, and then state within a reasonable degree of medical certainty his opinion.

In Dr. Triana's deposition he initially testified that, based upon the two authorized visits and one unauthorized visit with the Claimant, and relying upon what the Claimant historically related to him, he could causally relate the Claimant's low back injury with his work related automobile accident. (Deposition of Dr. Triana p. 28, lines 13-25; p. 29, lines 1-16). However, Dr. Triana did not consider all of the attending data before concluding Claimant's lower back injury was causally related to his motor vehicle accident of July 14, 2009. Dr. Triana testified he relied on what the Claimant told him in his diagnosis. (Deposition of Dr. Triana p. 45, lines 22-25). During Claimant's treatment, Claimant never informed Dr. Triana about the fall he had on August 25, 2009 where the Claimant fell down some stairs striking his head on the railing at home. (Deposition of Dr. Triana p. 47, lines 12-20). Dr. Triana testified that a disc protrusion, the type of injury in Claimant's back, could be caused by a number of things including a fall. (Deposition of Dr. Triana p. 47, lines 1-11). After learning of the Claimant's fall on August 25, 2009, Dr. Triana testified it would be very difficult to say with any amount of certainty what the cause of the Claimant's disc protrusion was. (Deposition of Dr. Triana p. 50, lines 18-25). Dr. Triana admitted that after a review of all the attending facts he had much more doubt as to causation of Claimant's lumbar complaints. Dr. Triana testified, "I can't say with a reasonable amount of medical certainty that [Claimant's back injury] was caused by his accident or his fall or whatever, no." (Deposition of Dr. Triana p. 53, lines 9-11).

Dr. Triana opined that "there is still a possibility" that Claimant's lower back injury was caused by his work related motor vehicle accident, and concluded that "we just don't know." (Deposition of Dr. Triana p. 52, lines 1-8). South Carolina Courts have long held that a "possibility" is not enough to show that a workman's injury arose out of and in the course of his employment. Fowler v. Abbott Motor Co., 236 S.C. 226, 113 S.E.2d 737 (1940).

Dr. Triana was asked if he was 51% sure that Claimant's low back injury was caused by Claimant's work related automobile accident. Dr. Triana responded, "Yes, I – I would be leading more likely toward his injury – his truck injury than his fall at home." (Deposition of Dr. Triana p. 57, lines 14-18). Although Dr. Triana concluded that he was 51% sure that Claimant's low back injury was causally connected to Claimant's work related automobile accident, this testimony is weakened by the fact that Dr. Triana changed opinions three times during the course of his deposition while the authorized treating physician, Dr. Bethea has stated unequivocally that Claimant's low back injury is not causally related to Claimant's work accident.

Furthermore, Dr. Triana's opinion regarding the Claimant's left leg symptoms were also not stated within a reasonable degree of medical certainty, or most probably the result of Claimant's accident. Dr. Triana was specifically asked whether Claimant's alleged leg symptoms actually produced the at home fall. He responded, "Yeah, and that's what I was arguing earlier. We don't know." (Deposition of Dr. Triana p. 65, lines 10-17).

III. THE HEARING COMMISSIONER ERRED IN FINDING AS FACT THAT THE CLAIMANT HAS NOT REACHED MAXIMUM MEDICAL IMPROVEMENT.

The hearing Commissioner concluded as a matter of law that "under section 42-9-620, claimant has not reached maximum medical improvement from all conditions causally related to his injury on July 14, 2009." (Conclusion of law #4, Decision and Order, January 13, 2011).

Defendants submit this conclusion is based upon an erroneous legal conclusion as the Workers' Compensation Act does not contain a section 620 in chapter 9 of the Act.

Furthermore, the greater weight and the preponderance of the evidence does not support a finding that Claimant has not reached maximum medical improvement. On December 14, 2009, Dr. James Bethea opined Claimant had reached maximum medical improvement except for further care of Claimant's left elbow injury. Dr. Bethea recommended Claimant received treatment for his left elbow which had then become infected and required incision and drainage. (Defendants' APA pp. 56-58). Claimant received the recommended treatment and was subsequently placed at maximum medical improvement by Dr. Bethea on January 6, 2010 for both his cervical neck injury as well as his left elbow contusion. (Defendants' APA p. 59-60). Dr. Bethea further opined that Claimant sustained 0% impairment to his cervical spine and 0% impairment to his left elbow and able to return to work without restrictions. (Defendants' APA p. 61). Dr. Bethea also opined Claimant would not need future medical care related to his work injury. (Defendants' APA p. 61).

The sole medical evidence in the record to contradict the Claimant's treating physician's finding that Claimant is at maximum medical improvement, sustained 0% impairment rating to the cervical neck as well as the left elbow, and is able to return to full duty work without restrictions is the medical opinion of Dr. Mark Triana. However, Dr. Triana's medical opinion wavered during his deposition testimony. At one point, Dr. Triana testified he could not, within a reasonable degree of medical certainty, relate Claimant's low back injury to Claimant's work accident. (Deposition of Dr. Triana p. 53, lines 9-11). Dr. Triana's ultimate conclusion that it was at least 51% more likely that Claimant's low back injury was causally related to Claimant's work accident is contradictory to the medical evidence as a whole as well as Claimant's

authorized treating physician's unequivocal opinion that the low back injury was not casually related; and is therefore no support for the hearing Commissioners finding of fact and conclusion of law that Claimant has not reached maximum medical improvement. (Deposition of Dr. Triana p. 57, lines 14-18; Deposition of Dr. Bethea, pp. 6-7; p. 26, lines 23-28; p. 27, lines 1-6, Defendants' APAs).

CONCLUSION

For the foregoing reasons Defendants contend the Hearing Commissioner erred in finding that Claimant sustained a lumbar spine injury by accident arising out of and in the course and scope of his employment. Therefore, Defendants respectfully request the Full Commission reverse the Order of the Hearing Commissioner with respect to such finding. Defendants further request a finding that the Claimant has reached MMI for all causally-related body parts and to enter an award, if any is due, consistent with the impairment ratings in the record.

fw 
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Charleston, South Carolina
February 23, 2011

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



WCC File #: 0908371

Carrier File #: 0001-0593-09-0002

Carrier Code #: SF827

Employer FEIN #:

Timothy Hannah

Claimant's Name
 356 Azalea Street
 Johnsonville, South Carolina 29555

Address City State Zip

(843) 433-4800

Home Phone #
 R. Mark Davis

Work Phone #
 McAngus Goudelock & Couris

Proprietor's Name

Law Firm

MJV/Butler Trucking Inc.

Employer's Name
 Post Office Box 1022
 Georgetown, South Carolina 29440

Address City State Zip

Palmetto Timber S.I. Fund c/o Walker, Hunter & Associates, Inc.

Insurance Carrier
 (843) 576-2782

Phone Number

Date of Accident: 7/14/09

1. Temporary Compensation Paid:

Number of Weeks	From	To	Amount
98	7/15/09	06/11	\$ 37,759.68
			\$
			\$
			\$
			\$

2. The claimant returned to work on _____

(m/d/yyyy)

☐ With restrictions but at a salary not less than before the injury.

☐ Without restrictions.

3. The claimant agrees he or she was able to return to work on 2/10/10.

(m/d/yyyy)

I agree that I was disabled for the period(s) indicated and I was paid compensation as shown above. I UNDERSTAND THAT MY WEEKLY TEMPORARY COMPENSATION CHECKS WILL STOP; HOWEVER, I GIVE UP NO RIGHTS TO COMPENSATION FOR FUTURE DISABILITY, FOR PERMANENT DISABILITY, DISFIGUREMENT OR MEDICAL CARE. The effect of this form has been fully explained to me, and I have received a copy of it. I understand that I should not sign this form until 15 days after I have returned to work or agree I was able to return to work.

Claimant's Signature

Employer's Representative Signature

(Check one) ☒ Witness ☒ Claimant's Attorney

Date Agreement Signed

File this form with the Claims Department no later than 31 days from the date the claimant returned to work to terminate temporary compensation after the first 150 days after employer's notice of the injury according to R.67-605. Within the 150 period, obtain Form 17 to document that claimant agrees he or she is able to return to work.

WCC Form #17
 Rev. Date 3/97

17

RECEIPT OF COMPENSATION

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



AMENDED

WCC File #: 0908371

Carrier File #: 0001-0593-09-0002

Carrier Code #: SF827

Employer FEIN #:

Timothy Hannah

Claimant's Name SSN

356 Azalea Street
Johnsonville, South Carolina 29555

Address City State Zip

(843) 433-4800

Home Phone #

R. Mark Davis

Preparer's Name

Work Phone #

McAngus Goudelock & Courie

Law Firm

MJV/Butler Trucking Inc.

Employer's Name

Post Office Box 1022
Georgetown, South Carolina 29440

Address City State Zip

Palmetto Timber S.I. Fund c/o Walker, Hunter & Associates,
Inc.

Insurance Carrier

(843) 576-2782

Phone Number

Date of Accident: 7/14/09

1. Temporary Compensation Paid:

Number of Weeks	From	To	Amount
109 1/7	7/15/2009	8/16/2011	\$ 41,572.88
			\$
			\$
			\$
			\$
			\$

2. The claimant returned to work on _____

(m/d/yyyy)

☐ With restrictions but at a salary not less than before the injury.

☐ Without restrictions.

3. The claimant agrees he or she was able to return to work on 2/10/10.

(m/d/yyyy)

I agree that I was disabled for the period(s) indicated and I was paid compensation as shown above. I UNDERSTAND THAT MY WEEKLY TEMPORARY COMPENSATION CHECKS WILL STOP; HOWEVER, I GIVE UP NO RIGHTS TO 'COMPENSATION' FOR FUTURE DISABILITY, FOR PERMANENT DISABILITY, DISFIGUREMENT OR MEDICAL CARE. The effect of this form has been fully explained to me, and I have received a copy of it. I understand that I should not sign this form until 15 days after I have returned to work or agree I was able to return to work.

Claimant's Signature

Employer's Representative Signature

(Check one) ☐ Witness ☒ Claimant's Attorney

Date Agreement Signed

File this form with the Claims Department no later than 31 days from the date the claimant returned to work to terminate temporary compensation after the first 150 days after employer's notice of the injury according to R.67-505. Within the 150 period, obtain Form 17 to document that claimant agrees he or she is able to return to work.

WCC Form # 17
Rev. Date 3/97

17

RECEIPT OF COMPENSATION

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM THE S.C. WORKERS' COMPENSATION COMMISSION

Appellate Panel Review

W.C.C. File No. 0908371

Timothy J. Hannah, ... Appellant,

v.

MJV/Butler Trucking, Inc.,

and

Palmetto Timber S.I. Fund c/o

Walker, Hunter & Associates, Inc., ... Respondents.

APPELLANT'S FINAL BRIEF

W. E. Jenkinson, III, Esquire
Jenkinson, Jarrett, & Kellahan, P.A.
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Kingstree, SC 29556
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STATEMENT OF THE ISSUES ON APPEAL

- I. Whether substantial evidence supports the Commission's interpretation of treating physician Dr. Triana's testimony as not supporting the necessary causal relationship between the July 14, 2009 accident and Timothy Hannah's lumbar spine pain.
- II. Whether the Commission erred in failing to consider the employee's lumbar spine condition in combination with the elbow and cervical spine injury received on July 14, 2009, or alternatively to consider whether the July 14, 2009 accident aggravated pre-existing spinal conditions as required in light of *Bartley v. Allendale County Sch. Dist.*, 392 S.C. 300, 709 S.E.2d 619 (2011).
- III. Whether the Commission's rulings that Timothy Hannah has received all proper medical care that will tend to lessen his period of disability and is not entitled to medical treatment or other benefits for his lumbar spine injury are supported by substantial evidence and proper legal analysis.
- IV. Whether the Commission's order and ruling as a whole fails to consider the condemnation of employer doctor shopping in *Risinger v. Knight Textiles*, 353 S.C. 69, 577 S.E.2d 222 (Ct. App. 2002).

STATEMENT OF THE CASE

On July 14, 2009, Timothy Hannah, age 52, was driving a tractor-trailer for his employer when he lost control, and the truck rolled over on the driver's side. After initially paying for some medical treatment for an elbow and cervical spinal injury indisputably caused by the work accident, Defendants filed a Form 21 on February 2, 2010, seeking to stop payment of temporary benefits based upon the claims of the physician Defendants sent Mr. Hannah to for an independent medical examination. This physician performed the elbow surgery, which was indisputably covered, but never fully evaluated the disputed lumbar spine injury, as he never received the lumbar spine MRI that Mr. Hannah obtained privately when Defendants refused to pay for it. Without receiving the requested lumbar MRI, on January 6, 2010, this physician declared Mr.

Hannah at maximum medical improvement for his injuries to his cervical neck and left elbow. He declared Mr. Hannah's remaining disability related to his cervical and elbow injuries to be zero and released him to return to work even though he prescribed Darvocet for Mr. Hannah's cervical pain and testified his lumbar pain also required such narcotic medication.

A hearing was held on July 30, 2010, to determine the issues in Form 21, 50 and 51. Mr. Hannah's sought compensation and continuing medical treatment for all aspects of the injuries he claims he suffered in connection with the accident arising out of and occurring during the course of his employment on July 14, 2009, including his cervical spine, left elbow and lumbar spine, which in turn has caused weakness in his legs. Mr. Hannah argued he had not reached maximum medical improvement with respect to his lumbar spine and corresponding problems with his legs and needed additional medical treatment for these problems. In the alternative, Mr. Hannah contended his permanent disability far exceeded any rating in the record.

Defendants admitted Mr. Hannah sustained injury to his cervical spine and elbow in the accident of July 14, 2009. However, they denied his lumbar spine injury was a result of the accident. Alternatively, Defendants asserted Mr. Hannah developed back problems as either a result of a preexisting condition or the natural progression of degeneration related to his age. Defendants requested a finding that Mr. Hannah had reached maximum medical improvement on January 6, 2010, and requested a credit for overpayment of temporary total benefits from this date.

By Order dated January 13, 2011, Hearing Commissioner Roche determined Mr. Hannah's lumbar spine injury was causally related to the accident of July 14, 2009, and

found Mr. Hannah had not reached maximum medical improvement from all conditions causally related to that accident. Further, the Commissioner found Mr. Hannah was entitled to additional medical care and treatment from the first authorized treating orthopedic physician selected by his employer, Dr. Mark Triana.

Defendants timely filed and served a Form 30 Request for Commission Review. On July 25, 2011, an appellate panel of three commissioners reversed the initial commissioner's ruling finding the greater weight and preponderance of the evidence supported a reversal of the Single Commissioner's Order finding the claimant had sustained a compensable lumbar spine injury. Commissioners Beck and Wilkerson voted to reverse Commissioner Roche's decision and findings while Commissioner Williams would have affirmed Commissioner Roche and dissented. The Appellate Panel Decision and Order did not address either the *Bartley v. Allendale County Sch. Dist.*, 392 S.C. 300, 709 S.E.2d 619 (2011) decision rendered a few months before or the earlier *Ellison v. Frigidaire Home Products*, 371 S.C. 159, 638 S.E.2d 664 (2006) decision on the effect of aggravation of pre-existing conditions or combination of pre-existing conditions with injuries caused by a work-related accident.

Mr. Hannah timely filed his notice of appeal.

STATEMENT OF FACTS

On July 14, 2009, Mr. Hannah was driving a loaded 18 wheeler for his employer, hauling a load of gypsum in Berkley County on SC Highway 41. While attempting to negotiate a right curve, Mr. Hannah was unable to straighten his steering wheel, lost control of the truck and testified, "I think it flipped, I'm not sure." (R. p. 30, line 13). He

had his seat belt on and was trapped in the cab with his legs pinned under the steering wheel at his pelvis. (R. p. 31, lines 3-12).

Mr. Hannah is of small stature, about 5' 6" with a weight of 145 pounds. (R. p. 31, lines 14-16). He had never been in any other vehicular accidents where he had to have medical treatment, and his only prior on-the-job injury occurred in 1983, when he severed a portion of his finger. (R. p. 31, line 23 – p. 32, line 3). When taken to the emergency room in Georgetown, Mr. Hannah testified he hurt from the top of his head all the way down to his hips, but his elbow and neck hurt the worst. (R. p. 33, lines 12-20). The ER record reflects diagnoses of sprain of the neck, contusion of the elbow, contusion of the chest wall, contusion of the abdominal wall, concussion without coma and open wound of the elbow. (R. p. 118). He was prescribed Percocet for pain and discharged home. (R. p. 34, lines 11-18; R. p. 119).

Mr. Hannah was followed by Doctors Care from July 21, 2009 to September 9, 2009 for injuries related to the accident. (R. p. 121). Doctors Care referred him to an orthopedic surgeon, Dr. Mark Triana, on August 26, because of complaints of weakness in his legs and pain in his lumbar spine since July. (R. p. 120). None of the Doctors Care records reflect any complaints or treatment to the lumbar spine until August 26, 2009. However, the physical therapy records from around that date note an improved gait pattern with decreased left leg dragging indicating the physical therapists had previously noticed problems with his left leg indicative of a lumbar spine injury even if such problems were not actually written down in the earlier records. (R. pp. 84-88) Mr. Hannah testified he initially did not think he had injured his low back. During this period of time, however, he was also taking oxycodone for pain relief. After beginning to feel

better and starting to move around, he realized he had a problem in his low back. (R. p. 36, lines 11-24). (R. p. 37, line 24 - p. 38, line 3).

At the August 26th visit, he explained to the Doctors Care physician that the day before his leg gave out, he fell on his stairway, and hit the right side of his face on the railing. Doctor's Care then referred him, as a workers' compensation patient, to Dr. Triana, an orthopedic surgeon, in Georgetown for evaluation and treatment of his low back, cervical spine and elbow complaints. (R. pp. 120, 35, 74).

Mr. Hannah first saw Dr. Triana, the insurance carrier-approved orthopedic physician, on September 20, 2009, with complaints of neck and left shoulder pain that "radiates down the middle of his back" and "chronic low back pain radiating into his left leg and he finds that his left leg buckles at times." Additionally he came "with an MRI that shows degenerative disc at C5-6 with a small disc protrusion that may very well be causing his neck and shoulder symptoms." (R. p. 122). Hannah also brought x-rays of his lumbar spine to his first visit with Dr. Triana, which showed some degenerative disc disease of his back. Although Dr. Triana does not remember what medical provider had taken those lumbar x-rays, Hannah must have made some prior complaints about his low back in order to have lumbar spine x-rays to bring with him to his first visit with Dr. Triana. (R. pp. 62-63) Dr. Triana wanted an MRI of the lumbar spine.

On the next visit with Dr. Triana, he noted Mr. Hannah's workers' compensation carrier "would not in any way take ownership of his lumbar pain," so he could not get an MRI of his lumbar spine. Other arrangements were made to use Hannah's health insurance to have the lumbar MRI. (R. p. 124). The MRI of November 5, 2009, disclosed "mild disc space narrowing and a small broad-based type protrusion, which effaces the

ventral thecal sac and abuts the descending left L5 nerve root" at the L4-5 level. (R. p. 125).

After receiving this diagnosis, the workers' compensation carrier then sent Mr. Hannah to a different orthopedist, Dr. James F. Bethea, in Columbia for a second opinion / independent medical examination. (R. pp. 130-131; R. pp. 96-98). Dr. Bethea's medical notes and examination of December 4, 2009, found an impression of neck pain, left shoulder pain, infection of the left elbow and lower back pain. (R. p. 128).

After operating on his elbow, Dr. Bethea discharged Mr. Hannah stating he had 0% impairment from the elbow and cervical spine injuries sustained in the accident. In this same visit, however, he found Mr. Hannah was still in pain from his cervical spine, elbow, and lumbar spine significant enough to give him a prescription for Darvocet. (R. p. 104, line 25 - p. 106 line 14). The 0% impairment was to the cervical spine. He made no findings as to the lumbar spine at that time because he did not have the lumbar MRI to review. (R. p. 132; R. pp. 103-104) In his deposition he testified the reason he wanted to see the low back MRI was because it would have told him if there had been any trauma to the low back. He would not admit that if the MRI showed trauma injury it would support a finding that Hannah had suffered a lumbar injury in the truck wreck even though it was possible for such a wreck to cause such an injury. (R. pp. 101-102) Without ever appearing to consider aggravation of a pre-existing degenerative back injury by the wreck as being a sufficient connection to support causation, he kept insisting Hannah's low back pain in the fall of 2009 could not be causally connected to the wreck because there was no mention of a low back injury in the workers compensation medical records during the first six weeks after the wreck. (R. pp. 99, 108) However, he did admit that a diagnosis

of "chronic" back pain requires about three months of ongoing back pain and given the timing of that diagnosis in the medical records, the onset of Hannah's chronic low back pain would be pretty close to the date of the truck wreck (R. p. 107)

Dr. Bethea also admitted Hannah's pain down the left leg with numbness in the foot as well as weakness of the left leg could be caused by a lumbar spine injury; that weakness could cause the leg to give out and cause a fall; that the medical records are consistent with such a scenario and there is nothing in the medical records which would be contradictory to such a scenario. (R. pp. 100, 101) He was not aware of any injuries Timothy Hannah might have suffered that could have caused his lumbar spine pain in the fall of 2009 other than the truck wreck in July or the fall in August. (R. p. 102, lines 6-15).

Focusing upon Mr. Hannah's complaints of low back pain, Dr. Triana reviewed the emergency room records and complaints in his deposition. He opined that confusion of the abdomen can also encompass the area of the lumbar spine in the diagnosis. (R. p. 58, lines 14-17). When questioned about Mr. Hannah not having specific complaints of lumbar pain at the ER, Dr. Triana testified such circumstances are not unusual, especially where people have multiple complaints of severe pain, and the brain focuses on the most severe pain. It does not mean people do not have pain in other areas. (R. p. 59, line 9 - p. 60 line 14).

Dr. Triana testified as to a number of medical opinions with respect to Timothy Hannah's condition. These can be summarized best as follows:

- The condition found in the MRI of November 2009 is consistent with trauma. (R. p. 68, lines 13-22).

- The complaints of Mr. Hannah and the medical findings of Dr. Triana with respect to the lumbar spine were caused by the injury received in the accident of July 14, 2009. (R. p. 69, line 13 - p. 70, line 12).
- That Mr. Hannah will need additional pain medication and epidural steroid injections, care and treatment that are necessary and a result of the injury received in the accident of July 14, 2009. (R. p. 72, line 8 - p. 73, line 2).
- Mr. Hannah needs to remain out of work during the care and treatment required for the pain in his lumbar spine. (R. p. 73, lines 3-7).
- That Mr. Hannah has not reached maximum medical improvement. (R. p. 73, lines 17-21).

In regard to the causation of Mr. Hannah's lumbar and leg pain, the weakness of his left leg, the connection between those issues and the July wreck and August fall, and the need for continuing treatment of Mr. Hannah's back and/or leg, Dr. Triana testified on direct:

A. Well, when Mr. Hannah came in, he was complaining of his neck and back pain. I mean, from the first visit, he told me he was having neck pain and he was having low back pain. ... [The low back pain] was radiating into his left leg. He found that his left leg would give way or buckle at times. And he did have some x-rays of his lumbar spine. ... and [the x-rays] showed some degenerative disc disease of his back.

Q. ... You said his third complaint the note says is just chronic low back pain? What do you mean by chronic low back pain?

A. Well, he had been having back pain for quite some time that was radiating into his legs. ... and I said on his x-ray he did have some degeneration of his facet joints, which are the joints between the vertebra and the low back.

Q. Considering a person of his age, is it unusual to have some degenerative?

A. Not at all. ...

Q. Tell us about the physical examination on that day?

A. ... And his left leg to me seemed like his muscles were just globally weaker than on the right. So, there wasn't any focal area or one muscle group that was weak. It just seemed his whole leg was weaker. ...

Q. What's the reason you based upon what you had seen so far of his weak left leg?

A. Well, at that time with him complaining of his back pain and leg pain, I felt that it was coming from his back -- ... -- some pathology in his back. ... I was concerned about this back and leg complaints, so I wanted to get an M.R.I. of his back. ... And we felt that he was symptomatic enough that we were going to keep him out of work and put him on some pain medicine and he hadn't -- he had run out of any that he had had before. And my biggest concern was that he couldn't go back to work because he couldn't drive and especially taking narcotic medication. And I specifically said he cannot lift, bend, push, crawl or ride in vibrating vehicles until I saw his M.R.I. of his back. ...

Q. Now tell us about the M.R.I. scan. ...

A. ... On the 14th of January saw him back after he had gotten his M.R.I. His M.R.I. showed some desiccation which is some drying out. And you can actually see the changes on the M.R.I. compared to a healthy well hydrated disc. And this was at the L4-5 level. It did show some facet arthritis they saw on his x-rays. And I felt that this was a evidence of a chronic process or saw that it had been going on for a while. However, I did state that he had a small protrusion of disc material on the left side which was -- it was extend[ed] into the neuro foramen. That's the hole that the nerve comes out of. And that could be the cause of his left leg pain. ...

Q. And what was his [Dr. Goltra, radiologist] findings as to the --

A. Said L4-5 level, there's a small broad based protrusion with secondary abutment of the descending L5 nerve roots with mild central canal stenosis. ... And that's the similar thing that I described.

Q. Can you tell me whether or not to a reasonable degree of medical certainty the injury or condition described in Dr. Goltra's M.R.I. scan is consistent with trauma -- can be caused by trauma?

A. I think the protrusion of the disc or that component of the description can be, yes.

(R. pp. 61-68)

A. All right. I think that historically, Mr. Hannah related to me that he didn't have the same type of pain in his leg and his back before this accident that he did afterwards. And it seems to be related to that event that all this started. The findings on the M.R.I. are consistent with a -- a recent change in the disc. Whether it's de -- degenerative or not, the protrusion of the disc certainly correlates with his left leg symptom that he states started after this accident. And so, I can causally relate the two.

- Q. Is that to a reasonable degree of medical certainty as to the accident in July 14 -
- A. Yes -
- Q. - 2009?
- A. - It is.
- Q. Now you saw him on February 25th.
- A. Yes.
- Q. What was his condition when you saw him then?
- A. Well, he was still complaining of his back and leg pain. He still was complaining of so - his neck and arm pain. It was radiating into his shoulder blades. I can also say that he was pretty upset or angry over the fact that he had seen his doctor in Columbia who had took care of the olecranon bursa and told him that he had no problems with his neck or back. So, he was quite irritated with that - with that report. So it didn't surprise me that he was upset about this neck and back and leg and arm and everything still hurting him. But he was still complaining of the same complaints in his neck, his neck, his back and his leg.
- Q. Is his condition the same as you saw him in January or was it deteriorating?
- A. I would say - I wouldn't say it's any worse than just say he's no better either.
- Q. You talked to him about surgery and he - you're not - you don't think - or tell us what the situation was regard to future surgery as concerned.
- A. Well, we talked at length about the fact that - that his neck symptoms were relieved with his epidural injections which gave me very good evidence or confidence that if we proceeding with surgery of his neck that we can get a good result and relieve his symptoms. His back and - and leg pain I have had some recent experience with a device called the x-stop which separates the spinous process between the vertebra. It will unload the neuro foramen and it may very well relieve the pain in his left leg as opposed to a much bigger, much serious - more serious surgery and any kind of discectomy and fusion of that disc. So we talked at length about that possibility.
- Q. Now, can you tell us whether or not to a reasonable degree of medical certainty that as a result of this injury of July 14, 2009, he needs further medical treatment for his lumbar spine and related conditions?
- A. Yes, I do.
- Q. Will he need any additional care and treatment for his cervical spine?
- A. Yes, Sir. I believe he does.
- Q. Can you tell us whether or not to a reasonable --- a reasonable degree of certainty he will - whether or not he will need additional pain medications and epidural steroid injections as a result of the injury of Jan --- July 14, 200 - of 2009?

A. At this point, that is our plan. He was going to continue with another injection in his low back and his medication. And he was to see me back in a couple of months to see how he responded to that.

Q. Can you tell us whether or not to a reasonable degree of medical certainty the entire time you see him and presently he needs to remain out of work as a result of his conditions?

A. Yes, he does.

Q. And can you tell us whether or not to a reasonable degree of medical certainty he -- whether or not he'll be able to return to work and -- until and after he receives the medical care and treatment that you've described?

A. I would hope that once we get his neck and back complaints treated, then I may include surgery, that he'd go back to the previous level of employment, yes.

Q. Now, can you tell us whether or not to a reasonable degree of medical certainty he has reached maximum medical improvement as of this day?

A. I do not believe he has.

(R. pp. 69-73)

Dr. Triana underwent extensive cross-examination, during which time he expressed some qualification of his initial opinion relating to the lumbar spine and the interplay of the fall on the step where Mr. Hannah struck his face in August of 2009.

Q. So -- And I understand there -- and this may be over generalizing or over simplifying. But a -- a disc protrusion in the lumbar spine could be -- could be caused by a number of things. Is that correct?

A. That's correct.

Q. It could be caused by lifting. Is that correct?

A. Yes.

Q. Could it be caused by falling?

A. Yes.

Q. Okay. And I noticed, I've looked through your records, particularly the September 30th record. And I note that -- that Mr. Hannah did not -- he told you about the truck wreck, but didn't mention anything about the fall that he had on August 25th, 2009. Is there anything in your records where he reported that he fell at home down some stairs?

A. No.

Q. Okay. And the reason I ask is that Doctor's Care record dated August 26th where they refer to an orthopedist -- which I believe is how he got to you.

A. Yes.

- Q. There is a mention that he fell at home and he hit the right side -- ... It also though in the physical therapy records -- and this is one of the -- his physical therapy progress current status report dated 8/26/09, there's a notation patient reports falling down the step and falling on face and --- excuse me --- on elbow at home. ... And so, curiously what we've been through how there's no mention of back pain up to a certain point. There's a mention of back pain afterwards. And I'll submit to you it -- it's in the records that the first mention of lower back pain comes a day after that fall at home that's documented in Doctor's Care records and the physical therapy records. ... Okay, so we've established that many things can cause a -- a disc protrusion in the back including falls, including truck wrecks, car accidents. So, is it fair to say that of the fall at home at home could cause -- could have caused a disc protrusion?
- A. Yes, and the only thing that I can say that again, adds doubt to the whole issue of what -- it came first the chicken or the egg, the doctor says that his left leg gave out and he fell. And you know, you could argue just his -- I guess a -- assuming that this disc was there and -- and effected the strength in his leg and that's why it gave out. So, the disc protrusion was already there when he fell. I don't know. I mean, I -- I guess unless you were the good Lord, there's no way of telling that exactly what -- what caused this disc protrusion. We know that he had a degenerative disc there. I mean, that is something that has been going on for years. It wasn't caused by his accident. I can tell you the strongest thing is historically he tells me that he started getting this leg pain shortly after the accident. Now, the timeframe -- the exact date, he did not relate that to me. And I don't have any documentation of that. And that his leg pain continued and it wasn't getting any better despite the medications and things he had for treating his neck. So, that is my basis for saying that -- and the fact that if you rolled over a truck and had that kind of an injury to your neck, it certainly is reasonable to think that he could have had some kind of trauma to his lumbar spine at the same time. So, I don't know if that helps of [sic] muddies the water.
- Q. It -- and let me ask you something to muddy the water further. So, now that we have two events, a -- truck wreck and a fall, is it possible to say with any certainty what the cause of his disc protrusion was?
- A. It's be [sic] very difficult to say exactly.
- Q. Okay
- A. Other than historically what he's relating to me, yes. ...
- Q. Is it still your opinion to within a reasonable degree of medical certainty given the records we've reviewed today, that Mr. Hannah's -- the -- or the disc protrusion of Mr. Hannah's lumbar spine was caused by the truck wreck in July of 2009?

- A. I – I – after reviewing all the records I can say I've much more doubt to one to one causal relationship. I think that there is still a possibility, but it – again, it could be like you said from – from other – historically from other injuries. ... Q. So, that taking it step further, is it fair to say that it – it's impossible to say that it's more likely that his injury was caused by the truck wreck than the fall down the stairs?
- A. I think the only thing if it's swings my decision one way or the other is the – the documentation that his leg gave out and he fell. ... You know, people's legs don't usually give out when they're walking up and down the stairs. He's a young guy. He's healthy. I mean, he has good muscle tone. So, that's what would – would make me wonder what caused his leg to give out and fall.
- Q. And – and according to the records, we – we don't know exactly what caused his leg to give out? Whether he – he tripped or a dog ran into the back of his leg or whether it was due to weakness in his leg?
- A. No, we don't.
- Q. Okay, so, it is not – it's just to get straight to the point, do you have an opinion as to the – stated within a reasonable degree of medical certainty as to the cause of Mr. Hannah's lower back injury?
- A. I – I can't says [sic] with a reasonable amount of medical certainty that it was caused by his accident or his fall or whatever, no.

(R. pp. 77-83) When one or two lines are taken in isolation and out of context of the remainder of the cross examination, and particularly without considering the testimony on direct and redirect, it may appear he qualified his causation opinions far more than he actually did. On redirect examination and in conclusion to questions by Mr. Davis, Dr. Triana clarified the relationship between the fall on the steps and the accident and how it affected the degree of certainty of his opinions, saying:

- Q. The notes of September 30th, 2009, you noted in that his third complaint was chronic low back pain. He complained of it. Radiating to his left leg and he finds his left leg buckles at times.
- A. Yes.
- Q. Is the fall incident, which was documented by Doctor's Care on the 26th, where his left leg gave out, consistent with your history and –
- A. Yes –
- Q. --- Finding?
- A. --- It is.
- Q. Is it consistent with a person who has a lumbar spine injury, the left leg giving out?

- A. Yes, it could be.
- Q. Okay. And if he was falling because of that, it -- can you tell us whether or not it would be evidence of a pre-existing condition and not one resulting from this fall?
- A. And that's just what I said.
- Q. Is that to a reasonable degree of medical certainty?
- A. Yes.
- Q. And you have documented that to a reasonable degree of medical certainty -- his M.R.I. scan read and results were consistent with trauma?
- A. Yes.
- Q. Are you aware of any other trauma that Mr. Hannah suffered other than the accident of July 14, 2009 if that's when the accident?
- A. The proceeded disc -- fall at home?
- Q. Yes, sir.
- A. No.
- Q. Now, I also want to show you the rehab notes for the 28th which was consistent with it. And --- and show you this note and ask you is that a record of the rehab indicating some leg weakness -- left leg weakness?
- A. Let me see, it says the patient ambulating clinic with improved gait pattern. Decreased dragging of left leg.
- Q. Does that indicate to you there had been ---
- A. He had been complaining of left leg symptoms at that time.
- Q. Yes, sir. And had been -- and prior to that time from -- based on the note?
- A. Well, it says with improved gait pattern. So it's improved from something.
- Q. Yes, sir.
- A. So, that's the -- that's the only thing I can gather from that.
- Q. Yes, sir. Now, this whole case again revolves around this -- you understand when we say to a reasonable degree of medical certainty that means it's more likely than not without any absolute certainty?
- A. Yes.
- Q. Now ---
- A. But you're also asking me to put my experience and reputation, whatever on the --- the line to say that I can effectively support this opinion. Now to me, did -- it's -- it's -- I think I could support probably a little bit more to decide that this pre-existed this fall and that he had some pre-existing problems with his left leg before he fell at home. And that's what I'm saying. That it would be more likely to me that he had problems with his leg and his back prior to this fall at home. That [sic] the only other documented injury was the truck accident.
- Q. And -- and your opinion has got to be confined to what we know?
- A. Exactly.

- Q. And it can't be confined to speculation?
- A. Yes, but you had to tell me that I was a 100 percent sure one way or the other, I can't - ...
- Q. ... Let me ask you this. Fifty-one percent sure?
- A. Yes, I -- I would be leading more likely toward his injury -- his truck injury than his fall at home.
- Q. All right. Now, with that explanation -- and that is a -- I would also tell you that 51 percent or greater means more likely or [sic] a reasonable degree of medical certainty. Given that type of definition, can you tell us whether or not to a reasonable degree of medical certainty the care or treatment and the opinions you provided ... earlier when I asked you the questions ... are that Mr. Hannah suffered an injury in this accident of the 14th of July which most likely caused his lumbar spine injuries.
- A. In that context -- or in that context, I would say yes.
- Q. And would your other opinions as to the future medical care and treatment be necessary?
- A. Yes.
- Q. To a reasonable degree of medical certainty?
- A. Yes they would. ...
- Q. Just a follow up ... as I understand it, it is your opinion that more likely than not the disc protrusion was caused by the July motor vehicle accident? Is that your opinion stated to within a reasonable degree of --
- A. All right. I think that ---
- Q. -- medical certainty?
- A. -- If -- If I had to lean towards choosing between the fall at home that we described and that car or the -- the truck accident, that I would state that the truck accident was the -- or to me, a more reasonable event that started causing this left leg symptom and his back problem, yes. ...
- (R. pp. 84-89)
- A. ... And it may very well have been that his fall at home brought that more to his attention. It could have aggravated his problem more. It certainly was more in his mind at that time after he fell.

(R. p. 90)

Read in full context, taking into account the questions asked and how answers to other questions relate and qualify what is being said, it is clear Dr. Triana did not ever admit that his level of certainty that the wreck had caused and/or contributed to causing and/or aggravated Hannah's lumbar condition and pain fell below the level of 51% or more probably than not. What he said was that given the additional information about the

fall, he was less sure of a direct one-to-one causal relationship between the wreck and the lumbar pain, but there was still a causal relationship. Given the additional information about the fall, it is not possible to determine "exactly" what most directly precipitated or caused Mr. Hannah's lumbar pain, but there is a causal relationship that goes back to the wreck which includes the lumbar pain, the left leg weakness, and the fall when his leg gave out in August.

In regard to the neck injury, Dr. Triana's February 25, 2010 notes state the MRIs demonstrate

"a left sided disc protrusion at C5-6 on top of a degenerative disc. He also has a desiccated lateral disc with a lateral disc protrusion at L4-5 on the left. Both of these correlate with his symptoms that he complains about in his left shoulder and left leg."

(R. p. 126). He goes on to conclude Hannah needs to be kept "out of work as he can't do any repetitive lifting, pushing, pulling, climbing and certainly riding in vibratory vehicles like heavy equipment. (R. p. 126). In particular, he was concerned that Hannah's work consisted of driving, and that he should not be driving as long as he needed narcotic pain medication. (R. pp. 65-66) Apparently, when Dr. Bethea concluded that Hannah had reached maximum medical improvement, had a 0% remaining disability from his elbow and neck injuries and could return to work, he failed to consider Mr. Hannah's type of work. He was clear and firm in his deposition that when he made these findings in January of 2010, Mr. Hannah unequivocally was still suffering neck and elbow pain significant enough to require the narcotic pain medication Darvocet every four hours. (R. p. 105)

As of the date of the hearing, Claimant testified he continued to have back pain, could not ride long distances, or do any meaningful work related activities and requested that he receive further medical care and treatment for his injuries sustained in the accident.

The Hearing Commissioner also considered the deposition of Tim Sauer, private investigator obtained by the Defendant, who made a video of the Claimant on one occasion. The video is short and shows the Claimant leaning and looking under the hood of a car for approximately seven minutes. There was no work being done by the Claimant other than observing something going on under the hood of a vehicle. The video did not demonstrate the Claimant was unimpaired or capable of doing any work.

ARGUMENT

I. The Standard of Review

"An appellate court can reverse or modify the Commission's decision if it is affected by an error of law or is clearly erroneous in view of the reliable, probative, and substantial evidence in the whole record." *Pierre v. Seaside Farms, Inc.*, 386 S.C. 534, 689 S.E.2d 615 (2010).

"Substantial evidence" is not a mere scintilla of evidence nor the evidence viewed blindly from one side of the case, but is evidence which, considering the record as a whole, would allow reasonable minds to reach the conclusion that the administrative agency reached or must have reached in order to justify its action.

Lark v. Bi-Lo, Inc., 276 S.C. 130, 135, 276 S.E.2d 304, 306 (1981).

II. The Commission's interpretation of treating physician Dr. Triana's testimony as failing to support the necessary causal relationship between the July 14, 2009 accident and Timothy Hannah's lumbar spine pain is not supported by substantial evidence in the record.

In order to meet his burden of proof that his injury is compensable, a claimant must demonstrate by a preponderance of the evidence or the greater weight of the evidence that his injury was proximately contributed to by his employment. *Hall v. Desert Aire, Inc.*, 376 S.C. 338, 656 S.E.2d 753 (Ct. App. 2007) However, injured employees are not required to prove their injuries were necessarily caused by specific events in order to recover workers' compensation benefits. *Smith v. NCCI, Inc.*, 369 S.C. 236, 253, 631 S.E.2d 268 (Ct. App. 2006) citing *Clade v. Champion Labs.*, 330 S.C. 8, 11, 496 S.E.2d 856, 857 (1998). As in proximate cause analysis in other areas of the law, it is not necessary for a claimant to show his employment was the direct or sole cause of his injury or that there is a one-to-one causal relationship between his injury and his employment. "[I]t is enough if there be a causal connection between the injury and the business, a connection substantially contributory though it need not be the sole or proximate cause." *Jordan v. Dixie Chevrolet, Inc.*, 218 S.C. 73, 79, 61 S.E.2d 654, (1950). Moreover, where an injury or accident arising out of or in the course of employment aggravates or accelerates a previously diseased condition resulting in disability or death from the aggravated condition, the aggravated or accelerated condition is a compensable injury. *Glover v. Columbia Hospital of Richland County*, 236 S.C. 410, 418-419, 114 S.E.2d 565 (1960) Furthermore,

where a latent or quiescent weakened, but not disabling, condition resulting from disease is by accidental injury in the course and scope of employment, aggravated, accelerated or activated, with resulting disability, such disability is compensable.

Id at 419-420.

The Commission Appellate Panel relied on a few very specific parts of Dr. Triana's deposition as supporting their findings. R. p. 77, lines 1-11 say:

Q. So – And I understand there – and this may be over generalizing or over simplifying. But a – a disc protrusion in the lumbar spine could be – could be caused by a number of things. Is that correct?

A. That's correct.

Q. It could be caused by lifting. Is that correct?

A. Yes.

Q. Could it be caused by falling?

A. Yes.

R. p. 80, lines 17-25 say:

Q. It – and let me ask you something to muddy the water further. So, now that we have two events, a – truck wreck and a fall, is it possible to say with any certainty what the cause of his disc protrusion was?

A. It's be [sic] very difficult to say exactly.

Q. Okay

A. Other than historically what he's relating to me, yes.

R. p. 83, lines 9-11 say:

A. I – I can't says [sic] with a reasonable amount of medical certainty that it was caused by his accident or his fall or whatever, no.

Taken out of context and in isolation, these questions and answers may appear to provide support for a factual finding that Dr. Triana's testimony failed to provide the requisite expert testimony establishing a causal relation between Hannah's lumbar spine injury and his employment. However, only a viewing of the evidence blindly from one side of the case could possibly lead to such a conclusion. The only conclusion which can be drawn from Dr. Triana's testimony as a whole is that he testified that it was more probable than not that either the truck wreck directly caused Hannah's lumbar pain prior to the fall as evidenced by the fact that his lumbar pain was already chronic (of three months duration) when he first saw Hannah at the end of September 2009 or the truck wreck aggravated

Hannah's pre-existing degenerative disc disease to the point where pressure was being put on a nerve at the L4-L5 joint weakening Hannah's left leg sufficiently to cause it to buckle and go out on him causing the fall on August 25th and the combination of the pre-existing degenerative disc disease, the aggravation of that pre-existing disease by the wreck, and the exacerbation of those problems by fall resulting from the weakened leg together caused disabling pain in Hannah's lumbar region. Although he could not pick between the wreck and the fall as the sole, one-to-one or "exact" cause of all Hannah's lumbar pain, ruling out all other possibilities, or even establish to a medical certainty that only the truck wreck caused Hannah's lumbar pain, he could testify more probably than not that the wreck causally contributed to the lumbar injury. Even if Hannah's lumbar pain did not start until after the fall, given the physical therapy records documenting prior gait problems dragging his left leg, it is still probable the wreck contributed to the lumbar pain by weakening Hannah's leg and causing the fall, which aggravated the prior lumbar problems. (R. pp. 84-88, 90).

The law does not require a claimant to prove which specific event was the sole cause of his injury to the exclusion of other events. *Jordan v. Dixie Chevrolet, Inc.*, 218 S.C. 73, 79, 61 S.E.2d 654, (1950). However, it would appear from both the defendant's questioning of Dr. Triana and the Commission's ruling that both defense counsel and the Commission acted under the mistaken belief the law requires the claimant to prove the exact event causing his injury and precludes causation based on an undisputed work-related accident aggravating a pre-existing condition causing a weakness which then leads to a later accident which is in fact not unrelated to the work accident.

Moreover, Dr. Bethea's testimony could not provide substantial evidence for the rejection of Dr. Triana's causation testimony or the claimant's own causation testimony. He admitted the wreck could have caused the lumbar injury directly or it could have combined with the pre-existing degenerative disc disease to weaken the leg and cause the later fall. He also admitted that given the definition of "chronic" and the timing of when the diagnosis of chronic low back pain was made, the low back pain would have started around the time of the truck wreck. He also admitted nothing in the record contradicted Dr. Triana's theory of causation, and his only reason for refusing to agree with Dr. Triana's opinion was his belief there was no evidence of low back pain prior to the fall. Most importantly of all, he testified that it was important for him to review the MRI in order to form an opinion as to the cause of Hannah's lumbar pain, that he did not form an assessment of the cause of Hannah's lumbar pain at his last visit because he did not have the MRI, and that he had never reviewed all the available medical evidence in the case. In short, he lacked the necessary basis to testify as to causation of Hannah's lumbar pain. Furthermore, he obviously did not understand the legal standards for proof of causation or disability or compensability in workers compensation cases¹ as he testified unequivocally that on the date he certified Hannah as having 0% disability in his elbow and cervical spine Hannah was still experiencing so much pain in those two locations that

¹ Care must be taken to make sure doctors understand the correct standard required by the law in giving their testimony as to both causation and employability. If they do not, they may well testify that someone is disabled who is not disabled according to workers compensation law, that someone is employable under workers compensation law when they are not, that causation exists when it does not, or that causation does not exist when it does under the law. See *Bartley v. Allendale County Sch. Dist.*, 392 S.C. 300, 305, 709 S.E.2d 619, (2011).

it was necessary to prescribe Darvocet, a narcotic pain reliever, every four hours for that pain. It is obvious Hannah could not return to a job as a truck driver while taking narcotic pain relievers every four hours. (R. pp. 93, 99-105, 107, 109-112).

Thus, the record as a whole, without being viewed blindly from the defendants' side, does not contain substantial evidence supporting the Commission's fact finding that Hannah sustained no compensable injury to his lumbar spine.

III. The Commission erred in failing to consider the employee's lumbar spine condition in combination with the elbow and cervical spine injury received on July 14, 2009, or alternatively to consider whether the July 14, 2009 accident aggravated pre-existing spinal conditions as required in light of *Bartley v. Allendale County Sch. Dist.*, 392 S.C. 300, 709 S.E.2d 619 (2011).

The law is well established that the causal connection between a work related incident and a compensable injury can be established in several non-exclusive ways. The most obvious means is for the work related incident to directly cause an injury as happened with the cut on Hannah's elbow. However, a compensable injury can also arise when the work related incident or employment proximately contributes to the injury by combining with other non work related factors to cause the injury since employment is not required to be the sole cause of the injury. Additionally, a compensable injury occurs when employment or a work related accident aggravates or accelerates a previously diseased condition resulting in disability or death from the aggravated condition or accelerated condition. *Jordan v. Dixie Chevrolet, Inc.*, 218 S.C. 73, 79, 61 S.E.2d 654, (1950); *Glover v. Columbia Hospital of Richland County*, 236 S.C. 410, 418-419, 114 S.E.2d 565 (1960).

Most recently, in *Bartley v. Allendale County Sch. Dist.*, 392 S.C. 300, 709 S.E.2d 619 (2011), our Supreme Court held that when an employee with a pre-existing injury or

disease is injured in a work related accident, the resulting disability must be determined by considering the combined effect of all medical conditions after the injury, including those conditions not directly related to the work related accident.

[T]here is no requirement that the pre-existing condition aggravated the work injury or that the work injury aggravated the pre-existing condition; rather, the question to be considered was whether the combined effects of the condition and the workplace injury resulted in a greater disability than would otherwise have existed.

392 S.C. at 308, 709 S.E.2d at 623.

Both Dr. Triana and Dr. Bethea testified that Timothy Hannah probably had pre-existing degenerative disc disease as the normal result of aging. (R. pp. 62-63, 67; 109-111, 113-114) The x-rays and MRIs also support the existence of degenerative disc disease. (R. p. 122; R. pp. 62-63, 67). Both agreed a traumatic injury such as the truck wreck was the type of incident which would make previously asymptomatic disc degeneration become symptomatic or cause the protruding disc documented on the lumbar MRI. Both also agreed leg weakness, radiating pain, and a leg buckling were symptoms of the kind of protrusion shown in the lumbar MRI. Triana's testimony with the physical therapy records demonstrated that the physical therapist must have noted but not documented such symptoms before the fall as they said his leg dragging had improved shortly after the fall. There was also evidence Hannah was pinned in the wreck at his pelvis by the steering wheel and experienced such trauma in the abdominal / pelvic / lumbar area that the emergency room noted contusions to his abdominal wall demonstrating he suffered trauma in this area in the wreck. There are MRIs demonstrating degeneration in both the cervical and lumbar area of his spine.

However, despite all this evidence, and the testimony of the doctors concerning trauma aggravating degenerative disc disease, there is not one word in the Commission's order reversing the Hearing Commissioner's finding of a compensable lumbar injury about the wreck aggravating, exacerbating, or activating prior degeneration of any part of Hannah's spine. The Commission simply never considered anything other than whether Hannah had proved a direct injury to his lumbar spine caused directly, solely, one-on-one or exactly by the truck wreck, ruling out all other causes including the fall after the wreck when his leg gave way. There is not one word in the Commission's order addressing the issue of the fall occurring because of leg weakness resulting from the effects of the truck wreck on Hannah's lumbar / pelvic / abdominal area. The Commission simply did not consider the causation law reiterated in *Bariley v. Allendale County Sch. Dist.*, 392 S.C. 300, 709 S.E.2d 619 (2011).

IV. The Commission's rulings that Timothy Hannah has received all proper medical care that will tend to lessen his period of disability and is not entitled to medical treatment or other benefits for his lumbar spine injury are not supported by substantial evidence and are contrary to controlling legal precedent.

Hall v. United Rentals, Inc., 371 S.C. 69, 636 S.E.2d 876 (Ct. App. 2006), demonstrates that when the issue is further medical treatment, a two part analysis is required. First, if the claimant has not reached maximum medical improvement, medical treatment that will lessen the period of disability must be continued. In reaching a determination on lessening the period of disability, treatment needed to prevent a condition from deteriorating in the future and causing more disability is treatment, which will lessen the ultimate period of disability and is covered. This is true even if the claimant has managed to return to work. Second, if the claimant has reached maximum

medical improvement, the percentage of permanent disability must be assessed on the combination of all conditions. Even where the disability is permanent, further medical treatment which may improve the claimant's quality of life and ability to cope without improving the overall disability rating is nevertheless covered under *S.C. Code Ann.* § 42-15-60. *Hall v. United Rentals, Inc.*, 371 S.C. 69, 636 S.E.2d 876 (Ct. App. 2006)

As previously discussed, the Commission did not consider any possibility other than proof that the truck wreck was the sole and exact cause of Hannah's lumbar pain. It applied an incorrect legal standard on causation, which caused it to reach an incorrect result on future medical care for Hannah's lumbar spine. Dr. Triana testified that based on the response to the epidural injection treatment, there was good cause to believe that surgery would provide more permanent improvement for both Hannah's neck and low back/ leg pain. (R. pp. 71-72). Dr. Bethea testified that Hannah remained in such a degree of pain in both his lumbar and cervical spine as to require narcotic pain relievers. He did not consider the possibility of surgery or the fact that Hannah's profession is truck driving which is inherently incompatible with narcotics. Thus, his testimony is not reliable and does not amount to more than a scintilla of evidence that Hannah has in fact reached maximum medical improvement as to any of his spinal problems. Thus, the Commission's decision that Hannah had reached maximum medical improvement of his injuries from the wreck and was not entitled to further medical treatment for his lumbar spine is not supported by either substantial evidence in the record as a whole or the controlling law on medical treatment.

V. The Commission's reliance on the Defendant's stretched interpretation of Dr. Bethea's incomplete examination, findings, and testimony impermissibly sanctions employer/insurer doctor shopping which was condemned in *Risinger v. Knight Textiles*, 353 S.C. 69, 577 S.E.2d 222 (Ct. App. 2002).

In *Risinger v. Knight Textiles*, 353 S.C. 69, 577 S.E.2d 222 (Ct. App. 2002), the court condemned an interpretation of S.C. Code § 42-15-80 which would allow an employer who does not like the opinion of the physician it selected to provide treatment to the employee to shop around for an opinion more favorable to the employer/insurer by referring the employee to another physician for evaluation.

[W]e believe Knight's interpretation of section 42-15-80 would lead to an absurd result. See *Broadhurst v. City of Myrtle Beach Election Comm'n*, 342 S.C. 373, 380, 537 S.E.2d 543, 546 (2000) ("However plain the ordinary meaning of the words used in a statute may be, the courts will reject that meaning when to accept it would lead to a result so plainly absurd that it could not possibly have been intended by the Legislature or would defeat the plain legislative intention.") (citation omitted). Under Knight's interpretation of the statute, the employer/carrier would be able to continue to seek a new doctor's opinion each time it did not like the opinion of the claimant's doctor. This would allow the employer/carrier to "shop around" indefinitely until it found a favorable opinion, often sacrificing much needed treatment. We do not believe this result was intended by the legislature.

577 S.E.2d at 224.

When Doctor's Care felt Hannah's workers compensation care for his injuries from the truck wreck required the services of an orthopedic specialist, they recommended an orthopedic referral. Defendants agreed to the referral. Dr. Triana was their choice. The referral included Hannah's lumbar pain. When Dr. Triana asked for authorization for an MRI to properly evaluate and treat that pain, Defendants refused to approve the MRI. Instead, they chose to refer Hannah to another orthopedic surgeon whose practice includes a high number of independent medical evaluations for insurers and who thus has

a financial incentive for applying very strict causation standards and drawing conclusions, which tend to favor insurers over patients. Even with these conditions, Dr. Bethea did not evaluate the lumbar pain during or in connection with the visits Defendants' authorized because he was never provided with the MRI he felt was necessary to determine whether Hannah's lumbar problems were caused by trauma.

Without ever providing Bethea with that MRI, Defendants' attorneys questioned Dr. Bethea in his deposition concerning whether a fall could have caused lumbar symptoms similar to Hannah's. Then, still without the MRI that Bethea said was necessary to determine if the symptoms were caused by trauma, they asked Bethea if he had an opinion as to whether the lumbar symptoms could be causally related to the wreck. It is not surprising that without the diagnostic tests Bethea said he needed to review to determine if the symptoms were caused by trauma, Bethea concluded the causal connection could not be established.

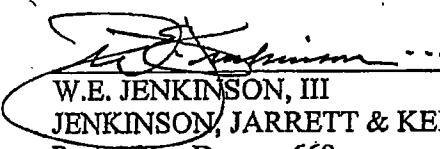
Then, ignoring Dr. Bethea admissions that Hannah's pain down the left leg with numbness in the foot as well as weakness of the left leg could be caused by a lumbar spine injury; that weakness could cause the leg to give out and cause a fall; that the medical records are consistent with such a scenario and there is nothing in the medical records which would be contradictory to such a scenario, Defendants persuaded the Commission to accept the opinion of their independent medical examiner who did not review crucial evidence as "unequivocally stat[ing] that Claimant's alleged low back injury is not causally connected to Claimant's work related injury." One more twist was added to the scenario. Defendants terminated Hannah's authorization to receive treatment from Dr. Triana, the orthopedist they had originally selected to provide

treatment. Hannah indisputably needed additional treatment for his elbow. Even Defendants' independent medical examiner could not dispute that need and recommended that treatment. With no authorization to continue receiving treatment for even his elbow from Dr. Triana, Hannah was required by Defendants to accept that treatment from Dr. Bethea. Thus, Defendants created a credible argument that Dr. Bethea was not just an independent medical examiner. They created an argument that he was a "treating" physician, hopefully lending more credence to his opinion that a causal connection between the wreck and the lumbar injury could not be established even though this physician had never examined the crucial objective evidence concerning the injury, the MRI he asked for but never received.

The end result is exactly the result *Risinger* condemned and said the legislature could not have intended. The employer/carrier shopped around until it found a favorable opinion albeit one based on less than all the relevant evidence, sacrificing much needed treatment. *Risinger* clearly demonstrates the policy implemented by our worker's compensation legislation does not authorize or condone doctor shopping by an employer/insurer. The employer/insurer has the means to prevent employee doctor shopping, as it is authorized to select the physician initially designated to evaluate and treat the work related injury. It also has control of selection of any specialist to whom the employee is referred. But the legislature did not intend for the employer/insurer to be able to cut off treatment its selected physician determined was necessary to treat the work related injury. That is precisely what happened in this case.

CONCLUSION

This record demonstrates that the Commission did not base its factual findings on the record as a whole. Its findings are based on blindly accepting a few snippets of testimony out of context as supporting one side's position disregarding all the other testimony. Its results also show it failed to consider the proper law in reaching its conclusion that Hannah has reached maximum medical improvement and has no remaining impairments from the truck wreck. The full Commission's order is also contrary to policy condemning employer/insurer doctor shopping enunciated in *Ristinger*. Accordingly, the decision of the full Commission should be reversed, and the ruling of the Hearing Commissioner should be reinstated.



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March 21, 2012

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM THE
SOUTH CAROLINA WORKERS' COMPENSATION COMMISSION

T. Scott Beck, Avery B. Wilkerson, Derrick L. Williams
Workers' Compensation Commissioners

WCC File No. 0908371

Timothy L. Hannah, Employee, Claimant, Appellant

v.

MEV/Butler Trucking, Inc., Employer, and
Palmetto Timber S/L Fund o/o
Walker, Hunter, & Associates, Inc., Carrier, Respondents

FINAL BRIEF OF RESPONDENT

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STATEMENT OF THE CASE

The Appellant is a 52 year-old man once employed by Butler Trucking ("Respondent"), who alleges he was injured at work on July 14, 2009, when the truck he was driving rolled over and came to rest on the driver's side. Appellant initially alleged injuries to his cervical spine and left elbow. Respondents filed a Form 21 dated February 22, 2010 seeking to stop payment of temporary benefits based upon the authorized treating physician's (Dr. James Bethea) finding that Appellant was at maximum medical improvement for injuries to his cervical spine and left elbow. A hearing was initially scheduled for April 22, 2010. During a lengthy pre-hearing conference Appellant alleged a lumbar spine injury without filing a Form 50 concerning compensability of the same. Respondents denied responsibility for the lumbar spine related to the work injury. In an effort to avoid bifurcation of the issues of the claim, the Single Commissioner ordered a continuance to allow Appellant to file a Form 50 adding an injury to the lumbar spine so that all issues could be heard together in a single hearing. A hearing was ultimately set for July 30, 2010, to determine the issues as set forth on Forms 21, 50 and 51.

In an Order dated January 13, 2011, the Single Commissioner determined that Appellant's alleged injury of the lumbar spine was causally related to the accident of July 14, 2009. The Single Commissioner further ordered that Appellant had not reached maximum medical improvement and that Appellant was entitled to additional medical care for the lumbar spine.

On January 17, 2011, Respondents timely filed and served a Form 30 Request for Commission Review. Respondents attached fourteen specific Grounds for Review to the Form 30.

Following oral arguments before the Full Commission on March 22, 2011, a majority of the Appellate Panel issued an Order dated July 25, 2011, reversing the findings of the Single Commissioner regarding the compensability of the lumbar spine related to the work accident.

Appellant filed a Notice of Appeal with the South Carolina Court of Appeals on August 22, 2011.

STATEMENT OF THE FACTS

The Appellant testified that on July 14, 2009, he was driving an 18-wheeler for the Respondents hauling a load of gypsum from the Berkley County power plant. (Hearing Transcript before the Single Commissioner, July 30, 2010, p. 10, ll. 7-11; R. p. 29). Appellant attempted to make a right hand turn to manage a curve in the road, but could not straighten his steering wheel to come out of the curve. (Hr. Tr. p. 11, ll. 5-11; R. p. 30). The steering wheel released causing Appellant to lose control of the 18-wheeler. The truck rolled and came to rest on the driver's side. (Hr. Tr. pp. 10-11; R. p. 29-30). Appellant testified he was trapped in the cab as the steering wheel was pinned against his legs. (Hr. Tr. p. 12, ll. 6-12; R. p. 31). Appellant was taken to Georgetown Hospital for treatment. Appellant testified he told the physicians at Georgetown Hospital that only his left elbow and neck were hurting him. (Hr. Tr. p. 14, ll. 15-20; R. p. 33).

Medical records from Georgetown Memorial Hospital dated July 14, 2009, show Appellant sustained a cervical sprain and left elbow contusion as a result of a motor vehicle accident. (Defendant's APA p. 36; R. p.152) (*emphasis added*). Nowhere on the initial intake report is there a mention of Appellant complaining of back pain or any indication that Appellant sustained any type of injury to his back or legs. (Defendant's APA p. 40; R. p. 153; Hr. Tr. p. 43, ll. 3-12; R. p. 46). Appellant testified he was initially treated for injuries to his head, a

concussion, contusions to his pelvis, prescribed Percocet, Oxycodone, and Hydrocodone, and released that July 14, 2009. (Hr. Tr. p. 15, ll. 7-21; R. p. 34). A report from Georgetown Memorial Hospital from July 14, 2009, specifically lists "back, upper, mid-, and lower" as options for patients' location of pain, and these choices were not circled. (Defendant's APA p. 42; R. p. 154; Hr. Tr. p. 43, ll. 13-24; R. p. 46). A diagram of the body from Georgetown Memorial Hospital shows the locations of Appellant's pain. There are no circles around Appellant's lower back or legs. (Defendant's APA p. 43; R. p. 155; Hr. Tr. p. 44, ll. 1-8; R. p. 47).

Medical records from Doctors Care dated July 21, 2009 through August 7, 2009, do not indicate any complaints of pain in or about Appellant's lower back. (Defendant's APA pp. 50-52; R. pp. 156-158; Hr. Tr. p. 46; R. p. 48). Physical therapy notes dated August 11, 2009 through August 20, 2009, do not mention Appellant's lower back. (Defendant's APA pp. 12-17; R. pp. 146-151). Appellant made 11 physical and occupational therapy visits, one emergency room visit and four Doctor's Care visits without mention of any lower back pain or leg pain. (Deposition of Dr. Mark Triana, March 31, 2010, p. 45, ll. 7-13; R. p. 76; Hr. Tr. p. 48, ll. 8-16; R. p. 50) (*emphasis added*).

Appellant testified that some time prior to August 26, 2009, his left leg gave out and he fell down the steps of his porch striking his face against the railing. (Hr. Tr. p. 17, ll. 5-12; R. p. 35). Appellant never reported his left leg giving out to any of the treating physicians or physical therapists prior to his at home fall (believed to be August 25, 2009). (Hr. Tr. p. 48, ll. 2-19; R. p. 50) (*emphasis added*). In fact, Appellant's first reported back pain and leg weakness came on August 26, 2009 in a Doctor's Care report which indicates "yesterday tripped, hit right side of face." (Defendant's APA p. 53; R. p. 159; Hr. Tr. p. 47, ll. 22-25, p. 48, ll. 1-3; R. pp. 49-50).

Although Appellant testified he informed the doctors that his left leg was giving him problems well before this first documentation, medical records from all providers indicate Appellant had not complained to any doctor of his purported left leg weakness at any time prior to the unrelated fall at his home. Appellant testified his medical providers did not pay him any attention. (Hr. Tr. p. 48, ll. 8-16, p. 18, ll. 5-10; R. p. 50, p. 36).

Appellant first saw Dr. Mark Triana on September 30, 2009 and informed Dr. Triana at this first visit of his back pain. (Hr. Tr. p. 21; R. p. 39; Claimant's APA pp. 81-82; R. p. 122-123). Dr. Triana's deposition was taken prior to the Single Commissioner's hearing and submitted as evidence. Dr. Triana testified that he was never informed by the Appellant that, just a few weeks prior to this initial visit, Appellant had fallen down some stairs at his house and struck his face on the railing. (Dr. Triana Dep. Tr. p. 47, ll. 13-25; R. p. 77) (*emphasis added*).

Dr. Triana testified that a disc protrusion, similar to Appellant's, could be caused by a number of things including falling. (Dr. Triana Dep. Tr. p. 47, ll. 1-11; R. p. 77). Dr. Triana testified to the following:

Q: So — and I understand there — and this may be over generalizing or over simplifying. But a — disc protrusion in the lumbar spine could be — could be caused by a number of things. Is that correct?

A: That's correct.

Q: Could it be caused by falling?

A: Yes.

(Dr. Triana Dep. Tr. p. 47, ll. 1-11; R. p. 77).

Dr. Triana was shown medical records where Appellant failed to make mention of any back or leg symptoms until his unrelated fall and subsequent report to Doctor's Care on August 26, 2009. (Dr. Triana Dep. Tr. p. 40, ll. 10-16, p. 49, ll. 1-6; R. p. 75, p. 79; Defendant's APA

p. 53; R. p. 159). Dr. Triana testified that he relied on what the Appellant told him during their consultation on September 30, 2010 (after the unrelated fall), as a basis for his diagnosis. (Dr. Triana Dep. Tr. p. 45, ll. 22-25; R. p. 76). Dr. Triana testified that if the story the Appellant related to him was untrue or inaccurate then that would change his opinion on causation. (Dr. Triana Dep. Tr. p. 51, ll. 1-4; R. p. 81). In fact, after learning of the unrelated fall, Dr. Triana testified that he has much more doubt as to the causal relationship between Appellant's low back complaints and the work accident, and recanted his previous diagnosis and causative opinion. (Dr. Triana Dep. Tr. p. 51, ll. 19-25, p. 52, ll. 1-8; R. pp. 81-82). Dr. Triana testified to the following:

Q: Is it still your opinion to within a reasonable degree of medical certainty given the records we've reviewed today, that Mr. Hannah's -- the -- or the disc protrusion of Mr. Hannah's lumbar spine was caused by the truck wreck in July of 2009?

A: I -- I -- after reviewing all the records I can say I've much more doubt to one to one causal relationship. I think that there is still a possibility, but it -- again, it could be like you said from -- from other -- historically from other injuries.

Q: Is -- is it fair to say we just don't know?

A: *We don't know.*

(Dr. Triana Dep. Tr. p. 51, ll. 19-25, p. 52, ll. 1-8; R. pp. 81-82) (*emphasis added*).

Dr. Triana testified at one point that he could no longer say within a reasonable degree of medical certainty that Appellant's back injury was caused by his work related accident. (Dr. Triana Dep. Tr. p. 53, ll. 4-11; R. p. 83).

Appellant treated with authorized treating physician, Dr. James Bethea, for injuries to his cervical spine and left elbow. (Hr. Tr. pp. 26-27; R. pp. 40-41). Dr. Bethea performed a left elbow excision on the Appellant on December 22, 2009. (Claimant's APA at 105; R. p. 134). On January 6, 2010, Dr. Bethea placed Appellant at maximum medical improvement for his neck

injury, as well as his left elbow contusion. Dr. Bethea assigned a 0% impairment rating to the Claimant's cervical spine and left elbow on a Form 14B dated February 10, 2010. (Defendant's APA pp. 59-61; R. pp. 160-162). On the Form 14B, Dr. Bethea also affirmed that the Appellant can return to work without restrictions and there are no future medical recommendations to a reasonable degree of medical certainty. As it pertains to the low back, Dr. Bethea testified in his deposition that the Appellant's low back complaints are not related to the work injury:

Q: And based on the review of the records so far – and this is the crux of the case – do you have an opinion whether or not Mr. Hannah's lower back complaints are causally related to his truck accident back in July of 2009?

A: It doesn't appear to be related to me.

Q: Do you hold that opinion within a reasonable degree of medical certainty?

A: I do.

(Deposition of Dr. James Bethea, June 2, 2010, p. 26, ll. 23-25, p. 27, ll. 1-6; R. pp. 94-95).

Following Appellant's treatment with Dr. Bethea, he returned for treatment with Dr. Triana on his own.

Terry Allen Butler, owner of Butler Trucking, testified before the Single Commissioner. Mr. Butler was present at the scene of the accident and extricated the Appellant from the vehicle. (Hr. Tr. p. 59, ll. 16-18; R. p. 51). Mr. Butler testified that the Appellant only complained of pain in "his neck and his elbow" following the accident. (Hr. Tr. p. 60, ll. 17-19; R. p. 52).

The only activities Appellant testified he has done since his accident are go to church, visit his children, and drive to the store and back. (Hr. Tr. p. 32, ll. 20-25, p. 33; R. pp. 42-43). However, video surveillance reflected that Appellant was able to perform mechanic work on a neighbor's car. (Surveillance Reports from InQuest, dated May 8, 2010 – May 12, 2010; R. pp. 135-141). Appellant testified that on the date of the video surveillance he drove to his brother-

in-law's house to check on his brother-in-law's car. Appellant testified that he looked under the hood of the car, leaning over and bending, but did not perform any mechanical work on the car. (Hr. Tr. pp. 34-35; R. pp. 44-45).

Tim Sauer, the investigator who conducted surveillance on the Appellant, testified regarding the contents of his report and the activities he viewed. Mr. Sauer testified that on May 8, 2010, he viewed Appellant leave his home in his car and drive to where a white Cadillac was parked with its hood up. (Deposition of Tim Sauer, July 27, 2010, p. 8, ll. 2-22; R. p. 116). Appellant was seen lifting, leaning and reaching under the hood of the car. *Id.* Appellant was also viewed lying on his back while working under the car and on his knees while working on the car. (Surveillance Reports from Inquest). The Appellant was viewed performing these activities without any apparent pain, assisted walking devices, or limp. Appellant was viewed working on this white car for nearly two hours -- 11:01 a.m. to 12:55 a.m. (Tim Sauer Dep. Tr. p. 12; R. p. 112; Surveillance Reports from InQuest; R. pp. 135-141).

STANDARD OF REVIEW

The South Carolina Administrative Procedures Act establishes the standard of review for judicial review of the decisions of the South Carolina Workers' Compensation Commission. *Lark v. Bi-Lo, Inc.*, 276, S.C. 130, 134, 276 S.E.2d 304, 306 (1981). In an appeal from the Full Commission, a reviewing Court may not substitute its judgment for that of the Commission as to the weight of the evidence on questions of fact, but may reverse when the decision is affected by an error of law. *S.C. Code Ann* §. 1-23-380 (5); *Steven v. Avins Constr. Co.*, 324 S.C. 334, 337, 478 S.E.2d 74, 76 (Ct. App. 1996).

Findings of fact, inferences, and any conclusions drawn by the Commission may be disturbed on appeal only if they are "clearly erroneous" in view of the reliable, probative, and

"substantial evidence on the whole record." *Lark v. Bi-Lo, Inc.*, 276 S.C. 130, 136, 276 S.E.2d 304, 307 (1981). As defined by the South Carolina courts, "substantial evidence" is not a mere scintilla of evidence, nor is the evidence reviewed blindly from one side of the case, but 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. *Id.* at 136, 276 S.E.2d at 306; *Muir v. C.R. Bard, Inc.*, 336 S.C. 266, 282, 519 S.E.2d 583, 591 (Ct. App. 1999).

The Appellate Panel is the ultimate fact finder in workers' compensation cases and is not bound by the Single Commissioner's findings of fact. *Muir v. C.R. Bard, Inc.*, 336 S.C. 266, 281, 519 S.E.2d 583, 591 (Ct. App. 1999). The Commission, not this Court, is the fact finder. "It is not within our province to reverse findings of the Commission which are supported by substantial evidence." *Id.* at 282, 519 S.E.2d at 591. "[T]he possibility of drawing two inconsistent conclusions from the evidence does not prevent" the Commission's findings from being supported by substantial evidence. *Id.*

ARGUMENT

I. SUBSTANTIAL EVIDENCE SUPPORTS THE FINDING OF THE COMMISSION THAT THE CLAIMANT FAILED TO CARRY HIS BURDEN OF PROOF THAT HE SUSTAINED A COMPENSABLE INJURY BY ACCIDENT TO HIS LOW BACK.

The Full Commission correctly reversed the findings of the Single Commissioner and held the Appellant failed to meet his burden of proof under *S.C. Code Ann.* § 42-1-160 to prove a compensable injury to the low back. The Respondents assert that substantial evidence supports the Commission's findings when viewing the record as a whole. Thus, Respondents respectfully request this Court affirm the Commission's Order *in toto*.

To sustain an award under the Workers' Compensation Act, it must appear that the injury resulted from an accident which both "arose out of" and "in the course of" the employment. *Williams v. South Carolina State Hosp.*, 254 S.C. 377, 140 S.E.2d 601 (1965). The language "injury by accident arising out of and in the course of employment" requires not only that the injury occur within the period of employment, but also that it arise out of the employment, "as when the employment is a proximate cause." *Lee v. Wentworth Mfg. Co.*, 240 S.C. 165, 168, 125 S.E.2d 7, 9 (1962). The claimant has the burden of proving facts that will bring the injury within the workers' compensation law, and such award must not be based on surmise, conjecture or speculation. *Clade v. Champion Labs.*, 330 S.C. 8, 11, 496 S.E.2d 856, 857 (1998).

The evidence as a whole supports affirmation of the Commission's Order under the substantial evidence standard. The emergency room report indicates that on July 14, 2009, Appellant was brought to Georgetown Memorial Hospital for injuries sustained in a motor vehicle accident. (Defendant's APA p. 36; R. p. 152). This record indicates Appellant complained of left neck and left elbow pain. *Id.* Appellant was diagnosed with a cervical neck strain and left elbow contusion and released home the same day. (Defendant's APA p. 36; R. p. 152). The same intake report, dated July 14, 2009, specifically lists "back, upper, mid-, and lower" as options for patients' location of pain, *however these choices were not circled.* (Defendant's APA p. 42; R. p. 154; Hr. Tr. p. 43, ll. 13-24; R. p. 46). A diagram of the body from Georgetown Memorial Hospital shows the locations of Appellant's pain indicated by circles around specific body parts. *There are no circles around Appellant's lower back or leg.* (Defendant's APA p. 43; R. p. 155; Hr. Tr. p. 44, ll. 1-8; R. p. 47). On July 21, 2009, Appellant presented to Doctor's Care with his only complaints being pain in the left elbow and neck. (Defendant's APA p. 50; R. p. 156). Again, on July 28, 2009, a Doctors Care report indicated

Appellant presented with complaints in his neck and left elbow without mentioning Appellant's left leg or lumbar spine. (Defendant's APA p. 51; R. p. 157). Appellant continued to complain of pain in only his neck and elbow when he presented to Doctors Care on August 7, 2009. (Defendant's APA p. 52; R. p. 158).

Appellant initially presented for physical therapy on July 29, 2009 with a diagnosis of a neck sprain and left elbow contusion. (Defendant's APA p. 1; R. p. 143). On August 11, 2009, Appellant treated with Next Step Rehabilitation Services. There is no mention of any back pain or leg symptoms at this visit. In fact, Next Step Rehabilitation Services has a form they fill out that provides the therapists with a number of symptoms and body parts they refer to as a "Problem List." This problem list includes a checkbox for the symptom of "Impaired Gait/Balance" which is unchecked. (Defendant's APA pp. 3-4; R. pp. 144-145). Appellant had "no new complaints" on August 20, 2009, when he treated with Next Step Rehabilitation Services. (Defendant's APA p. 17; R. p. 151).

The medical records *are void* of any mention of Appellant's lumbar pain or leg symptoms until August 26, 2009, where a Doctor's Care note indicated Appellant's "left leg 'gave out' at 5:30 yesterday and patient fell and hit right side of face on railing." (Defendant's APA p. 53; R. p. 159) (*emphasis added*). Appellant's initial report of any lower back or leg symptoms came over six weeks after his work related motor vehicle accident. During those six weeks, Appellant had 11 physical and occupational therapy visits, one emergency room visit, and at least four Doctor's Care visits without mentioning any lower back pain or left leg symptoms.

Furthermore, the testimonial evidence does not support a finding that Appellant sustained a low back injury causally connected to his work related automobile accident. Dr. Mark Triana had two authorized visits with the Appellant; one on September 30, 2009 and the other on

October 29, 2009. (Claimant's APA 81-83; R. pp. 122-124). During his deposition, Dr. Triana initially testified that he could relate the Appellant's low back injury to his work related automobile accident of July 14, 2009. Dr. Triana came to this conclusion based upon what Appellant related to him historically. (Dr. Triana Dep. Tr. p. 28, ll. 13-25; p. 29, ll. 1-16; R. pp. 69-70). During Appellant's brief treatment with Dr. Triana, Appellant *never informed the physician about the fall he had on August 25, 2009 where the Appellant fell down stairs striking his head on a railing at home.* (Dr. Triana Dep. Tr. p. 47, ll. 12-20; R. p. 77). During cross-examination, Dr. Triana changed positions and concluded that with this new knowledge of Appellant's fall, and in light of the medical evidence reviewed, he could no longer say within a reasonable degree of medical certainty that Appellant's low back injury was caused by his work related automobile accident. (Dr. Triana Dep. Tr. p. 53, ll. 4-11; R. p. 83) (*emphasis added*).

Dr. Triana's testimony is not dispositive of causation as the Appellant contends in his Initial Brief. Dr. Triana's testimony is far from clear as to causation. However, Dr. James Bethea, the authorized treating physician, has *unequivocally stated that Appellant's low back complaints are not causally connected to Appellant's work related injury.* (Dep. Tr. Dr. Bethea, p. 27, ll. 1-6; R. p. 95).

The Appellant relies solely upon the beneficial portions of Dr. Triana's deposition testimony to establish causation between the work injury and the low back complaints, as that is the only piece of evidence in the record that arguably offers a semblance of causation to the work injury. However, the substantial evidence standard necessitates a viewing of the "record as a whole" and not only the beneficial portions as put forth by the Appellant. *Lark v. Bi-Lo, Inc.*, 276 S.C. 130, 135, 276 S.E.2d 304, 306 (S.C. 1981). The Appellant is asking this Court to view the evidence blindly from one perspective without considering the record as a whole. Obviously,

this is not the objective of the substantial evidence standard. The record as a whole reveals substantial evidence which supports the Commission's Order. Specifically, Dr. Bethea's opinion on causation is not refuted and there are six weeks worth of treatment records without evidence of a complaint of low back pain or leg weakness. Additionally, Appellant had a documented intervening accident which was followed by low back and left leg complaints. Lastly, Dr. Triana equivocated on causation during his deposition.

Expert medical testimony is designed to aid the Appellate Panel in coming to the correct conclusion. *Sharpe v. Case Produce, Inc.*, 336 S.C. 154, 519 S.E.2d 102 (1999); *Hargrove v. Titan Textile Co.*, 360 S.C. 276, 599 S.E.2d 604 (Ct. App. 2004). Therefore, the Appellate Panel determines the weight and credit to be given to the expert testimony. *Hargrove*, 360 S.C. at 293-94, 599 S.E.2d at 613. Once admitted, expert testimony is to be considered just like any other testimony. *Hargrove*, 360 S.C. at 294, 599 S.E.2d at 613. Although medical testimony is entitled to great respect, the fact finder may disregard it if there is other competent evidence in the record. *Hargrove*, 360 S.C. at 294, 599 S.E.2d at 613.

The substantial evidence supports that the fact finder (Full Commission) gave adequate weight to all the evidence, including the medical testimony. To reverse the findings of the Commission on causation of the low back would be against the substantial evidence in the record and place such a finding in the realm of surmise, conjecture or speculation. *Clade v. Champion Labs.*, 330 S.C. 8, 11, 496 S.E.2d 856, 857 (1998). Lastly, finding for the Appellant would require the Court of Appeals to weigh the evidence blindly from one perspective.

II. THE COMMISSION DID NOT COMMIT ERROR BY FAILING TO ADDRESS *BARTLEY*, NOR DID THE COMMISSION COMMIT ERROR BY NOT ADDRESSING AN AGGRAVATION ANALYSIS UNDER S.C. CODE ANN. § 42-9-35.

A. Appellant's failure to preserve issues for appellate review.

Appellant raises for the first time before this Court, *Bartley v. Allendale County School District*, 392 S.C. 300, 709 S.E.2d 619 (2011), and the issue of aggravation of a pre-existing condition. Respondents assert both of these issues were not preserved for appellate review and therefore not addressable.

Generally, an issue must be both raised to and ruled upon by the trial court in order to be preserved for appellate review. *State v. Dunbar*, 356 S.C. 138, 142, 587 S.E.2d 691, 694 (2003). Arguments raised for the first time on appeal are not preserved for appellate review. *Knight v. Waggoner*, 359 S.C. 492, 496, 597 S.E.2d 894, 896 (Ct. App. 2004). Issue preservation requires a party to preserve an issue both at trial and in presentation of the issue on appeal. *S.C. Dep't of Transp. v. M & T Enters. of Mt. Pleasant, LLC*, 379 S.C. 645, 659, 667 S.E.2d 7, 15 (Ct. App. 2008) (stating "if an issue is preserved at the trial court level, it must still be properly raised and argued to the appellate court"). This rule is consistent with the general restriction that one cannot present and try a case on one theory and then attack the result below by presenting another theory on appeal. *Butler v. Town of Edgefield*, 328 S.C. 238, 493 S.E.2d 838 (1997).

The issues raised in *Bartley* and the issue of an aggravation of pre-existing condition were not raised by the Appellant on the Form 50, the Form 58 (Claimant's Form 58; R. p. 25), before the Single Commissioner (See Generally Transcript of proceedings before the Single Commissioner) or before the Full Commission (See Generally Transcript of proceedings before the Full Commission). An issue that was not preserved for review should not be addressed by

the Court of Appeals, and the court's opinion should be vacated to the extent it addressed an issue that was not preserved. *Hendrix v. Eastern Distribution, Inc.*, 320 S.C. 218, 464 S.E.2d 112 (1995).

Respondents request the Court of Appeals not address the issues raised in Appellant's Initial Brief concerning *Bartley* and an aggravation of a pre-existing condition as they were not preserved for appellate review.

B. *Bartley* and the "combined effects" argument is not applicable.

Although not preserved for Appellate Review, Respondents contend the *Bartley* case is not applicable to the case at bar for other reasons. Appellant argues the Commission erred by not considering the recent holding of *Bartley v. Allendale County School District*, 392 S.C. 300, 709 S.E.2d 619 (2011). (Respondents note that the *Bartley* decision was filed on April 11, 2011, and the Full Commission hearing was held on March 22, 2011).

The claimant in *Bartley* had a "complex medical history of physical ailments along with psychological conditions...that affected her for much of her adult life." *Id.* at 302, 709 S.E.2d at 620. The Court in *Bartley* was concerned with whether the claimant's work injury and pre-existing conditions created a greater disability based upon their "combined effects." *Id.* at 309, 709 S.E.2d at 623. The Court relied upon a similar analysis in *Ellison v. Frigidaire Home Products*, 371 S.C. 159, 638 S.E.2d 664 (2006), and reversed and remanded the *Bartley* case back to the Commission to determine whether the combined effects of the non-work related issues coupled with the work injury to create a greater disability.

The *Bartley* court (and *Ellison* court) applied statutory sections of the South Carolina Worker's Compensation Act that are *not* applicable for injuries after July 1, 2007. Before July 1, 2007, *S.C. Code Ann.* § 42-9-400(a) (2006) read:

If an employee who has a permanent physical impairment from any cause or origin incurs a subsequent disability from injury by accident arising out of and in the course of his employment, resulting in compensation and medical payments liability or either, for disability that is substantially greater, *by reason of the combined effects of the preexisting impairment and subsequent injury* or by reason of the aggravation of the preexisting impairment, than that which would have resulted from the subsequent injury alone, the employer or his insurance carrier shall in the first instance pay all awards of compensation and medical benefits provided by this title; but such employer or his insurance carrier shall be reimbursed from the Second Injury Fund....

The *Bartley* case derived the "combined effects" issue from *S.C. Code Ann.* § 42-9-400 (a) (2006).

The date of accident in *Bartley* was September 26, 2002. The date of accident in the case at bar is July 14, 2009. The South Carolina Legislature made specific changes to *S.C. Code Ann.* § 42-9-400 for dates of accident that occur after July 1, 2007. *S.C. Code Ann.* § 42-9-400 (a) (2011) now reads:

If an employee who has a permanent physical impairment from any cause or origin incurs a subsequent disability from injury by accident arising out of and in the course of his employment, resulting in compensation and medical payments liability or either, for disability that is substantially greater and is caused by aggravation of the preexisting impairment than that which would have resulted from the subsequent injury alone, the employer or his insurance carrier shall pay all awards of compensation and medical benefits provided by this title; but such employer or his insurance carrier shall be reimbursed from the Second Injury Fund....

The "combined effects" section was removed from the statute for dates of injury after July 1, 2007. The Appellant's contention that *Bartley* and/or *Ellison* are applicable is misguided. Not only is there no evidence of a pre-existing condition that could be used to "combine" with the work injury, the legal mechanism for the "combined effects" argument is not applicable for cases after July 1, 2007. *S.C. Code Ann.* § 42-9-400.

C. Appellant's failure to meet the burden of proof under *S.C. Code Ann.* § 42-9-35.

Although not preserved for Appellate Review, the Appellant cannot meet his burden of proof under *S.C. Code Ann.* § 42-9-35 to prove an aggravation of a pre-existing condition. During the Full Commission hearing, Appellant's counsel admitted "[t]here's no previous history anywhere of [Appellant] ever having a back injury. If he did, a little guy like this driving an 18 wheeler every day, he wouldn't be driving an 18 wheeler if he had a pre-existing injury before. Never – no record of it whatsoever." (Transcript of Full Commission proceedings, dated March 22, 2011, p. 16, ll. 1-6; R. p. 55) (*emphasis added*). Thus, the Appellant puts forth an issue before this Court that is not preserved for appeal, and that he argued against at the Full Commission. Moreover, there is no medical evidence to support the Appellant had a pre-existing condition that was aggravated by the work injury to a reasonable degree of medical certainty as required under *S.C. Code Ann.* § 42-9-35.

S.C. Code Ann. § 42-9-35 indicates that an "employee shall establish by a preponderance of the evidence, including medical evidence, that: the subsequent injury aggravated the preexisting condition or permanent physical impairment." Under subsection (c) of § 42-9-35, the legislature has defined medical evidence as "expert opinion or testimony stated to a reasonable degree of medical certainty." Respondent's contend there is no medical evidence stated to a reasonable degree of medical certainty that the work injury aggravated a preexisting condition.

III. APPELLANT'S CONTENTION THAT RESPONDENTS WERE "DOCTOR SHOPPING" IS UNFOUNDED AND IRRELEVANT TO THIS APPEAL.

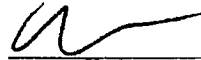
The Appellant contends the Respondent's were "doctor shopping" when they provided treatment with Dr. Bethea, in lieu of Dr. Triana. Respondents assert this is an issue not preserved for appellate review, and is furthermore wholly irrelevant. Appellant cites *Risinger v.*

Knight Textiles, 353 S.C. 69, 577 S.E.2d 222 (Ct. App. 2002), in support of his argument that S.C. Code Ann. § 42-15-80 does not allow an employer to “shop” around for beneficial medical opinions. The key difference between the case at bar and the *Risinger* case is there was a final Order in place in *Risinger* and the carrier was paying benefits per the Order. *Id.* at 72, 577 S.E.2d at 224. The Court of Appeals in *Risinger* affirmed the holding of the Commission that § 42-15-80 does not apply when a final order has been issued and the carrier is paying benefits pursuant to a final order. There was no final order in the case at bar when care was undertaken by Dr. Bethea. *Risinger* does not apply to these facts, and Appellants point is misguided on “doctor shopping.”

According to S.C. Code Ann. § 42-15-80, “[a]fter an injury and so long as he claims compensation, the employee, if so requested by his employer or ordered by the commission, shall submit himself to examination, at reasonable times and places, by a qualified physician or surgeon designated and paid by the employer or the commission.” There is no evidence in the record that the Respondents were doing anything outside of the confines of the law, and there is absolutely no evidence there was any “doctor shopping.”

CONCLUSION

For the foregoing reasons, Respondent’s aver the South Carolina Workers’ Compensation Commission correctly denied the Appellant’s allegations of a lumbar spine injury related to the work accident. The substantial evidence supports the findings of the Commission, and Respondents respectfully request the South Carolina Court of Appeals affirm the Order of the Full Commission *in toto*.



Mark Davis, Esquire
Andrew Luadzers, Esquire
McAngus, Goudelock & Courie, LLC
P.O. Box 877
Charleston, SC 29402-0877
843-576-2782
Attorney for Respondent

Date: 3/28/12

SC Workers' Compensation Commission

1333 Main Street, Suite 500
Post Office Box 1715
Columbia, South Carolina 29202-1715



WCC File #: 0908371

Carrier File #: 0001-0593-09-0002

Carrier Code #: SF827

Employer FEIN #:

Timothy Hannah

Claimant's Name SSN
356 Azalea Street
Johnsonville, South Carolina 29555

Address City State Zip

(843) 433-4800

Home Phone #

R. Mark Davis

Preparer's Name

Work Phone #

McAngus Goudelock & Courie

Law Firm

MJV/Butler Trucking Inc.

Employer's Name

Post Office Box 1022
Georgetown, South Carolina 29440

Address City State Zip

Palmetto Timber S.I. Fund c/o Walker, Hunter & Associates,
Inc.

Insurance Carrier

(843) 576-2782

Phone Number

The date of injury reported on the Form 12A is: 7/14/2009

Check applicable section(s). The employer's representative requests a hearing to:

- I. ☐ Stop payment of compensation. Claimant has reached maximum medical improvement and Claimant continues to receive temporary compensation payments. The employer's representative requests a hearing pursuant to § 42-9-260(D) to stop payment of temporary compensation. A hearing requested pursuant to this section must be held within sixty days of the date of the request.

Claimant reached maximum medical improvement on (m/d/yyyy) (copy of medical report must be attached).
Compensation payments are current as of _____ and shall continue until otherwise ordered or until a Form 17 is signed by the claimant.
A Form 17 was offered and refused on _____.

- II. ☐ Address suspension, termination, or reduction of temporary disability payment for any cause.

- ☐ a. At any time pursuant to § 42-9-260(E).
☐ b. After the one-hundred-fifty day period has expired pursuant to § 42-9-260(F), R.67-505 and R.67-506.

The basis for the termination/ suspension is ____

- III. ☒ Determine if compensation is due pursuant to § 42-9-10, § 42-9-20 or § 42-9-30 and, if so, in what amount, based on the following grounds:

Defendants contend the Claimant reached maximum medical improvement on February 10, 2010, per the opinion of Dr. James Bethea. Temporary benefits were properly stopped per the enclosed Form 17, but there remains a large overpayment of temporary benefits after MMI.
Claimant reached maximum medical improvement on 2/10/2010 (m/d/yyyy) (copy of medical report must be attached).

- IV. ☒ Request Credit for Overpayment of temporary compensation pursuant to § 42-9-210.

- V. ☐ Determine amount of compensation for claims involving a fatality. (Dependency investigation must be attached).

- ☐ a. Payment of unpaid balance of compensation when employee dies pursuant to § 42-9-280.
☐ b. Amount of compensation for death of employee due to accident pursuant to § 42-9-290.

A hearing requested pursuant to this section will be set on an expedited basis.

- A \$ 25.00 filing fee and updated Form 18 must be included with an employer's request for a hearing.

- An employer requesting a hearing must include certification that the request has been served on all parties in compliance with R.67-211.

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

W.E. Jenkinson, III, Esquire
Jenkinson, Jarrett & Kellahan, PA
Post Office Drawer 669
Kingstree, South Carolina 29556

South Carolina Worker's Compensation Commission
Post Office Box 1715
Columbia, South Carolina 29202

on the 7th day of November, 2012 by: ☒ first class mail; ☐ personal service; ☐ certified mail.

Preparer's Signature

Attorney for Employer/Carrier
TitleNovember 7, 2012
Date

Questions about the use of this form should be directed to the Judicial Department at 803-737-5675, or visit us online at www.wcc.sc.gov.

WCC Form # 21

Revised 04/18/2011

21

Employer's Request for Hearing



Jenkinson, Jarrett & Kellahan, PA

ATTORNEYS AT LAW

120 WEST MAIN STREET • POST OFFICE DRAWER 669 • KINGSTREE, SOUTH CAROLINA 29556
TELEPHONE (843) 355-2000 • FACSIMILE (843) 355-2010 • TOLL FREE 1-888-354-7417
www.jenkinsonlaw.com

W. E. Jenkinson, III
Ernest J. Jarrett*
Jennifer R. Kellahan**

M. Amanda Harrelson Shuler

*Certified Family Court Mediator
**Certified Circuit Court Mediator

January 8, 2013

VIA EMAIL:

bcheeseboro@wcc.sc.gov

Commissioner Andrea C. Roche
South Carolina Workers'
Compensation Commission
Division of Claims
Post Office Box 1715
Columbia, SC 29202-1715

Re: Timothy Hannah v. MJV, Inc/Butler Trucking, Inc.
Date of Injury: July 14, 2009
WCC#: 0908371
Carrier File #: 0001-0593-09-0002

Dear Commissioner Roche:

Please find enclosed herewith the Form 58 along with our Notice of Submission of Medical Records as Direct Evidence on Behalf of the Employee/Claimant. By copy of this letter to R. Mark Davis, attorney the employer and carrier, I am serving them with a copy of the same.

With kindest regards, I am

Very truly yours,

JENKINSON, JARRETT & KELLAHAN, P.A.

W. E. Jenkinson, III
email: billy@jenkinsonlaw.com

WEJ,III/lis

Enclosure(s): as stated

Cc: Timothy Hannah
R. Mark Davis, Esquire
McAngus Goudelock & Courie, LLC
PO Box 12519
Columbia, SC 29211
mdavis@mgclaw.com



Claimant's Name: Timothy J. Hannah Employer's Name: MJV, Inc./Butler Trucking Inc.
Address: 532 E. Hwy 378 Address: PO Box 698
City: Johnsonville State: SC Zip: 29555 City: Georgetown State: SC Zip: 29442
Home Phone: (843) 610-7509 Work Phone: () Carrier: Palmetto Timber SI Fund
Preparer's Name: W. E. Jenkinson, III, Esquire Preparer's Phone #: (843) 355-2000

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

☒ Injury ☐ Illness ☐ Repetitive Trauma

1. Compensation Rate: 381.32 2. AWW: \$571.95 Date of Injury: 07/14/2009
3. Type of injury and body part(s): cervical spine, left shoulder, left elbow and lumbar spine
4. Facts in controversy: a) Claimant is in need of further medical care and treatment for his cervical spine; b) weekly compensation from December 1, 2011 to date for change of circumstances; and c) for finding that the Claimant has not reached MMI for his cervical spine injury
5. Legal issues involved: This is an action for review of award on change of condition, §42-17-90, additional, appropriate medical treatment for his condition, and weekly compensation benefits from December 1, 2011 to date
6. Unusual aspects: The Claimant was entitled to benefits through July 25, 2011 the date the full commission in a divided opinion reversed the opinion of the single commissioner. Claimant has since executed a Form 17. The Court of Appeals did not rule with finality until September 26, 2012.
7. Witnesses (designate if expert):* The Claimant Timothy Hannah, 532 E. Hwy 378, Johnsonville, SC 29555
8. Exhibits: APA Exhibits and Affidavit of Timothy Hannah; Medical records from McLeod Regional Medical Center, Choppee Medical Center and opinion of Dr. James Brennan forthcoming
9. Medical evidence (Indicate report pursuant to R.67-612; deposition or appearance):
APA Exhibits
10. Name, address, and specialty, if any, of the treating physician: James F. Bethea, M.D., Columbia Orthopaedic Specialists, LLC 1301 Taylor Street, Suite 3-0, Columbia, SC 29202-0306; Mark E. Triana, D. O., Carolina Orthopaedic Specialists, 2185 N. Fraser Street, Georgetown, SC 29440 and James B. Brennan, M.D., Florence Neurosurgery & Spine, 1204 E. Cheves Street, Florence, SC 29506
11. Impairment rating(s); body part(s); physician and date of opinion: 0% Impairment, James F. Bethea, M.D. January 6, 2010
12. I am amending my Form 50/51 in the following manner: 11a. This is a request for payment of medical expenses related to a cervical spine cervical procedure which took place on June 5, 2012; payment of weekly wages from date of the change of circumstance December 1, 2011 and additional medical care and treatment for cervical spine injury

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

Signature: [Signature]

Email: Billy@jenkinsonlaw.com

Date of hearing: January 18, 2013

Time needed for hearing: 60 minutes

On behalf of ☒ Claimant ☐ Employer

File this form and proof of service on the opposing party according to R.67-611 and R.67-212. Do not send medical reports.

* Commissioners reserve the right to admit expert witnesses at hearings.

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



WCC File #: **0908371**
Carrier File #: **001-0593-09-0002**
Carrier Code #: **00827**
Employer FEIN #:

Claimant's Name: Timothy J. Hannah SSN: _____ Employer's Name: MJV, Inc./Butler Trucking Inc.
Address: 532 E. Hwy 378 Address: PO Drawer 698
City: Johnsonville State: SC Zip: 29555 City: Georgetown State: SC Zip: 29442
Home Phone: (843) 610-7509 Work Phone: () Insurance Carrier: Palmetto Timber SI Fund
Preparer's Name: W. E. Jenkinson, III Law Firm: Jenkinson, Jarrett & Kellahan, PA Preparer's Phone #: (843) 355 - 2000

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

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

Date of Injury or Illness: July 14, 2009

☒ Injury ☐ Illness ☐ Repetitive Trauma

- 1a. The claimant sustained an injury to cervical spine, left shoulder, left elbow and lumbar spine (Part(s) of Body Injured) on 07/14/2009 (Month/Day/Year) in Georgetown county, state of SC.

1b. Body part(s) affected are: cervical spine, left shoulder, left elbow and lumbar spine

Briefly describe how the accident occurred. Claimant was on his way back to work after making a delivery, he rounded the curve at Exit 17 off of SC Hwy. 41 and when he attempted to straighten his 18 wheel tractor trailer there was a catch in the steering and he could not straighten the 18 wheel tractor trailer. When the catch released he lost control of the 18 wheel tractor trailer loaded with logs and it rolled.

2. Both the claimant and the employer were subject to the South Carolina Workers' Compensation Act at the time of injury.
3. The relationship of employer and employee existed at the time of injury.
4. At the time of the injury the claimant was performing services arising out of and in the course of employment.
5. Notice of the accidental injury was given to the Employer on 07/14/2009 (Month/Day/Year) in the following manner:
Claimant remembers seeing Terry Butler, his employer, at the scene of the accident after he regained consciousness. Claimant is unsure of who called and reported the accident to Mr. Butler.

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

- ☐ (a) medical examination and treatment for: _____
☒ (b) additional medical examination and treatment for: cervical spine

☒ 7. Due to injury, the claimant requests temporary total disability benefits because of lost compensable time from work and wages for the period of: December 1, 2011 to date

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

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

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

10a. At the time of the injury, the claimant was paid weekly wages of \$571.95, and demands accounting of days worked and wages earned as provided by law.

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

11a. Further grounds or unusual aspects of claim:

This is a request for payment of medical expenses related to a cervical spine cervical procedure which took place on June 5, 2012; payment of weekly wages from date of the change of circumstance December 1, 2011 and additional medical care and treatment for cervical spine injury

11b. List names and addresses of all physicians or other medical specialists who have seen or treated the claimant as a result of the accident:
James F. Bethea, M.D. of Columbia Orthopaedic Specialists, LLC 1301 Taylor Street, Suite 3-0, Columbia, SC 29202-0306; Mark E. Triana, D.O. of Carolina Orthopaedic Specialists, 2185 N. Fraser Street, Georgetown, SC 29440; Patricia R. Grant, M.D., Georgetown Memorial Hospital Pain Management, 219 Church Street, Georgetown, SC 29440; Robert E. Kimpton, M.D., Doctor's Care, 1068 North Fraser Street, Georgetown, SC 29442; Thomas Howard, M.D., NextStep Rehab., 219 Church Street, Georgetown, SC 29440; Joseph Gammel, M.D., Georgetown Memorial Hospital, 606 Black River Road, Georgetown, SC 29440 and James B. Brennan, M.D., Florence Neurosurgery & Spine, 1204 E. Cheves Street, Florence, SC 29506

11c. To the best of your knowledge, did you have any prior permanent disability? No
If yes, describe: _____

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

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

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

14. Estimated time needed for hearing: 60 minutes

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


Preparer's Signature

Attorney
Title

billy@jenkinsonlaw.com
Email

January 8, 2013
Date

Refer to R.67-204 through R.67-210 and R.67-601 through R.67-615. Questions about the use of this form may be directed to the Commission's Claims Department.

WCC Form # 50
Revised 9/07

Amended 50

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

BEFORE THE
SOUTH CAROLINA WORKERS' COMPENSATION COMMISSION

TIMOTHY HANNAH,	)	WCC FILE NO.0908371
	)	
EMPLOYEE/CLAIMANT,	)	
	)	
MJV, INC/BUTLER TRUCKING,	)	ADDENDUM
	)	
EMPLOYER,	)	
	)	
PALMETTO TIMBER FUND	)	
	)	
INSURANCE CARRIER,	)	
	)	
DEFENDANTS.	)	
	)	

This is an action for review of award on change of conditions, §42-17-90 of the SC Code Ann. 1976 as amended. Claimant suffered injuries to his left elbow, left shoulder and cervical spine. He suffered these injuries in an 18 wheeler rollover accident on July 14, 2009.

A hearing was held on July 30, 2010 before Commissioner Andrea C. Roche to determine the issues in Forms 21, 50 and 51. The Commissioner found that the Claimant had not reached maximum medical improvement and that his limitations of the lumbar spine were causally related to the accident of July 14, 2009 and that he should be treated and evaluated (Order pp.10-11).

The Defendants filed an appeal and served a Form 30 request for Commission Review which was held on July 25, 2011. Three Commissioners reversed the initial Commissioner's ruling finding the greater weight and preponderance of the evidence supported a reversal of the single Commissioner finding that the Claimant had sustained a compensable lumbar spine injury. The three Commissioners did find that the Claimant suffered compensable injuries to his cervical spine and left elbow as a result of the July 14th accident. Dr. Bethea's opinion of January 2010 found a 0% medical impairment to the cervical spine and 0% impairment to his left elbow became the finding of the three Commissioners..

This decision was appealed to the South Carolina Court of Appeals affirmed the findings of the three Commissioners. Their decision was on September 26, 2012. The attached medical reports document the Claimant's change of condition since

reaching maximum medical improvement on January 6, 2010 since the hearing before Commissioner Roche and the full Commission referred to above.

The following changes of conditions are documented in the medical records since the maximum medical improvements finding in the hearings. Dr. James B. Brennan found in his initial treatment on May 23, 2012 that the Claimant presenting with chronic pain; "the patient apparently suffered a significant motor vehicle accident in April 2009, in which he had left shoulder and arm injuries as well as injuries to his leg. He has had chronic leg in his neck and arm as well as in his back, right hip and bilateral lower extremities." (APA 9, p.150). MRI scans revealed a C6-7 disc herniation with some canal compromise, a C6-7 anterior cervical discectomy with allograft fusion and plating. This surgical procedure was performed on June 5, 2012 at McLeod Regional Medical Center,

Dr. Brenna's physical exam found a "black male in obvious distress secondary to neck, left arm, back...pain"; as a result of the findings Dr. Brennan recommended Florence, SC. According to the medical records he was last seen by Dr. Brennan on November 26, 2012 and his next appointment is scheduled for early January 2013.

This Addendum is supplemented by the Affidavit of Timothy Hannah, which is attached.

Dated at Kingstree, SC this 8th day of January, 2013.


W. E. Jenkinson, III
JENKINSON, JARRETT & KELLAHAN, P. A.
Post Office Drawer 669
Kingstree, SC 29556
Telephone No. (843) 355-2000
Fax No. (843) 355-2010
**ATTORNEYS FOR EMPLOYEE/
CLAIMANT**

BEFORE THE
SOUTH CAROLINA WORKERS' COMPENSATION COMMISSION

TIMOTHY HANNAH,	)	WCC FILE NO.0908371
	)	
EMPLOYEE/CLAIMANT,	)	
	)	
MJV, INC/BUTLER TRUCKING,	)	
	)	
EMPLOYER,	)	
	)	
PALMETTO TIMBER FUND	)	AFFIDAVIT OF TIMOTHY HANNAH
	)	
INSURANCE CARRIER,	)	
	)	
DEFENDANTS.	)	
	)	

PERSONALLY appeared before me, Timothy Hannah, who after being duly sworn says:

1. I am the Claimant in the above captioned case. I was employed as an eighteen wheeler tractor trailer driver for MJV, Inc./Butler Trucking and was involved in a rollover accident with the vehicle on July 14, 2009. Due to the rollover accident I suffered injuries to my left elbow, left shoulder, neck and low back. After a hearing, an appeal before the full commission and an appeal to the South Carolina Court of Appeals it was determined that I did not have a compensable injury to my low back.

2. As it appears in the medical records at the emergency room, APA 1 p. 2-4, I had complaints of left elbow, shoulder and cervical spine pain.

3. After being initially treated a number of times by Doctors Care in Georgetown after the accident I was finally referred on September 9, 2009 for a follow up with an orthopedist due to my complaints, (APA 2 p. 36-37).

4. The earliest appointment I could get was with Dr. Mark E. Triana of Carolina Orthopedic Specialists of Georgetown on September 30, 2009. The medical records of Dr. Triana states that an MRI showed I had a degenerative disc at C5-6 with a small disc protrusion "that may very well be causing his neck and shoulder symptoms" (APA 4 p. 81).

5. One of my major complaints was my low back pain which I was seeking treatment and was the subject of my appeal.

6. The Worker's Compensation insurance carrier abruptly changed my treating physician from Dr. Triana in Georgetown near where I live to Dr. James F. Bethea of Columbia who was to treat my left elbow complaint and surgically repaired my left elbow on December 22, 2009. Nowhere in the records of Dr. Bethea does it show he even reviewed the MRI scans of my neck or lumbar spine. I saw Dr. Bethea on December 4, 2009 and had the surgery performed on December 22, 2009 (APA 6 p. 96-97). I saw Dr. Bethea again on January 6, 2010 and on this occasion he discharged me 15 days following surgery, finding 0% impairment in my elbow and 0% impairment of my neck (APA 6 p. 103-104). I was still in substantial pain and obtained a prescription from Dr. Bethea for Darvocet, APA 6 p. 104, with no return appointment.

7. Following the Bethea visit a hearing was held and the cervical spine and elbow was found to be compensable with 0% impairment. This finding was affirmed by the three commissioners on July 25, 2011 (Finding 13, page 9).

8. I appealed the three commissioners' order to the Court of Appeals which affirmed the decision of the commissioners on September 26, 2012.

9. My neck had never hurt me prior to the accident. I have never had an injury to my neck or been treated for neck pain or problems even though I had been diagnosed with degenerative disease by Dr. Triana in October 2009 in my cervical spine. I have not injured my neck in any way since the accident. I have enjoyed excellent health as established by my medical records and testimony in this case. Because my neck pain was exacerbated due to this accident I sought additional medical treatment at the Choppee Medical Center in late 2011 where I saw Dr. Daniels for my complaints about my neck. He referred me to Dr. James J. Brennan a neurosurgeon with Neurosurgery and Spine, PC in Florence for further care and treatment to my cervical spine on May 23, 2012 (APA 9). The medical records indicate that I had chronic pain and "suffered a significant motor vehicle accident in April 2009, in which I had left shoulder and arm injuries as well as injuries to my legs and chronic pain in my neck and arms.

10. I never reported any of this further medical care and treatment to my attorney, W. E. Jenkinson, III. I did not seek further medical treatment until after the full commission ruled against me and we filed an appeal in the Court of the Appeals. I had to do something because I was hurting and needed relief. I thought it would be of no use to tell my lawyer and I did not inform him of this fact until we

met on January 3, 2013. My attorney had attempted to contact me about this hearing in December but I could not afford to have my phone and could not be reached. Finally, my attorney wrote me a letter before Christmas telling me it was important that I meet with him to discuss this hearing. It was not until January 3, 2013 that we were able to meet, and I informed him of these developments. He obtained my medical records.

11. These medical records showed that as a result of these injuries I was followed by Dr. Brennan who performed an interior cervical discectomy with allograft fusion and plating on June 5, 2012.

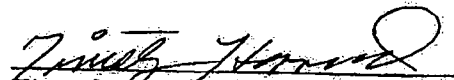
12. As of this date I am still under the care and treatment of Dr. Brennan for the surgical procedure to my neck and have not reached maximum medical improvement.

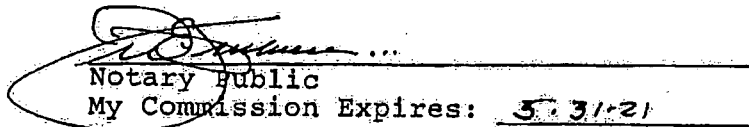
13. I have not been employed since my accident in April 2009. I still suffer from pain and limited use of my left arm due to the injury to my left elbow.

14. I would like to be further evaluated with respect to my neck and I have substantial medical expenses for which I have no funds to pay McLeod Regional Medical Center or any of the physicians who treated me. A portion of the medical expenses were paid by Medicare because I now receive Social Security Disability benefits as a result of the injuries I received in this accident.

Kingstree, SC

January 7, 2013


Timothy Hannah


Notary Public
My Commission Expires: 5.31.21

SC Workers' Compensation Commission

333 Main Street, suite 500 • Post Office Box 1715
Columbia, South Carolina 29202-1715
803)737-5723



WCC File #: 0908371

Carrier File #: 0001-0593-09-0002

Carrier Code #: SF827

Employer FEIN #:

Timothy Hannah

Claimant's Name

SSN

356 Azalea Street

Johnsonville, South Carolina 29555

Address City State Zip

(843) 433-4800

Home Phone #

R. Mark Davis

Preparer's Name

Work Phone #

McAngus Goudelock & Courie

Law Firm

MJV/Butler Trucking Inc.

Employer's Name

Post Office Box 1022

Georgetown, South Carolina 29440

Address City State Zip

Palmetto Timber S.I. Fund c/o Walker, Hunter & Associates, Inc.

Insurance Carrier

(843) 576-2782

Phone Number

Date of Accident: 7/14/09

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

1. It is admitted that the employee sustained an injury on or about the date set forth in the application. The reasons for denial are: Inasmuch as the Claimant suffered an accident involving injury to the cervical spine and left elbow. Defendants deny the nature and extent of the alleged injuries and body parts involved. See No. 11.
2. It is admitted that both the employer and employee were subject to the Workers' Compensation Act at the time in question. The reasons for denial are: _____
3. It is admitted that the relationship of employer and employee existed at the time in question. The reasons for denial are: _____
4. It is admitted that at the time in question the employee was performing service growing out of and incidental to his employment. The reasons for denial are: See No. 1 and No. 11.
5. It is admitted that notice of injury was given to the employer. The reasons for denial are: See No. 1 and No. 11.
6. It is denied that the employee needs/is entitled to additional medical care as a result of the injury. The reasons for denial are: Claimant has reached maximum medical improvement. See No. 1 and No. 11.
7. It is denied that the employee is entitled to temporary total disability for the period(s) of: _____
8. It is denied that the employee is permanently disabled. The reasons for denial are: No evidence of permanent disability. See No. 1 and No. 11.
9. It is denied that the employee has a serious disfigurement.
10. It is contended that an average weekly wage of \$571.95 applies, according to attached accounting of employee's earnings as provided by law.
11. Further contentions or grounds of defense are: Defendants deny the Claimant suffered a compensable injury by accident to the left shoulder and lumbar spine and contest the nature and extent of the alleged injury of the cervical spine and left elbow. The South Carolina Court of Appeals upheld the Full Commission Order denying compensability of the lumbar spine. Race judicata; Collateral estoppel; Statute of limitations; Notice; Laches; Causation; \$42-1-160; \$42-15-60; \$42-9-36; Pre-existing condition; Natural progression of a pre-existing condition; Intervening accident; Burden of proof; Improper filing of change of condition claim; No medical evidence to support change of condition claim; Defendants request credit for overpayment of TTD; Unauthorized medical treatment/non-compliance of medical treatment; Defendants reserve the right to amend or supplement this answer as investigation continues or in response to any testimony or evidence presented by Claimant.
12. Estimated time needed for hearing: 45 minutes

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

W.E. Jenkinson, III, Esquire
Jenkinson, Jarrett & Keilahan, PA
Post Office Drawer 669
Kingstree, South Carolina 29556

South Carolina Worker's Compensation Commission
Post Office Box 1715
Columbia, South Carolina 29202

on the 16th day of January, 2013 by ☒ first class mail; ☐ personal service; ☐ certified mail.
I verify the contents of this form are accurate and true to the best of my knowledge.

Preparer's Signature

Attorney for Employer/Carrier mdavis@mgclaw.com
Title Email

January 16, 2013
Date

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



Claimant's Name: Timothy Hannah SSN: _____
Address: 356 Azalea Street
Johnsonville, South Carolina 29555
Home Phone: (843) 433-4800 Work Phone: _____
Preparer's Name: R. Mark Davis

Employer's Name: MJV/Butler Trucking Inc.
Post Office Box 1022
Address: Georgetown, South Carolina 29440
Palmetto Timber S.I. Fund c/o Walker, Hunter &
Carrier: Associates, Inc.
Preparer's Phone #: (843) 576-2782

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

☒ Injury ☐ Illness ☐ Repetitive Trauma

1. Comp. Rate: \$381.32 2. AWW: \$ 571.95

Date of Injury: 07/14/09

3. Type of injury and body part(s): Neck and left elbow.

4. Facts in controversy: The Defendants admit the Claimant sustained an injury arising out of and in the course and scope of his employment on or about July 14, 2009, to his neck and left elbow. Previously, the Claimant alleged an injury to his lumbar spine. Pursuant to the Court of Appeals' Decision, dated September 26, 2012, the Claimant did not sustain a compensable injury to his lumbar spine and his injuries are limited to his neck and left elbow. The Defendants contend the Claimant reached maximum medical improvement (MMI) on January 6, 2010, pursuant to the opinion of Dr. James Bethea. Defendants contend the Claimant has provided any and all appropriate temporary benefits and request a credit of temporary benefits paid past the date of MMI or any benefits paid while the Claimant received both unemployment benefits and temporary benefits. Notably, the Claimant executed a Form 17 on August 31, 2011, allowing the Defendants to terminate temporary benefits; however, the Defendants are entitled to a credit of temporary benefits paid from January 6, 2010 through August 16, 2011. It is noted on the Form 17 that the Claimant agreed he could return to work on February 10, 2010. Thus, even if the Commission determines the Claimant did not reach MMI on January 6, 2010, there is still a credit of overpayment from February 10, 2010 through August 16, 2011. The Defendants object to a lump sum payment or inclusion of Utica-Mohawk allocation language in any award of the Commission. Therefore, the issues for determination are as follows: (1) Is the Claimant at MMI for his work injury? (2) Is the Claimant entitled to any permanent partial disability (PPD) for his left wrist and/or neck and, if so, to what extent? (3) Are the Defendants entitled to any credit of overpayment of temporary benefits? and (4) Is the Claimant entitled to any further medical treatment or benefits under the Act?

5. Legal issues involved: See number 4 above; S.C. Code Ann. Section 42-1-160; MMI; causation; S.C. Code Ann. Code 42-15-60; natural progression of a pre-existing condition; Intervening accident; S.C. Code Ann. Section 42-9-35; burden of proof; Motion to Postpone; pending Full Commission review; Issues not ripe; Defendants reserve the right to supplement this Brief.

6. Unusual aspects: The parties to this matter attended a hearing before Commissioner Roche on January 18, 2013. A Decision and Order was subsequently filed on December 5, 2013. Defendants timely filed a Form 30 requesting Full Commission review. Defendants contend that the hearing set before Commissioner Beck on January 15, 2014, is not ripe given the pending Full Commission review concerning issues of MMI, entitlement to medical treatment, and entitlement to temporary benefits. Defendants respectfully request the Commission grant the Motion to Postpone in lieu of proceeding with the hearing set for January 15, 2014.

7. Witnesses (designate if expert): * Marshall Butler, Terry Butler, John Jamison, and other representatives of the Employer and/or Carrier may be called upon to testify; Debbi Craig; the Defendants reserve the right to call any and all witnesses listed by the Claimant, including the Claimant.

8. Exhibits: The Claimant's personnel and/or payroll records may be submitted in response to testimony; the Claimant's deposition transcript may be submitted in response to testimony; deposition transcript of Dr. Mark Triana may be submitted in response to testimony; deposition transcript of Dr. James Bethea may be submitted in response to testimony; deposition transcript of Tim Sauer may be submitted in response to testimony; deposition transcripts of Dr. Brennan may be submitted in response to testimony; surveillance report and video dated May 19, 2010; Exhibit A: Form 17, dated August 31, 2011, 1 page; Exhibit B: S.C. Court of Appeals Opinion, dated September 26, 2012; Exhibit C: Decision and Order of Commissioner Roche, dated December 5, 2013; Exhibit D: Form 30, seeking Full Commission review; and Exhibit E: Motion to Postpone, dated December 27, 2013.

9. Medical evidence (Indicate report pursuant to R.67-612; deposition or appearance):

Medical records from Georgetown Memorial Hospital, dated 7/14/09 - 11/23/09, consisting of 21 pages; medical records of Doctors Care, dated 7/21/09 - 9/9/09, consisting of 9 pages; medical records of Next Step Rehabilitation Services, dated 7/29/09 - 9/17/09, consisting of 27 pages; medical records of James F. Bethea, MD of Columbia Orthopaedic Specialists, LLC, dated 12/4/09 - 2/10/10, consisting of 6 pages; medical records of Providence Hospital, dated 12/22/09, consisting of 2 pages.

10. Name, address, and specialty, if any, of the treating physician:

James F. Bethea, M.D.
Columbia Orthopaedic Specialists, LLC
1301 Taylor Street, Suite 3-0
Columbia, South Carolina 29201

11. Impairment rating(s); body part(s); physician and date of opinion: 0% impairment to the cervical spine and 0% impairment of the left elbow on January 6, 2010 per Dr. Bethea.

12. I am amending my Form 50/51 in the following manner: N/A

☐ **Mediation**

- ☐ a. Mediation is requested to be ordered pursuant to Reg. 67-1801 B.
☐ b. Mediation is required pursuant to Reg. 67-1802.
☐ c. Mediation is requested by consent of the Parties pursuant to Reg. 67-4803.
☐ d. Mediation has been conducted by a duly qualified mediator and resulted in an impasse.

Questions regarding mediation may be submitted to mediation@wcc.sc.gov.

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

W.E. Jenkinson, III, Esquire, Jenkinson, Jarrett &
Kellahan, PA

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

Post Office Drawer 669
address Kingstree, South Carolina 29556 on the 30th day of December, 20 13.
by ☒ first class postage ☐ certified mail ☐ personal service.

Signature: [Signature]

Email: mdavis@mgclaw.com

Date of Hearing: January 15, 2014

Time needed for hearing: 1 hour

Questions about the use of this form should be directed to the Jurisdictional Commissioner. Refer to Regulations 67-204 through 67-211, 67-211, and Regulations 67-601 through 67-615; as well as Reg. 67-1801. File this form and proof of service on the opposing party according to R.67-611 and R.67-212. Do not send medical reports. *Commissioners reserve the right to admit expert witnesses at hearings.

WCC FORM # 53

Revised 7/13

58

PRE-HEARING BRIEF



Jenkinson, Jarrett & Kellahan, PA

ATTORNEYS AT LAW

120 WEST MAIN STREET • POST OFFICE DRAWER 669 • KINGSTREE, SOUTH CAROLINA 29556
TELEPHONE (843) 355-2000 • FACSIMILE (843) 355-2010 • TOLL FREE 1-888-354-7417
www.jenkinsonlaw.com

COPY

September 11, 2014

W. E. Jenkinson, III
Ernest J. Jarrett*
Jennifer R. Kellahan**

J. Thomas Thompson

*Certified Family Court Mediator
**Certified Circuit Court Mediator

VIA EMAIL AND US MAIL
Commissioner Gene McCaskill
South Carolina Workers'
Compensation Commission
Post Office Box 1715
Columbia, SC 29202-1715

Re: Timothy Hannah v. MJV, Inc/Butler Trucking, Inc.
Date of Injury: July 14, 2009
WCC#: 0908371
Carrier File #: 0001-0593-09-0002

Dear Commissioner McCaskill:

Please find enclosed herewith the employee/claimant Form 58 and APA Submission/Timeline. Please note that the Claimant will be relying on previously submitted APA submissions and exhibits which are on file with the commission.

By copy of this letter to R. Mark Davis, Esquire, attorney for the employee/carrier, we are notifying him of this submission and we are serving a copy upon him by mail and email.

With kindest regards, I am

Very truly yours,

JENKINSON, JARRETT & KELLAHAN, P.A.

W. E. Jenkinson, III
email: billy@jenkinsonlaw.com

WEJ/lls

Enclosure(s): as stated

Cc: Timothy Hannah
R. Mark Davis, Esquire
McAngus Goudelock & Courie, LLC
PO Box 650007
Mount Pleasant, SC 29465

South Carolina Workers' Compensation Commission
1333 Main Street, Suite 500
P.O. BOX 1715
Columbia, SC 29202-1715
(803) 737-5739 www.wcc.sc.gov



PRE-HEARING BRIEF
WCC File No: 0908371

Claimant's Name: Timothy Hannah
Address: 532 Hwy 378 East Hannah
City: Johnsonville State: SC Zip: 29555
Home Phone: (843) 493-6692 Work Phone: ()
Preparer's Name: W. E. Jenkinson, III
Employer's Name: MJV/Butler Trucking Inc.
Address: Post Office Box 1022
City: Georgetown State: SC Zip: 29440
Carrier: Palmetto Timber S.I. Fund c/o Walker, Hunter & Associates, Inc.
Preparer's Phone #: (843) 355-2000

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

- ☒ Injury ☐ Illness ☐ Repetitive Trauma
1. Compensation Rate: \$381.32 2. AWW: \$571.95 Date of Injury: 07/14/2009
3. Type of Injury and body part(s): cervical spine and left elbow
4. Facts in controversy: The Claimant and Defendants admit that the Claimant sustained an injury arising out of and in the course and scope of his employment on or about July 14, to his neck.
A hearing was held as to whether or not he was entitled for treatment for his injury to his lumbar spine and it was decided by the Court of Appeals on September 26, 2012 that the Claimant did not sustain a compensable injury to his lumbar spine. Issues related to the neck and elbow were never heard by the commission and the pendency of the previous litigation related to the lumbar spine. There has never been a determination as to MMI related to the injuries sustained to the Claimant's neck. During the pendency of the appeal of the related to the lumbar spine the Claimant sought treatment for his cervical spine and surgical repair was performed by Dr. James Brennan, a neurosurgeon in Florence. A hearing as to the causation of the neck injury was held before Commissioner Andrea C. Roche, which resulted in her Order and Decision filed December 5, 2013 which was reversed and remanded by the appellate panel for a new hearing due to procedural error. The issues for determination are as follows: 1) when did the Claimant at MMI for the cervical spine injury, 2) is the Claimant entitled to any permanent or partial disability for his cervical spine and if so to what extent, 3) are the Defendants entitled to any credit for overpayment of temporary benefits, 4) is the Claimant entitled to any further medical treatment or benefits under the Act, and 5) should Ulta-Mohawk language be included, 6) alternatively, has the Claimant experienced a change of condition in the cervical spine 642-17-90.
5. Legal Issues Involved: See No. 4 above; SC Code Ann. Section 42-1-160; MMI; causation; SC Code Ann. 42-15-60; natural progression of a Pre-existing condition; Intervening accident; SC Code Ann. 42-9-35; burden of proof; for review of award on change of conditions, 642-17-90, additional, appropriate medical treatment for his condition, and weekly compensation benefits from December 1, 2011 to date.
6. Unusual aspects:
7. Witnesses (designate if expert):* The Claimant, Timothy Hannah, and Dr. James Brennan by deposition.
8. Exhibits: All exhibits attached hereto and all exhibits submitted by previous APA submissions and are on file with the Commission; previous orders and decisions of Commissioner Roche and the full commissioners as relate to the finding with respect to the cervical spine.
9. Medical evidence (Indicate report pursuant to R.67-612; deposition or appearance):
Medical records from Georgetown Memorial Hospital dated July 14, 2009 consisting of 24 pages; Doctor's Care dated July 21, 2009 - September 9, 2009, consisting of 13 pages; Carolina Orthopaedic Specialists dated September 30, 2009 - April 28, 2010, consisting of 9 pages; Florence Neurosurgery and Spine dated May 13, 2012 - November 26, 2012, consisting of 27 pages; Florence MRI and Imaging dated September 16, 2009, consisting of 1 page; Letters of Dr. James Brennan dated January 8, 2013 and May 9, 2013 consisting of 3 pages
10. Name, address, and specialty, if any, of the treating physician: Dr. Mark Triana, Carolina Orthopaedic Specialist and Dr. James S. Brennan, Florence Neurosurgery & Spine, 1204 E. Cheves Street, Florence, SC 29506
11. Impairment rating(s); body part(s); physician and date of opinion: 28% Impairment to cervical spine, Dr. James S. Brennan, May 9, 20013
12. I am amending my Form 50/51 in the following manner:
- ☐ Mediation
- ☐ a. Mediation is requested to be ordered pursuant to Reg. 67-1801 B.
- ☐ b. Mediation is required pursuant to Reg. 67-1802.
- ☐ c. Mediation is requested by consent of the Parties pursuant to Reg. 67-1803.
- ☐ d. Mediation has been conducted by a duly qualified mediator and resulted in an impasse.
- Questions regarding mediation may be submitted to mediation@wcc.sc.gov.

I verify the contents of this form are accurate and true to the best of my knowledge.
I certify I have served this document pursuant to Reg. 67-211 by delivering a copy to R. Mark Davis, Esquire, McAnugus Goudelock & Courie
address PO Box 650007, Mt. Pleasant, SC 29465 on the _____ day of September 2014 by: ☒ first class postage ☐ certified mail ☐
personal service.

Signature: _____

Date of hearing: September 25, 2014

Email: _____

Billy@tenkinsonlaw.com

Time needed for hearing: _____

One hour

Questions about the use of this form should be directed to the Jurisdictional Commissioner. Refer to Regulations 67-204 through 67-211 and Regulations 67-601 through 67-615; as well as Regulation 67-1801. File this form and proof of service on the opposing party according to R.67-611 and R.67-212. Do not send medical reports. * Commissioners reserve the right to admit expert witnesses at hearings.

PRE-HEARING BRIEF

WCC Form # 58

Revised 7/13

58

SOUTH CAROLINA WORKERS' COMPENSATION COMMISSION

W.C.C. FILE NO: 0908371

TIMOTHY HANNAH,

Employee,

Claimant,

vs.

MJV/BUTLER TRUCKING INC.,

Employer,

AND

PALMETTO TIMBER S.I. FUND C/O
WALKER, HUNTER & ASSOCIATES,
INC.

Carrier,

Defendants.

MOTION FOR RECONSIDERATION

TO: SOUTH CAROLINA WORKERS' COMPENSATION COMMISSION AND W.E.
JENKINSON, III, ESQUIRE:

Pursuant to South Carolina Workers' Compensation Regulation 67-215, Defendants, by and through their undersigned attorney, hereby move the Appellate Panel of the Full Commission to reconsider the issue of Defendant's request for credit for overpayment of Temporary Total Disability benefits which was not addressed in the Appellate Panel's Order dated February 23, 2016. Defendant's now move for reconsideration of this issue based upon the following grounds:

1. Claimant signed a Form 17 on August 31, 2011, in which he indicated that he was able to return to work on February 10, 2010.

2. Defendants continued to pay Claimant Temporary Total Disability benefits through August 16, 2011, while this case was on appeal to the Court of Appeals. Defendants were the Respondents in that appeal.
3. During the appellate process, Defendants had no mechanism to stop payment of Temporary Total Disability benefits to Claimant because the South Carolina Workers' Compensation Commission did not have jurisdiction of the case while the case was on appeal at the Court of Appeals.
4. Accordingly, Defendants continued to pay Temporary Total Disability benefits until the Form 17 was executed on August 31, 2011.
5. As such, Defendants contend that they are entitled to a credit for Temporary Total Disability Benefits paid to Claimant during the period of February 10, 2010, through August 16, 2011, which is a total of 79 weeks of benefits.
6. At all stages of litigation, Defendants have raised the issue for Defendants' credit for overpayment of Temporary Total Disability benefits.
7. A hearing was held in this case on September 25, 2014. In his Decision and Order dated July 2, 2015, Commissioner McCaskill held that pursuant to S.C. Code Ann. § 42-9-210, "a credit is to be deducted from the amount to be paid to Claimant as compensation." Commissioner McCaskill further held that since he was not awarding Claimant any compensation, "none exists from which to deduct a credit.
8. On November, 17, 2015, a hearing was held in this case before the Appellate Panel. The Appellate Panel reviewed Commissioner McCaskill's Decision and Order dated July 2, 2015, and reversed in part, holding that Claimant was entitled to a disability award.

9. However, the Appellate Panel did not address the issue of Defendants' credit for overpayment of Temporary Total Disability benefits.

10. Now that it has been determined that Claimant is entitled to a disability award, Defendants respectfully request that the Appellate Panel address the issue of Defendants' credit for overpayment of Temporary Total Disability Benefits and amend the order to reflect a credit.

11. Further, Defendants respectfully request the Appellate Panel reconsider its Finding of Fact that, "Claimant has sustained a 28% permanent partial disability to the cervical spine based upon a fusion of C6-7 and the Claimant's testimony" where the preponderance of the reliable evidence in the record from the authorized treating physician dated January 6, 2010, reflects claimant reached maximum medical improvement with no permanent impairment of the cervical spine.

12. Further Defendants request reconsideration and amendment of the Appellate Panel's findings concerning the award of permanent partial disability being termed as disability of the "cervical spine" where the Act provides disability awards for the "back" and not specific segments of the spine.

WHEREFORE, Defendants respectfully request that the Commission reconsider the Defendants' credit for overpayment of Temporary Total Disability benefits from the period of February 10, 2010, through August 16, 2011, which is a total of 79 weeks of benefits, and reconsider the findings and conclusion that Claimant suffered 28% permanent partial disability to

the cervical spine, and amend the Appellate Panel Order dated February 23, 2016, to reflect these changes requested by Defendants.

RESPECTFULLY SUBMITTED,

R. MARK DAVIS
MCANGUS GOUDELOCK & COURIE, L.L.C.
Post Office Box 650007
735 Johnnie Dodds Blvd, Suite 200
Mt. Pleasant, South Carolina 29465
(843) 534-0101
Attorneys for the Employer/Carrier

Charleston, South Carolina
February 29, 2016

BEFORE THE
SOUTH CAROLINA WORKERS' COMPENSATION COMMISSION

TIMOTHY HANNAH,	)	WCC FILE NO,0908371
	)	
EMPLOYEE/CLAIMANT,	)	
	)	
MJV, INC/BUTLER TRUCKING,	)	NOTICE OF SUBMISSION OF
	)	MEDICAL RECORDS AS DIRECT
EMPLOYER,	)	
	)	EVIDENCE ON BEHALF OF
PALMETTO TIMBER FUND	)	EMPLOYEE/CLAIMANT
	)	
INSURANCE CARRIER,	)	
	)	
DEFENDANTS.	)	
	)	

**TO: COMMISSIONER ANDREA C. ROCHE, AND R. MARK DAVIS,
ESQUIRE OF MCANGUS GOUDELOCK & COURIE, LLC.,
ATTORNEY FOR THE EMPLOYER/CARRIER:**

YOU ARE HEREBY NOTIFIED that the Employee/Claimant pursuant to South Carolina Code Section 1-23-330(1) (1976, as amended) herewith submits the following:

APA #	NAME OF REPORT(S)/PHYSICIAN OR OTHER EVIDENCE	DATE OF REPORT(S)	PAGE
1.	Georgetown Memorial Hospital Dr. Joseph Gammel	07/14/09	1-24
2.	Doctor's Care Robert E. Kimpton, M.D.	07/21/09-09/09/09	25-38
3.	NextStep Rehab Georgetown Memorial Hospital Thomas Howard, MD	07/29/09-09/17/09	39-80

4.	Carolina Orthopaedic Specialist Mark E. Triana, M.D.	09/30/09-02/25/10	81-87
5.	Georgetown Memorial Hospital Patricia R. Grant, M.D.	10/09/09-10/12/09	88-92
6.	Columbia Orthopaedic Specialists, LLC James F. Bethea, M.D.	12/04/09-01/06/10	93-104
7.	Sisters of Charity Providence Hospitals James F. Bethea, M.D.	12/22/09	105-147
8.	Carolina Orthopaedic Specialist Mark E. Triana, M.D.	04/28/2010	148-149
9.	Florence Neurosurgery & Spine James B. Brennan, M.D.	05/23/12-11/26/12	150-177

YOU ARE FURTHER NOTIFIED that you have the rights of cross-examination and should you desire to exercise said right, you are to forthwith schedule the deposition(s) of the doctor(s) whose report(s) are submitted.

YOU ARE FURTHER NOTIFIED that the following witnesses may be called on behalf of the employee/claimant:

Timothy Hannah, 532 East Hwy 378, Johnsonville, SC 29555

YOU ARE FURTHER NOTIFIED that photocopies of the medical report referred to herein and attached hereto are being forwarded to the South Carolina Workers' Compensation Commission for insertion into the file and inclusion into evidence on behalf of the Employer/Carrier.

January 8, 2013
Kingstree, SC



W. E. Jenkinson, III
JENKINSON, JARRETT & KELLAHAN, P. A.
Post Office Drawer 669
Kingstree, SC 29556
Telephone No. (843) 355-2000
Fax No. (843) 355-2010
**ATTORNEYS FOR EMPLOYEE/
CLAIMANT**

CAROLINA ORTHOPAEDIC SPECIALISTS

2185 N. Fraser Street

Georgetown, SC 29440

(843)520-1941

September 30, 2009 (G-OV)

Hannah, Timothy J.

HX: Timothy is a 51 year old black male who comes in today complaining of neck and back pain. He has been a truck driver for an 18 wheeler for Butler Trucking for the last 7 years and had some kind of mechanical problem with his truck back in July. He jack-knifed the truck and flipped it over apparently on July 14, 2009. He was seen in the ER and evaluated and then released. They did do **x-rays** in the ER which were reportedly unremarkable for trauma.

Since his accident he has been having neck and left shoulder pain that radiates down the middle of his back. He has gone through PT at Next Step, he has had pain medication, and anti-inflammatories without relief.

He does come in with an **MRI** that shows a degenerative disc at C5-6 with a small disc protrusion that may very well be causing his neck and shoulder symptoms. He also hit his olecranon on something and it was lacerated and he now has a chronic olecranon bursitis.

His third complaint is just chronic low back pain radiating into his left leg and he finds that his left leg buckles at times. He does have **x-rays** of his lumbar spine which show some early degenerative facet arthritis.

PRESENT MEDICATIONS: None. **ALLERGIES:** None.

PAST MEDICAL HISTORY: Unremarkable. **PAST SURGICAL HISTORY:** He had some upper left humeral surgery for a hematoma with a football injury. **HABITS:** He is married and has four children. He smokes less than a pack a day, denies alcohol use, is right-handed and has been a truck driver as stated above.

PX: Physical exam shows a thin middle-aged male. He has full range of motion of his neck and upper and lower extremities. Deep tendon reflexes are without deficit. His muscle groups are intact although abduction of the left shoulder is quite painful and his left leg seems globally weaker than the right without a focal deficit. There is a very rubbery, swollen left olecranon bursa. We did aspirate his left olecranon bursa and injected a cc of Kenalog and we will see if that helps that go down.

We are going to obtain a cervical epidural and see if it is helpful in relieving his neck and arm symptoms. I would like to get an **MRI** of his lumbar spine to see what is going on there as it has not been adequately addressed at this point.

We will keep him out of work. It may take a couple of months to get the complete answers and we will put him on some Lorcet 1-2 x3/day as needed for pain. He

CAROLINA ORTHOPAEDIC SPECIALISTS
2185 N. Fraser Street
Georgetown, SC 29440
(843)520-1941

September 30, 2009 (G-OV)
Hannah, Timothy J.
Page two

certainly cannot drive while he is taking narcotic medication and he cannot lift, bend, push, pull, crawl or ride in vibrating vehicles until we address all his concerns.

FU: Four weeks to review his injections and his **MRI** of his back. (Triana)cmm

CAROLINA ORTHOPAEDIC SPECIALISTS
2185 N. Fraser Street
Georgetown, SC 29440
(843)520-1941

October 29, 2009 (G-OV)
Hannah, Timothy J.

HX: Tim comes in for a follow-up on his cervical and lumbar disc disease. His Workman's Comp would not in any way take ownership of his lumbar pain and so he did not get his **MRI** completed of his lumbar spine. He is going to go through his regular insurance to have that done next week.

He did get one epidural from Dr. Grant and it helped a little bit for a short period of time but he is still getting pain in his neck and down his arms. We are going to try another epidural. He has plenty of his pain medicine if need be and we will keep him out of work until we see him back.

FU: We will make further recommendations at next visit. We will see him back in about 6 months. (Tríana)cmm

MICHEAL N. BOHAN, M.D.
Certified, American Board Orthopaedic Surgery
Fellow, American Academy Orthopaedic Surgeons

EDWARD J. MIKOL, M.D.
Certified American Board Orthopaedic Surgery
Sports Medicine, Arthroscopic & Shoulder Surgery



MARK E. TRIANA, D.O.
Certified, American Osteopathic Board
Orthopaedic Surgery

ERIC HEIMBERGER, M.D.
Certified, American Board Orthopaedic Surgery
Fellow, American Academy Orthopaedic Surgeons
Joint Reconstruction, Sports Medicine, Trauma,
General Orthopaedics

PATIENT NAME: HANNAH, TIMOTHY
PATIENT ID#: 21861
DATE OF BIRTH:

REFERRING PHYSICIAN: Mark Triana, D.O.
DATE OF EXAM: 11/05/09

MAGNETIC RESONANCE IMAGING (MRI) LUMBAR SPINE WITHOUT CONTRAST

CLINICAL HISTORY: Low back pain extending into the left leg since MVA in July 2009.

TECHNIQUE: This study was performed on the GE HDxt 1.5 Tesla EchoSpeed MRI System. Coronal T1, sagittal T2 FSE, sagittal T2 FSE with fat suppression, sagittal T1 FSE, axial T2 FSE, axial T1 FSE.

CONTRAST: None.

COMPARISON: None.

FINDINGS: The vertebrae marrow, height, and alignment appears unremarkable. The conus medullaris and cauda equina appear normal.

The L1-2, L2-3, L3-4, and L5-S1 discovertebral joints appear unremarkable without evidence of compressive discopathy or central canal stenosis. There is no evidence of neural foraminal narrowing.

The L4-5 level shows mild disc space narrowing and a small broad-based protrusion, which effaces the ventral thecal sac and effaces the ventral thecal sac and abuts the descending left L5 nerve root (axial T2 image 7; thickening of the ligamentum flavum and intermediate-grade hypertrophic facet arthrosis contribute to mild trefoil central canal stenosis.

IMPRESSION:

1. L4-5 level: small, broad-based protrusion with secondary abutment of the descending left L5 nerve roots; mild central canal stenosis.

Reported by: Raymond Radanovich, M.D./ Signed by: David D. Goltra, Jr., M.D.

Raymond Radanovich, M.D.
RR/DAT/2679
Job ID#: 122346
DD: 11/05/09 04:01 P
DT: 11/05/09 04:30 P

REVIEWED AND APPROVED BY:

David D. Goltra, Jr., M.D.

Page 1 of 1

Georgetown Location: 2185 N. Fraser Street, Georgetown, SC 29440
Phone 843 | 520 | 1941 • Fax | 843 | 545 | 1490

Myrtle Beach Location: 3315 Caduceus Drive, Suite B (Azalea Lakes), Myrtle Beach, SC 29588
Phone 843 | 294 | 1941 • Fax | 843 | 294 | 1945

CAROLINA ORTHOPAEDIC SPECIALISTS
2185 N. Fraser Street
Georgetown, SC 29440
(843)520-1941

January 14, 2010 (G-OV)
Hannah, Timothy J.

HX: Tim comes in with his **MRI** of his lumbar spine. He reiterates that when he wrecked his truck his neck and arm were bothering him the most, but shortly after he started having back and left leg pain and it has not let up. His Workman's Comp is not taking ownership of his back and leg symptoms, however we did get an **MRI** of his lumbar spine and he does have an attorney.

His **MRI** shows significant desiccation of the L4-5 disc with some facet arthritis which is an underlying chronic degenerative process, however he does have a small protrusion of the disc on the left side which correlates well with his neuroforamenal narrowing on the left and his left leg pain.

Historically one could relate the injury with the onset of his symptoms and whether or not Workman's Comp takes ownership of that I do feel he needs to proceed with a lumbar epidural and we will see if it will relieve his symptoms. I certainly don't see the immediate need for any kind of surgical intervention. Down the road he may be a candidate for an x-stop but we will try the pain modalities first.

The injections in his cervical spine have helped quite a bit. They have relieved his pain in his neck and arm for periods of time; it has not been a permanent relief. We will give this a little bit more time as he has just had his 3rd epidural. It certainly indicates that the symptoms can be reversed which is a better indication he may respond to surgical intervention in the form of a fusion of his C5-6 disc protrusion.

Of note, with his previous visit we had recognized the chronic olecranon bursitis which he said started after he contused his left elbow during this accident. It was very swollen and we aspirated it and injected some steroids. He had a recurrence of the swelling and possibly cellulitis and eventually needed an excision of his olecranon bursa which is what I would have recommended had I seen him. Unfortunately, Workman's Comp sent him to another doctor. This has healed up very nicely and he has very good range of motion and it looks like that has been put to rest.

FU: We will keep him out of work over the next 6 weeks and see if we can't get him a lumbar epidural. We will see him back in 6 weeks and have a more serious discussion about his future plans. We refilled his Lorcet. (Tiana)cmm

SCANNED

CAROLINA ORTHOPAEDIC SPECIALISTS
2185 N. Fraser Street
Georgetown, SC 29440
(843)520-1941

February 25, 2010 (G-OV)
Hannah, Timothy J.

HX: Tim comes in after returning from a visit with a doctor in Columbia. He states the doctor rated his injuries and released him from care. He brings in a copy of the report and the impairment stating that he has no problems with his neck or back and no impairment.

Again, I can only say that he still complains of pain in his neck radiating down his left arm, his shoulder and between his shoulder blades. He has pain in his low back that radiates into his left leg.

We reviewed the **MRI's** in the past and he does have a left sided disc protrusion at C5-6 on top of a degenerative disc. He also has a desiccated disc with a lateral disc protrusion at L4-5 on the left. Both of these correlate with his symptoms that he complains about in his left shoulder and left leg.

PHYSICAL EXAMINATION: His deep tendon reflexes, muscle groups and range of motion is without deficit. Straight leg raising does pull in his buttocks and down his left leg and extremes of motion of his neck does seem to pull in his left shoulder.

He has had some good relief of his symptoms with epidural injections in his neck and with the second injection in his low back. He has a follow-up for a third injection in his low back.

I'm really not interested in proceeding with any surgery if at all possible, however Mr. Hannah is very distraught about the position that his employer is taking in that he doesn't appear to be concerned about his injuries and his ongoing pain. He takes Lorcet occasionally to treat his pain.

I'm not sure that I can really succeed in making him happy under these conditions but I do feel strongly that he has pathology in his cervical and lumbar spine that correlates with his complaints. We will see how he does long term after his last injection in his lumbar spine and follow him up in 2 months. We will keep him out of work as he can't do any repetitive lifting, pushing, pulling, climbing and certainly riding in vibratory vehicles like heavy equipment will be aggravating and he understands this. *

FU: Two months. (Triana)cmm

Columbia Orthopaedic Specialists, LLC
1301 Taylor Street, Suite 300
Columbia, SC 29202-0306

DATE: 01/06/10

PATIENT: Timothy Hannah
SSN:

This patient is seen back following his left olecranon bursa surgery at Providence December 22nd. The incision was well healed, so the sutures were removed. He did have some persistent sensitivity at his left elbow.

He does continue to have neck and lower back pain. He states that he cannot walk too far. However, no pain medication is being taken. Sleep is a problem. There has been no radiating arm or leg pain. There has been no loss of bowel or bladder control, but he states that he does suffer from occasional urinary hesitation.

At the cervical spine he had 45° of lateral rotation in either direction with the maneuver to the left more uncomfortable. There was 60° of flexion with 40° of extension. Lateral bending was possible to 30° in either direction with the maneuver to the left more uncomfortable.

He stood up without any particular problem. Flexion was possible to 80°. Extension of the lumbar spine was possible to 20°. He had 30° of lateral rotation in either direction. Lateral bending was also possible to 30° either to the right or left.

He stood on his toes and heels without any particular problem. He could squat only about halfway due to his pain. Straight leg raising was negative. Distal neurovascular status was intact in both the upper extremities and lower extremities. Due to his recent surgery, there was some decreased left grip strength.

As far as his left elbow is concerned, I think that he has reached maximum medical improvement. For the next three weeks he should avoid any pushing, pulling, lifting or carrying with the left upper extremity over 5 lb. /?

I also believe that he is at maximum medical improvement from his neck injury. Using the 6th edition of the AMA Guides there should be no impairment to his cervical spine.

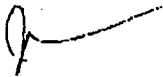
01/06/10
Timothy Hannah
Page 2

To make this determination I did use the Cervical Spine Regional Grid. His functional history is two grades above the clinical studies and physical examination, so it is considered unreliable. I did use the physical examination and clinical studies to calculate his final impairment, which as noted above, is zero.

He asked for pain medication and I did dispense (#60) Darvocet N 100 to be taken one every four hours as needed for pain.

No return appointment was made for him here.

I was not able to locate a lumbar spine MRI scan, but I would be interested in reviewing that if it is available.



James F. Bethea, M.D.
JFB/prf

(Next Appointment p.r.n.)

Cc: Walker, Hunter and Associates
Att: Debbie Craig, Associate Claims Adjuster
P.O. Box 212848
Columbia, SC 29221-2848

SCANNED

CAROLINA ORTHOPAEDIC SPECIALISTS
2185 N. Fraser Street
Georgetown, SC 29440
(843)520-1941

April 28, 2010 (G-OV)
Hannah, Timothy J.

HX: Timothy is still waiting for his court date with the Workman's Comp commissioner. He has degenerative disc herniation at C5-6 to the left which correlates well with his left arm pain. He is getting a lot of pain around his elbow at this time and I do feel it is radicular in nature. He is also getting low back pain that radiates down his left leg.

Deep tendon reflexes and muscle groups are without gross focal deficit. His left arm is weaker than his right globally I think secondary to pain. He walks with a limp on his left leg.

We are going to refill his Lorcet and keep him out of work until he gets some resolution to his court case. I would recommend considering a decompression and fusion of the C5-6 disc as a first approach to relieving his pain. He had epidurals which helped for short periods of time but are not helping long term. I don't think it is necessary to consider any more epidurals. Dr. Grant has suggested PT but he is a fairly active young gentleman and I don't think the therapy is going to be effective long term.

PU: Two months or sooner if we can proceed with more aggressive treatment. (Dr. Triana)cmm

BEFORE THE
SOUTH CAROLINA WORKERS' COMPENSATION COMMISSION
WCC FILE NO. 0908371

TIMOTHY J. HANNAH,

CLAIMANT,

-VS-

MJV, INCORPORATED/BUTLER
TRUCKING,

HEARING BEFORE
COMMISSIONER

EMPLOYER,

ANDREA C. ROCHE

AND

TRANSCRIPT

PALMETTO TIMBER FUND,

CARRIER,
DEFENDANTS,

THE WORKERS' COMPENSATION HEARING, TAKEN
BEFORE CORA ELLIS BRUTON, A NOTARY PUBLIC IN AND
FOR THE STATE OF SOUTH CAROLINA, COMMENCING AT THE
HOUR OF 11:25 PM, FRIDAY, JULY 30, 2010, GEORGETOWN
COUNTY JUDICIAL CENTER, 401 CLELAND STREET,
GEORGETOWN, SOUTH CAROLINA 29442.

CORA ELLIS BRUTON - COURT REPORTER
131 BROWNING COURT
LEXINGTON, SOUTH CAROLINA 29073
(803)397-0189

APPEARANCES

FOR THE CLAIMANT

W.E. JENKINSON, III, ESQUIRE
JENKINSON, JARRETT AND KELLAHAN, P.A.
POST OFFICE DRAWER 669
KINGSTREE, SOUTH CAROLINA 29556
843-355-2000

FOR THE DEFENDANTS

R. MARK DAVIS, ESQUIRE
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POST OFFICE BOX 977
CHARLESTON, SOUTH CAROLINA 29402
843-576-2900

REPORTED BY

CORA ELLIS BRUTON
COURT REPORTER
131 BROWNING COURT
LEXINGTON, SOUTH CAROLINA 29073
803-397-0189

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(EXHIBITS)

No Exhibits Proffered

CORA ELLIS BRUTON - COURT REPORTER
131 BROWNING COURT
LEXINGTON, SOUTH CAROLINA 29073
(803)397-0189

1 THE COURT: Today's date is July the 30th,
2 2010. This is WCC File Number 0908371. This is
3 the case of the Claimant, Timothy J. Hannah,
4 represented by Attorney W. E. Jenkinson, III versus
5 the Employer, MJV, Incorporated/Butler Trucking,
6 Incorporated, its Carrier Palmetto Timber Fund;
7 both Defendants represented by Attorney R. Mark
8 Davis.

9 The issues today are those raised on the Forms
10 50 and 51 and also pursuant to Defendants' request
11 to stop payment and pay compensation. We have an
12 average weekly wage of \$571.95 with a resulting
13 compensation rate of \$381.32 and a date of accident
14 of July the 14th, 2009.

15 Are there any objections to APAs,
16 jurisdiction, venue or any other items?

17 MR. JENKINSON: No, ma'am and I think we've
18 also agreed to the deposition of Mr. Sowell, that
19 was just taken this week, the private investigator
20 and it'll be in those -- his transcript is --

21 THE COURT: I've got it. I just wanted to
22 make sure I had it.

23 Without objection the Commission's file
24 becomes a part of the record with the exception of
25 self-serving declarations and unstipulated

1 medical reports.

2 Before going on the record we did have a
3 pre-hearing conference.

4 It's the position of the Claimant that he
5 suffered an injury by accident arising out of the
6 course and scope of his employment on July the 14th,
7 2009. It's the position of the Claimant that as a
8 result of this accident he injured his cervical
9 spine, that he injured his elbow. That after the
10 accident he had contusions actually all over his
11 body, but that he's got problems with the cervical
12 spine, with his elbow and also with his lumbar spine
13 that's affecting his legs as a result of this
14 accident. It's the position of the Claimant that he
15 has not reached maximum medical improvement and in
16 particular would request a finding that the lumbar
17 spine with the problems radiating to his legs would
18 be found compensable and that he is in need of
19 additional medical treatment for his lumbar spine.

20 In the alternative if I find that the lumbar
21 spine is not related to this accident it would be the
22 position of the Claimant that his permanent
23 disability would far exceed any rating in the record,
24 including that of Dr. Bethea and it would be the
25 position of the Claimant that Dr. Bethea's rating

1 actually isn't consistent with the restrictions under
2 which he's placed the Claimant and with the treatment
3 that the Claimant has received.

4 It's the position of the Defendants that the
5 Claimant -- they admit only that the Claimant injured
6 his neck and his elbow; they do admit the accident.
7 It's the position of the Defendants that the lower
8 back is not part of this claim, that it's not
9 related. It's the position of the Defendants that
10 the first time the lower back pain came up in the
11 medical records shows up after a fall at home and it
12 would be their position that anything wrong with the
13 Claimant's lower back would be related to that
14 unrelated fall at home.

15 In response to that it's the position of the
16 Claimant that actually the fall at home, he was
17 already having back problems before that, but it was
18 actually his back problems that caused his fall at
19 home; that his left leg gave out and at that point he
20 fell and hit his face. So it would be the position
21 of the Claimant that all of that would be related.

22 Is there anything either of you would like to
23 add?

24 MR. JENKINSON: I would like to add, Your Honor,
25 the Claimant has not reached MMI as to his neck or

1 back and the he needs medical treatment for his neck
2 and back as well, based upon the most recent record
3 that we just supplemented with based on Dr. Triana's
4 care.

5 THE COURT: Okay. Anything in addition?

6 MR. DAVIS: Just quickly, Your Honor, also we've
7 requested stop payment on a Form 21 and we request a
8 finding that Mr. Hannah reached maximum medical
9 improvement on January 6th and we request a credit
10 for overpayment of TTD benefits from that date.
11 Also, it is the position of the Defendants that an
12 alternative position is -- well the first position is
13 that his fall at home caused the back problems, but
14 alternatively that Mr. Hannah just developed back
15 problems as the result of a preexisting condition or
16 a natural progression of a preexisting condition or
17 age related changes which Dr. Bethea addressed in his
18 deposition. So even if the fall at home did not
19 cause the back problems or aggravate the back
20 problems it's our position he still didn't sustain a
21 compensable event or accident to his back from that.

22 THE COURT: All right. Anything in addition?

23 MR. JENKINSON: I think we're ready.

24 THE COURT: I think, Mark, y'all may have filed
25 the 21 first, but what we'll just do is conduct

1 A I had an industrial accident back in '83.
2 Q What did you hurt? What part of your body?
3 A I had a severed finger.
4 Q Hold it up high enough. You lost -- lost
5 your -- your little -- your pinky finger?
6 A Yes, sir.
7 Q Okay. And that's on your left hand?
8 A Right hand.
9 Q Right hand, I'm sorry. Any other injuries
10 -- you played football in high school?
11 A Yes, sir, I --
12 Q As little as you are?
13 A Yes, sir. I was a tough little kid I guess
14 you would say. I played running back --
15 Q You had one injury in high school?
16 A In '73 a guy caught me with some cleats and
17 -- I had a Pamplico game -- and I had a blood clot in
18 my left arm.
19 Q Ever hurt your back in your life?
20 A No, sir.
21 Q Ever have a back problem up until this
22 accident?
23 A No, sir.
24 Q Now, did the ambulance come?
25 A Yes, sir,

1 Q And did you go to the Georgetown Hospital
2 for treatment?

3 A Yes, sir, I did.

4 Q Emergency room?

5 A Emergency room.

6 Q Now, when you got to the emergency room I
7 know they always say what hurts.

8 A Yes, sir.

9 Q What all -- what all did you hit or where
10 were you hurting on your body at this time? Start
11 with the top of your head.

12 A Yeah, I was -- from the top of my head all
13 the way down to my hips, man it was, you know, I was
14 just hurting. And I was bleeding too, so --

15 Q What was hurting -- and I'm sure they asked
16 you this question; what's hurting the worst? What
17 did you tell them?

18 A My elbow and my neck.

19 Q Okay. That's what you told them?

20 A Yes, sir.

21 Q Okay. And did they do CAT scans of your
22 head, your body all the way down through your pelvis?

23 A Yes, sir.

24 Q Okay. And were you released to go home
25 that night?

1 A Yes, sir.

2 Q And they gave you a diagnosis on the ER
3 records at the hospital --

4 MR. JENKINSON: Commissioner, that's APA page 9
5 it lists each one of the diagnosis.

6 THE COURT: Okay.

7 Q You suffered injuries from your head,
8 concussion, contusions, down -- all the way on your
9 body all the way down to your pelvis?

10 A Yes, sir.

11 Q Okay. Now, were you sent home with any
12 medications?

13 A Yes, sir.

14 Q What kind?

15 A I've been on different ones. Percocet,
16 Oxycodone, Hydrocodone.

17 Q Those were pain medications?

18 A Yes, sir.

19 Q So you had -- actually were on pain
20 medication?

21 A Yes, sir.

22 Q Okay. And who followed you for -- did you
23 report this accident to your employer?

24 A He was at the accident -- scene of the
25 accident. I remember seeing him.

- 1 Q When you say he, who is he?
- 2 A Mr. Terry.
- 3 Q Mr. Butler?
- 4 A Yes, sir.
- 5 Q Okay. So he actually came to the scene?
- 6 A I remember seeing him, yes, sir.
- 7 Q Where were you directed to go by your
- 8 workers' comp insurance company? Which doctor?
- 9 A Oh, I was supposed to go to Doctors Care.
- 10 Q That's where they told you to go?
- 11 A Yes, sir.
- 12 Q Now, from the -- from after the accident
- 13 you went to, was it Doctors Care starting in the
- 14 latter part of July?
- 15 A Yes, sir.
- 16 Q And you went to Doctors Care through the
- 17 end of August?
- 18 A August.
- 19 Q After those visits to Doctors Care was it
- 20 -- did there come a time when you were referred to an
- 21 orthopedic surgeon; an orthopedic doctor, specialist?
- 22 A Yes, sir.
- 23 Q When -- when did that occur?
- 24 A I think it was around September 30th.
- 25 Q When?

1 A September 30th.

2 Q Okay. If the record shows that was on the
3 26th of August?

4 A Well.

5 Q What did you tell them on the 26th of
6 August that had occurred, something significant at
7 home; what did you tell them?

8 A Oh, I remember now. I was leaving home to
9 go to my daughter's house and I was walking down the
10 steps. And as I was walking down the steps my left
11 leg gave out and I fell and cut my face. So the next
12 --

13 Q Now, when you fell did you injure your
14 back?

15 A No, sir, just cut my face.

16 Q Did you land on your back?

17 A No, sir.

18 Q What did you land -- what -- what did you
19 hit?

20 A The railing on the side of the porch.

21 Q Okay. And did you cut -- do you have a --
22 receive a cut?

23 A Yes, sir.

24 Q Where?

25 A On the right side of my face.

1 A I followed instructions from Doctors Care
2 to make an appointment with --

3 Q What's the first appointment you could get
4 with Dr. Triana?

5 A I think it was around September the 30th.

6 Q Actually as the record shows it was the
7 29th. It was September 30th; I'm sorry, you're
8 right. You saw him on September 30th --

9 MR. JENKINSON: Commissioner, that's APA 81.

10 THE COURT: All right, sir.

11 Q That first visit did you tell Dr. Triana
12 about your low back problems?

13 A Yes, sir.

14 Q And in it did you tell him it had been some
15 time that it had been bothering you?

16 A Yes, sir.

17 Q And you've seen his records haven't you?

18 A Yes, sir.

19 Q Have you seen where it says -- "he calls it
20 chronic"?

21 A Yes, the back.

22 Q And you told him it had been bothering you
23 for a couple of months?

24 A Yes, sir.

25 Q What did -- as a result of that visit

1 did you have to schedule an MRI?

2 A Yes, sir. He wanted to schedule an MRI to
3 be precise in what was going on.

4 Q Now, was that ever approved by workers'
5 comp?

6 A No, sir.

7 Q How did you pay for the MRI?

8 A I used my own insurance to pay for the MRI.

9 Q After you used that for the MRI did they
10 approve -- your own insurance, were they inclined to
11 approve anything else?

12 A Well, they approved the MRI, but after that
13 they said it was -- should be on workman's comp and
14 they didn't go any further.

15 Q So you've been in a battle between workers'
16 comp --

17 A Workman's comp and my insurance.

18 Q Everybody's butting?

19 A Butting heads, yes, sir.

20 Q Okay. Now, did Dr. Triana also prescribe
21 you to have some epidurals in your low back and in
22 your back -- and in your back?

23 A Yes, sir.

24 Q And I believe you had a total of how many?

25 A Altogether I had six.

1 Q Now, that -- that was what part of the year
2 in '09?

3 A The last part of '09 and the beginning part
4 of '10.

5 Q Now, did Doctors Care or the rehabilitation
6 people ever treat anything other than your elbow and
7 your neck when you went to them?

8 A That's all, just my neck and my elbow.

9 Q That's all they would treat?

10 A Yes, sir.

11 Q Now, did -- did you receive a notice -- or
12 when did you last see Triana in '09?

13 A I think around --

14 Q You had an MRI in November.

15 A I last seen him, I think, was April.

16 Q You saw Triana a total of how many times in
17 all?

18 A Five, I think it was, if I recall.

19 Q Five? Five times?

20 A Yes, sir.

21 Q And that's between September and April of
22 2010?

23 A 2010, yes, sir.

24 Q Okay. Now, in the middle of this in late
25 November was Dr. Triana planning on operating on

1 your elbow?

2 A Yes, sir.

3 Q Did you have a right serious mess with your
4 elbow by this time?

5 A Yes, sir.

6 Q And all of a sudden you got a call to go to
7 Columbia instead?

8 A Yes, sir. They -- workman's comp sent me a
9 letter saying that I needed to --

10 MR. DAVIS: Objection, hearsay.

11 Q Well, as a result of receiving a letter who
12 did you go see?

13 A I received a letter from workman's comp
14 saying that I had to go to Columbia for a second
15 opinion on my --

16 MR. DAVIS: Objection, hearsay.

17 THE COURT: I'm going to overrule that because
18 that's coming from y'all anyway.

19 MR. JENKINSON: It's all in the APAs as well,
20 Commissioner.

21 BY MR. JENKINSON:

22 Q Did Dr. Triana know he had been pulled off
23 the case?

24 A No, sir.

25 Q Now, all of a sudden you're sent to

1 this doctor in Columbia?

2 A Yes, sir.

3 Q Did you ever know him or have any contact
4 with him before?

5 A No, sir.

6 Q You went to see him in early December?

7 A Yes, sir.

8 Q Did he -- did you tell him your back was a
9 problem?

10 A Yes, sir.

11 Q Your low back in particular?

12 A Yes, sir.

13 Q Did he treat your low back whatsoever?

14 A No, sir.

15 Q Did -- did he operate on your elbow?

16 A Yes, sir.

17 Q When was that?

18 A December 22nd of '09.

19 Q Did you tell him your neck was bothering
20 you?

21 A Yes, sir.

22 Q Did you -- did -- did you tell him that you
23 had a bulging disc in your neck as well?

24 A No, sir.

25 Q Okay. You didn't tell him that?

1 A No, sir.

2 Q Okay. He had the medical records there
3 with him?

4 A Yes, sir.

5 Q Okay. Now, on December 22nd he operated on
6 your elbow?

7 A Yes, sir.

8 Q Did you get to go home?

9 A Yes, sir, it was outpatient.

10 Q Okay. Now, when did you next see Dr.
11 Bethea?

12 A It was the 6th of January.

13 Q Have you ever seen Dr. Bethea since the 6th
14 of January?

15 A No, sir.

16 Q Now, when you saw Dr. Bethea on the 6th of
17 January --

18 MR. JENKINSON: And that's APAs 103 and 104,
19 Commissioner.

20 THE COURT: All right, sir.

21 Q -- did he tell you your -- your elbow was
22 healed?

23 A Yes, sir.

24 Q Did you tell him it was hurting?

25 A Yes, sir.

1 Q Did you tell him that -- that you couldn't
2 drive an 18 wheeler with your elbow in the shape it
3 was in right then?

4 A No, sir, I didn't tell him that, but I
5 couldn't.

6 Q Now, did he tell you that your elbow, on
7 the 6th of January, right after -- 15 days after your
8 surgery you had reached maximum medical improvement
9 and you were good to go?

10 A He gave me excuse for two weeks and said I
11 could return to work.

12 Q Now, did he put any limitations on you
13 going back to work that you know of?

14 A Yes, sir.

15 Q Sir?

16 A Yes, sir.

17 Q What did he say?

18 A No bending, no lifting over five pounds and
19 no -- I think it was climbing, stooping.

20 Q Can you drive an 18 wheeler with those kind
21 of restrictions?

22 A No, sir.

23 Q When you went there on the 6th did you tell
24 him you had some -- did you -- did you have any pain
25 medication with you?

1 A Yes, sir.

2 Q You did what you wanted to do?

3 A Yes, sir.

4 Q I think you said you played in the church
5 band?

6 A Yes, sir.

7 Q Have you been able to do that since the
8 accident?

9 A No, sir.

10 Q Why is that?

11 A I can't play the drums anymore because I
12 can't kick and keep up and that's a hard thing to do.
13 And the guitar, the bass is too heavy to be holding
14 trying to play standing up, so I can't do it.

15 Q You want -- you want medical treatment?

16 A Yes, sir.

17 MR. DAVIS: Objection, leading.

18 THE COURT: I'll allow that.

19 Q Anything else? Which parts of your back do
20 you want to have medical treatment for?

21 A My lower part of my back.

22 Q And -- what?

23 A The lower part of my back.

24 Q How about the -- how about your neck?

25 MR. DAVIS: Objection, leading.

1 THE COURT: I'll allow that as well.

2 A I want -- I want the lower part of my back
3 checked because that's where I'm having a lot of
4 problems. I know my neck's messed up because my left
5 hand still gets numb, but I can't walk like I want
6 to. You know, I -- I used to jog, I can't even jog
7 anymore. I just want some medical treatment so I can
8 go back to work -- get well and go back to work.

9 Q Your low back is your biggest problem?

10 A Yes, sir.

11 Q Okay. And you still have some numbness --

12 A In my left hand.

13 Q Now, if -- if you didn't have a problem
14 with your low back do you think you could still drive
15 an 18 wheeler?

16 A Yeah, if I didn't have no problem I'd go
17 back to work tomorrow.

18 Q You could do that?

19 A Yes, sir.

20 Q You -- your neck doesn't bother you enough
21 that that would hurt you?

22 A I -- I can -- I can deal with the neck, it
23 doesn't bother me as bad as my back.

24 Q Okay.

25 A As your low back?

BEFORE THE
SOUTH CAROLINA WORKERS' COMPENSATION COMMISSION
WCC FILE NO. 0908371

TIMOTHY J. HANNAH,

CLAIMANT,

-VS-

MJV, INCORPORATED/BUTLER
TRUCKING,

HEARING BEFORE
COMMISSIONER

EMPLOYER,

ANDREA C. ROCHE

AND

TRANSCRIPT

PALMETTO TIMBER FUND,

CARRIER,
DEFENDANTS,

THE WORKERS' COMPENSATION HEARING, TAKEN
BEFORE CORA ELLIS BRUTON, A NOTARY PUBLIC IN AND
FOR THE STATE OF SOUTH CAROLINA, COMMENCING AT THE
HOUR OF 9:47 AM, TUESDAY MARCH 22, 2011, SOUTH
CAROLINA WORKERS' COMPENSATION COMMISSION, 1333
MAIN STREET, COLUMBIA, SOUTH CAROLINA 29201.

CORA ELLIS BRUTON - COURT REPORTER
131 BROWNING COURT
LEXINGTON, SOUTH CAROLINA 29073
803-397-0189

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REPORTED BY

CORA ELLIS BRUTON
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LEXINGTON, SOUTH CAROLINA 29073
803-397-0189

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CERTIFICATE	19

(EXHIBITS)

No Exhibits Proffered

1 THE COURT REPORTER: Today is March 22nd, 2011.
2 This is South Carolina Workers' Compensation Case
3 Number 0908371. This is the case of Timothy J.
4 Hannah, Claimant, versus MJV, Incorporated/Butler
5 Trucking, Employer and Palmetto Timber Fund is the
6 Carrier.

7 The Appellant is the Defendant represented by
8 Attorney R. Mark Davis. The Respondent is represented
9 by Attorney W. E. Jenkinson, III. Each side is
10 allowed ten minutes for oral argument and the
11 Appellant three minutes in reply. You are requested
12 to argue the grounds of exception and stay within the
13 record.

14 THE COURT: Mr. Davis.

15 BY MR. DAVIS: Thank you, Mr. Chairman, members
16 of the Panel. Mark Davis on behalf of The Timber Fund
17 today.

18 This is an admitted case involving a motor
19 vehicle accident where a truck overturned. Admittedly
20 it was a -- a very bad accident. The Jaws of Life
21 were not used. Actually the Employer came to the
22 scene and extricated the -- the Claimant with -- EMS
23 was there as well, so not saying something didn't
24 happen. The case was admitted for injuries to the
25 cervical spine and the left elbow. His legs were also

1 hit railing with head" or face, I believe it was. So
2 that -- again, a question of proof and if you're
3 weighing the evidence of course you have all these
4 records beforehand and you've got the Claimant's
5 testimony. And I will say Dr. Triana is an important
6 witness in this case and we took his deposition. Dr.
7 Triana was briefly an authorized treating physician
8 for the elbow injury. Dr. Bethea ended up doing the
9 actual surgery, so care was transferred to Dr. Bethea.
10 The -- the Claimant will submit to you there was
11 sinister reason behind that, but of course there's
12 nothing in the record reflecting that. He was
13 transferred to Dr. Bethea, he did the surgery, he was
14 released with a zero percent to the cervical spine,
15 zero percent to the arm. Surgery was successful.
16 Claimant says he doesn't have pain in his shoulder
17 anymore. You know, and I questioned Triana
18 extensively, we both did and he -- he of course goes
19 back and forth. But what's interesting is he says
20 when -- he didn't have the information regarding the
21 fall at home. When presented to him he -- he made the
22 statement, "Well, I" -- and I asked him, I said, "Is
23 your opinion still the same that the wreck caused the
24 lower back problems?" And he said, "Well, I'd have to
25 think about that." So he starts vacillating. And

1 said that -- that what he saw in the video was in
2 stark contrast to what -- how the Claimant presented
3 to him or the complaints the Claimant made to him
4 regarding what he could and could not do.

5 So the final thing I'll leave you with, the Order
6 designates Dr. Triana as the authorized treating
7 physician and even if you agree with -- disagree with
8 me on the past ten minutes of my speech I would submit
9 that -- that -- that the Panel at least give the
10 Defendants the opportunity to send the Claimant to a
11 specialist. Dr. Triana is a general orthopedist and
12 if Mr. Hannah does, indeed, have a back problem I
13 think it would be more appropriate to send him to a
14 back specialist or a lower back, lumbar spine surgeon
15 to evaluate him.

16 COMMISSIONER BECK: Let me make sure I have two
17 facts straight from your presentation. Number one,
18 there is not a mention of any lumbar condition prior
19 to August 26th; and the whole basis for the 21
20 hearing not going forward was the lumbar spine?

21 MR. DAVIS: That is correct. The -- that is
22 correct. The 21 hearing did not go forward; it was --
23 the issues were consolidated --

24 COMMISSIONER BECK: I understand.

25 MR. DAVIS: -- to decide everything at

1 once including the lumbar back. So that's it.

2 Thank you for your time.

3 THE COURT: Thank you. Mr. Jenkins.

4 BY MR. JENKINS: Good morning. Thank you for the
5 opportunity to make a presentation on behalf of Mr.
6 Hannah.

7 There's always two sides to every case. Now for
8 the rest of the story, as Paul Harvey would say. Yes,
9 there is a gap. This gap and the genesis of it goes
10 back to Timothy Hannah being pinned in this accident
11 -- in the wreckage. His Employer went up and said,
12 "Timmy, how are you feeling? What's wrong?" He said,
13 "My neck hurts, my shoulder hurts and my elbows hurt."
14 Well, this guy is pinned in the wreckage now, taken to
15 the ER, and I submit the ER records speak for
16 themselves as to a spine injury. When he gets to the
17 ER the diagnosis in the ER is a concussion, cervical
18 spine neck injury, contusion to the abdomen, contusion
19 to the chest wall. Basically he is from here to his
20 pelvis, it hurt. Now this is a little scrawny guy,
21 tiny guy. And he is hurting from his head to his toe.
22 He can't differentiate whether I'm hurting worse right
23 in this spot or worse in this spot; he is hurting
24 pretty significantly from his head to his toe and is
25 released with Oxycontin type pain relievers. He goes

BEFORE THE
SOUTH CAROLINA WORKERS' COMPENSATION COMMISSION
WCC FILE NO. 0908371

TIMOTHY J. HANNAH,	)	
	)	
CLAIMANT,	)	
	)	
VS.	)	TRANSCRIPT OF PROCEEDINGS
	)	
MJV, INC./BUTLER TRUCKING	)	SEPTEMBER 25, 2014
INC.,	)	
	)	
EMPLOYER,	)	
	)	
AND	)	
	)	
PALMETTO TIMBER FUND,	)	
	)	
CARRIER,	)	
	)	
DEFENDANTS.	)	

THIS HEARING WAS HELD BEFORE COMMISSIONER
GENE MCCASKILL, REPORTED BY SKYLET KEAN, COURT
REPORTER AND NOTARY PUBLIC IN AND FOR THE STATE OF
SOUTH CAROLINA; SAID PROCEEDINGS WERE HELD AT THE
NEW HORRY COUNTY COURTHOUSE, 1301 SECOND AVENUE,
COURTROOM 3-E, CONWAY, SOUTH CAROLINA, ON THURSDAY,
SEPTEMBER 25, 2014, COMMENCING AT 2:55 P.M.

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1 APPEARANCES

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13 MOUNT PLEASANT, SOUTH CAROLINA 29465

14
15
16 ALSO PRESENT:

17 TOM THOMPSON, ESQUIRE
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PROCEEDINGS

THE COURT: Today's date is September 25, 2014. This is Workers' Compensation Commission file number 0908371. This is the case of Timothy J. Hannah vs. MJV Inc./Butler Trucking, Inc. The carrier is Palmetto Timber Fund. The claimant is represented by W.E. Jenkinson, III and the employer/carrier represented by R. Mark Davis. Date of the accident is July 14th, 2009. The claimant has an average weekly wage of \$571.95 with a corresponding compensation rate of 381.32.

Are there objections to jurisdiction, venue or APAs?

MR. JENKINSON: No, sir.

MR. DAVIS: None from defendants.

THE COURT: All right. Without objection the Commission file becomes a part of the record with the exception of self-serving declarations and unstipulated medical reports.

Let's go off the record for a second.

(Off the record.)

THE COURT: Let's go back on the record.

All right. We are here today pursuant to a remand from the Full Commission for a hearing de

1 novo. There has been both a 50 and a 21 filed in
2 this case. The 50 was first. And so Mr. Jenkinson,
3 if you could, please, sir, place your client's
4 position on the record.

5 MR. JENKINSON: Thank you, Your Honor.
6 Represent Timothy Hannah who was injured in this
7 accident. It was a vehicle, 18-wheeler, rollover on
8 July 14th, 2009.

9 Originally, this case procedurally went up
10 on his injury to his lumbar spine, but he also
11 suffered an injury uncontested to his cervical spine
12 and his left elbow. The lumbar spine was contested.
13 So that was the first issue that was tried before the
14 commissioner which resulted in a hearing ruling in
15 favor of Mr. Hannah. Went up on appeal. That appeal
16 resulted in the commissioner being reversed, and the
17 lumbar spine was found not to be included. That
18 occurred in July of 2011. That was when the final
19 hearing was held and -- before the Full Commission.

20 That decision went under the Courts of
21 Appeals. Shortly after the decision, Mr. Hannah
22 signed a 17 stopping the check, and he will explain
23 that to you in a few minutes. For a year almost in a
24 half, it was on appeal and nothing was done.
25 Finally, the Court of Appeals ruled in late August

1 2012 on the lumbar spine issue affirming the Full
2 Commission. That fall we -- late that fall or early
3 winter, we fired this back up and had a second
4 hearing before the same commissioner on the cervical
5 spine issue and elbow. The elbow is not an issue
6 before the Court today. We're here on the cervical
7 spine issue.

8 And during the course of that hearing,
9 there were some procedure issues and also it was
10 determined that a treating physician -- what
11 happened, what transpired after the Form 17 was
12 signed and the matter was on appeal, Mr. Hannah
13 thinking he lost his case sought further medical
14 treatment and, in fact, had a surgical procedure
15 at -- a fusion C6-7 in a cervical spine by Dr.
16 Brennan, a neurosurgeon in Florence. That occurred
17 in July -- June in 2012.

18 We fired back up in the late -- on really
19 December, and the first time I saw Mr. Hannah was
20 early January right before the hearing. And in
21 that -- that was when we first learned that he had
22 this surgical procedure, the fusion of the cervical
23 spine. His affidavit is a part of the record at that
24 particular time.

25 We filed alternatively for a change of

1 condition as an alternative hearing. Because
2 originally he was treated by an orthopedist in
3 Georgetown, a Dr. Triana. Dr. Triana treated him
4 giving him epidurals in his neck, and the carrier
5 switched doctors and he saw a Dr. Bethea in Columbia.
6 In December Dr. Bethea saw him, did a surgical
7 procedure on his elbow and released him on the third
8 visit with an impairment rating on the cervical spine
9 of zero.

10 Dr. Triana, of course his treating
11 physician to his cervical spine based on an MRI scan
12 and other records in his care and treatment, found
13 that he could not go back to work because of the
14 injuries to his low back and to his cervical spine.
15 But Dr. Bethea didn't have the benefit of looking at
16 those MRIs which appears in his records as well. But
17 any event, he continued to treat with Dr. Triana
18 through April 2010 after he had been found to be at
19 zero by Bethea. All this is convoluted, but this is
20 how it plays out.

21 In any event, we appeared before
22 Commissioner Roche. Mr. Davis wanted to take the
23 deposition of Dr. Brennan and so she held the hearing
24 open. We ended up taking two deposition of
25 Dr. Brennan. The first deposition he testified how

1 he did a fusion at C6-C7. And it was pointed out,
2 well, Dr. Triana, his notes refer to C5-6.

3 Due to the confusion Dr. Brennan said I
4 need to see the original MRI back in September of
5 2009 so I can compare it with my MRI and make sure
6 that Dr. Triana and I are either on a different route
7 or we -- perhaps he made a mistake and referred to
8 the wrong level.

9 So we continued it. Got the MRI for him.
10 Then he testified a second time and said, aha,
11 Dr. Triana misstated because the MRI in '09 is at
12 C6-7. That's the problem and that's the problem I
13 operated on. He just misstated it when he
14 transcribed it and that's how it got put erroneously
15 in the record.

16 So at that time Commissioner Roche ruled
17 in favor of the claimant and the Full Commission
18 procedurally reversed for and remanded for a full de
19 novo here today, the reason we are here today. And
20 the issues before the Commission today are as
21 follows. Did the claimant -- has the claimant
22 reached MMI for his cervical spine injury; if so,
23 when? Secondly, is the claimant entitled to any
24 permanent or partial disability for his cervical
25 spine; and if so, to what extent and is the

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1 impairment rating provided by Dr. Brennan in this
2 case to the cervical spine?

3 Third, is the employer/carrier entitled to
4 any credit for overpayment of temporary benefits,
5 their position being that from the time Dr. Bethea
6 found him at MMI, there were checks paid through the
7 17 and they want reimbursement, I think 84 weeks.
8 Then is he entitled to the further medical treatment
9 under the act provided by Brennan for the surgery to
10 the cervical spine and the fusion?

11 Next, that Utica-Mohawk language be
12 included. Because as a result of these injuries,
13 he's now receiving Social Security benefits. And
14 alternatively has he -- has the claimant experienced
15 a change of condition in the cervical spine; that
16 position being if Brennan was -- I'm sorry. If
17 Bethea was correct, which we contend he wasn't to
18 start with. But alternatively if he was, there was a
19 change of condition based upon the medical testimony
20 of Dr. Brennan and the claimant which we'll present.
21 Those are the issues as we see them.

22 THE COURT: All right. Thank you, sir.
23 Mr. Davis.

24 MR. DAVIS: Thank you, Commissioner, on
25 behalf of defendants.

1 I mean, one enlarging principle here that
2 should guide us is ignorance of the law is no excuse.
3 And fortunately this situation we have a claimant who
4 was placed at maximum medical improvement, released
5 to return to work with no restrictions, given a zero
6 percent impairment rating who then allegedly worsens
7 a year-and-a-half later, over a year-and-a-half
8 later, goes and gets treatment on his own with his
9 own insurance or his wife's insurance, admittedly
10 never asked permission to do so, never asked for
11 authorization. His attorney didn't know. And so it
12 would be patently unfair to hold defendants
13 responsible for events that happened out of their
14 control far after the date of maximum medical
15 improvement.

16 And the fact that Mr. Hannah thought he
17 had lost his case is really of no bearing here. If
18 you sit on your rights, you lose them. There's
19 certain time restrictions in which you have to bring
20 claims. And so it puts the Commission and it puts
21 defendants in a very awkward position of trying to
22 unscramble an egg because he's already had the
23 surgery. He's already living with whatever results
24 came from that.

25 But the threshold issue in this case is an

1 unappealed portion of an order of the Full Commission
2 from July 25th, 2011, Conclusion of law Number 6,
3 where the Comm- -- the Full Commission states, "We
4 conclude that the claimant received all proper
5 medical care that would tend to lessen his period of
6 disability." That was never appealed. That is still
7 the law of the case. It's still good law. We can't
8 relitigate that issue. It's part of our res judicata
9 or collateral estoppel issue preclusion. That is set
10 in stone. So, you know, taking that a step further,
11 I would argue that the claimant was implicitly found
12 to be at maximum medical improvement in that same
13 order.

14 Now, I admit in that order there's no
15 specific finding of maximum medical improvement for
16 the -- for the neck and the elbow. There -- there is
17 a recitation in the order of the treating physician's
18 impairment rating. However, there is a case on point
19 just like this one, Cranford versus Hutchinson
20 Construction, 399 S.C. 65, a 2012 Court of Appeals
21 case, where just like in this case there was an
22 authorized treating physician that had assigned a
23 zero percent impairment rating. And the Court felt
24 that the MMI was implicitly held in that case.

25 So -- but even if you don't agree it would

1 be there, that Conclusion of Law Number 6 would
2 certainly bar defendants being held responsible for
3 the claimant's surgery and those associated costs.

4 So another curious thing that creates a
5 little bit of a conundrum is there is a alternative
6 position completed of a change of condition claim.
7 And, of course, as you know, a change of condition
8 claim can only be filed after a claimant reaches
9 maximum medical improvement. So you can't have the
10 benefit of both. He either is at MMI or is not and
11 has to prove a change of condition.

12 So back to my original point, there's an
13 issue of fundamental fairness here. There was just
14 unauthorized treatment that was never requested. The
15 defendants didn't get a chance to accept or deny it
16 or even investigate until far after several months
17 down the road.

18 So there's also an issue in this case
19 involving a potential intervening accident. So it's
20 undisputed that on August 25th, 2009, Mr. Hannah fell
21 at home on some steps and hit -- hit a railing with
22 his face. And as luck would have it to further
23 confuse issues, that the first MRI of the cervical
24 spine was not taken until three weeks after that
25 incident at home. So obviously reasonable minds

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1 could conclude that if you fall on some steps and hit
2 your face on a railing, that that could cause damage
3 to your cervical spine.

4 So there's an issue concerning
5 Dr. Brennan's testimony as to whether his
6 interpretation of Dr. Triana's treatment is being
7 directed towards C5-6 versus C6-7. And I would
8 object to Dr. Brennan's testimony today because
9 Dr. Brennan can't get inside Dr. Triana's mind and
10 know what he was thinking. The curious thing is in
11 two different places in Dr. Triana's records it
12 references C5-6. It could -- it could certainly be
13 that C6-7 was a component that developed later,
14 but -- but that testimony is not reliable because
15 Dr. Brennan can't tell us what Dr. Triana was
16 thinking. That's pure speculation and should be
17 disregarded by you.

18 There is an issue concerning credit for
19 temporary total disability benefits that were paid
20 during the appeal, and there was no mechanism for the
21 defendants to stop. And they've paid from
22 January 6th, 2010 to August 16th, 2011, a period of
23 84 weeks. Credit for overpayment was preserved at
24 the initial hearing in this case by order of
25 Commissioner Wilkerson. And I would argue that

1 defendants are entitled to that credit as a matter of
2 right as an operation of law.

3 Finally, just to clarify the claimant's
4 position, the left elbow is not an issue. It is an
5 issue before you and I believe in keeping with our
6 openings in the first hearing which was remanded,
7 there was a stipulation that there was zero percent
8 impairment to the left elbow. And I just wanted to
9 clarify that so that is before you, and defendants
10 request you to rule upon that issue because that is
11 an admitted body part. And, of course, we don't
12 believe there's any resulting disability from that.

13 So to sum up, defendants believe the
14 claimant is at maximum medical improvement, according
15 to the authorized treating physician Dr. James Bethea
16 on January 6th, 2010, who released him with zero
17 percent to the cervical spine and the left elbow.
18 Returned to work without restrictions. No future
19 medical care.

20 The claimant agreed he could return to
21 work by signing the Form 17. He agreed he could
22 return to work on January -- on, excuse me,
23 February 10th, 2010. There's an issue of credit, the
24 84 weeks which I've explained earlier. We believe
25 that the claimant has sustained no permanent partial

1 disability or permanent total disability as a result
2 of the cervical injury because he had already been
3 released by the treating physician. We believe there
4 was an intervening accident on August 25th, 2009,
5 when Mr. Hannah fell and hit his face on a railing.
6 And, of course, as a threshold matter, there's a
7 legal issue of law of the case, collateral estoppel
8 and res judicata, and also the implicit finding of
9 maximum medical improvement of the cervical spine in
10 the original Full Commission order and that's the
11 defendants position.

12 MR. JENKINSON: May I respond briefly?

13 THE COURT: Just give me one second, sir.
14 Yes, sir.

15 MR. JENKINSON: Thank you, sir.

16 Just briefly as to the MMI of Dr. Bethea.
17 Dr. Bethea very suddenly came on the scene after
18 Mr. Hannah was being successfully treated by
19 Dr. Triana in Georgetown. Why they wanted a doctor
20 in Columbia way away from Mr. Hannah and where we
21 lived, we don't know. But be that as it may, he
22 walked into Dr. Bethea's office. And on the first
23 visit Dr. Bethea found, well, you know, I would like
24 to look at the MRI of his cervical spine but I don't
25 have it. But in any event, he's at zero impairment

1 to the cervical spine on the first visit. The second
2 visit was exactly one month later after he had
3 operated on his elbow, and he confirmed that he was
4 at zero percent MMI. And the record was very clear.
5 He said even though he has pain to the left where the
6 MRI showed he had a problem, even though he's got
7 pain, he's still at zero impairment and MMI. And,
8 oh, by the way, he needs 60 Darvocet for pain and
9 gave him a prescription. Said you go home now.
10 You're released. That was the treating physician
11 Dr. Bethea that he's being relied upon by the
12 carrier.

13 Interestingly enough, Dr. Triana then
14 followed him three more months or four months through
15 April of -- but finally he gave up because he wasn't
16 being paid by the carrier and wanted to do surgery on
17 his cervical spine right after he had seen
18 Dr. Bethea, but, you know, it speaks for itself.

19 I'll turn to that order that he relies
20 upon, this Cranford case. That was briefed and
21 argued in full, if you really want to visit our
22 briefs in the last Full Commission hearing where it
23 was remanded back. But you have to look at the Full
24 Commission Order of July 2011. That order dealt only
25 with the lumbar spine. It had nothing to do with the

1 cervical spine. Mark's trying to interpret and
2 stretch a statement in that order dealing with the
3 lumbar spine and say it includes the cervical spine.
4 It says -- and it speaks for itself and it is what is
5 it and we would ask that you clarify it by looking at
6 it.

7 The face injury on falling on the rail in
8 August right after the accident, both doctors,
9 treating physicians both Brennan and Triana were
10 asked about that whether or not that injury is there,
11 both of them said no. But there's been no medical
12 testimony, Dr. Davis, Mark Davis, his opinion
13 otherwise. He's the only doctor I know and he's got
14 a law degree doctorate as opposed to a medical doctor
15 who's of that opinion. But be that as it may, it is
16 his opinion.

17 The credit for overpayment, it speaks for
18 itself. Time passed. Well, yeah, it's passed. But
19 it's been passed because of so many hearings and so
20 much stuff going on in this case which is very
21 convoluted.

22 But, you know, I agree with Mark. He says
23 this case is a matter of fundamental fairness. It
24 is. It's fundamental fairness because it's
25 unquestioned to this day that Timothy Hannah was

1 involved in a rollover 18-wheeler accident on
2 July 14th of 2009, unquestioned he went straight to
3 the hospital with a cervical spine injury,
4 unquestioned he's been treated for it ever since and
5 operated on and unquestioned he's here before you
6 seeking compensation for that injury. It's
7 unquestioned he never had a cervical spine injury
8 prior to this in his life, he's never been treated
9 for any neck or back injuries his entire life. And
10 all he wants is some fundamental fairness from this
11 Commission and from this carrier and to be
12 compensated for his injuries suffered while on the
13 job. So I agree with Mark, it is about fundamental
14 fairness.

15 THE COURT: Mr. Davis.

16 MR. DAVIS: Yeah, nothing other -- just to
17 address the order of 2011, it wasn't just about the
18 compensability of the lumbar spine. In fact, on
19 Page 7, there's -- at the end of the paragraph where
20 the findings of fact, the decision and order of the
21 hearing commissioner is reversed with regard to
22 compensability of the lumbar spine/lower back injury.
23 And then it goes on to address all of the other
24 issues: Compensation rate, admitted work-related
25 accident, cervical spine and left elbow treatment,

1 all these things were addressed.

2 So it's not -- this order has not been
3 limited to just the lumbar spine. That's what was
4 ultimately appealed and that's what we fought about
5 for a long time, but -- but this order addresses the
6 entire claim. That's all. Thank you.

7 THE COURT: Anything else, sir?

8 MR. JENKINSON: No, sir.

9 MR. DAVIS: No, sir.

10 THE COURT: All right. Anything else?
11 All right. Just one second.

12 (OFF THE RECORD.)

13 THE COURT: Let's go back on the record.
14 The Commission becomes a part of the record with the
15 exception of self-serving declarations and
16 unstipulated medical reports.

17 All right. Witnesses, Mr. Jenkinson?

18 MR. JENKINSON: Mr. Hannah, Your Honor.

19 THE COURT: All right. Mr. Hannah, if you
20 would come up, sir, and have a seat up here, please,
21 sir. And you just take your time. Just have a seat
22 right here. All right, sir, I have two requests for
23 you. The first is this is not -- the microphone is
24 not on, so you'll need to speak up. It's imperative
25 that the attorneys hear you, this young lady who's

1 making the record hear you and I hear you.

2 MR. HANNAH: Yes, sir.

3 THE COURT: Okay. And the second is if
4 you're asked a yes or no question --

5 MR. HANNAH: Yes.

6 THE COURT: -- please give me a yes or no
7 answer.

8 MR. HANNAH: Yes, sir.

9 THE COURT: I have a tendency to shake and
10 nod my head all the time.

11 MR. HANNAH: Yes.

12 THE COURT: Well, if you do that here, she
13 has to actually look over and see what you did and
14 then put that in the record. It slows her down. So
15 a yes or no question, give us a verbal yes or no
16 answer. Okay?

17 MR. HANNAH: Yes, sir.

18 THE COURT: Very good. Please swear the
19 witness.

20 TIMOTHY J. HANNAH,
21 AFTER BEING DULY SWORN TO TELL THE TRUTH, TESTIFIED
22 AS FOLLOWS:

23 THE COURT: Please state your name for the
24 record, sir.

25 THE WITNESS: My name is Timothy J.

1 Hannah.

2 THE COURT: All right. Thank you,
3 Mr. Hannah.

4 Mr. Jenkinson, your witness.

5 MR. JENKINSON: Thank you, Your Honor.

6 DIRECT EXAMINATION

7 BY MR. JENKINSON

8 Q. Mr. Hannah --

9 A. Yes, sir.

10 Q. -- you have been in this same seat, I
11 think, before --

12 A. Yes, sir.

13 Q. -- in hearings; have you not?

14 A. Yes, sir.

15 Q. And you understand why we are here?

16 A. Yes, sir.

17 Q. You were involved in an accident on
18 July 14th, 2009?

19 A. Yes, sir.

20 Q. Tell us briefly how that occurred.

21 A. The 14th of July I was coming out of Jay
22 Cross with a load (inaudible) going to Georgetown. I
23 rounded Jamestown on 41 going into 17 Bypass. My
24 steering mechanism locked up on my truck. I lost
25 control and I woke up. I was out. It was turned

1 over.

2 Q. Okay. Did you suffer any injuries?

3 A. Yes, sir.

4 Q. What body parts?

5 A. My neck, my chest, my elbow and my lower
6 back.

7 Q. And you understand here we're only
8 addressing the issue primarily -- well, really the
9 issue is your cervical spine or your neck; you
10 understand that?

11 A. Yes, sir.

12 Q. We've already tried your low back case;
13 you understand that?

14 A. Yes, sir.

15 Q. Okay. Now, today you heard me tell the
16 Court that we're not here about your elbow. And you
17 did have an injury to you elbow, didn't you?

18 A. Yes, sir.

19 Q. But that injury is healed and is well; is
20 it not?

21 A. Yes, sir.

22 Q. Okay. Now, were you taken by ambulance to
23 the hospital?

24 A. Yes, I was.

25 Q. Where?

1 A. Georgetown Memorial.

2 Q. And were you treated there?

3 A. Yes, sir.

4 Q. What injuries did -- were you treated for
5 your neck?

6 A. Yes, sir.

7 Q. And your elbow?

8 A. Yes, sir.

9 Q. Okay. Now, since that accident to today,
10 how many days have you worked?

11 A. None.

12 Q. You have not worked at all?

13 A. No, sir.

14 Q. Are you totally disabled?

15 A. Yes, sir.

16 MR. DAVIS: Objection. Calls for a legal
17 conclusion, his opinion.

18 THE COURT: I understand what your
19 objection is. I think he can answer that question.
20 I clearly know he's a layman and not an attorney, not
21 a doctor, but -- and it is his opinion as a
22 layperson. So I'm going to let him answer the
23 question.

24 MR. DAVIS: Thank you, Commissioner.

25

1 BY MR. JENKINSON

2 Q. And are you receiving benefits for that?

3 A. Yes, sir.

4 Q. From Social Security?

5 A. Social Security.

6 MR. DAVIS: Objection. I believe
7 entitlement to Social Security is irrelevant in the
8 case. Also, prejudicial because we're dealing with a
9 standard with the Social Security Administration and
10 workers' comp. So it should not be admitted in
11 evidence.

12 MR. JENKINSON: The purpose of that
13 question is not to compare it to Social Security, but
14 for purposes of the Utica-Mohawk language issue.
15 Just to establish that he is receiving it for
16 purposes. That's the reason why we would like --

17 THE COURT: Mr. Davis.

18 MR. DAVIS: Yes, sir.

19 THE COURT: Given that explanation --

20 MR. DAVIS: I will stipulate entitlement
21 to Utica-Mohawk language in any order.

22 MR. JENKINSON: Makes it a lot easier.

23 THE COURT: It does indeed.

24 MR. JENKINSON: Thank you, Your Honor.

25 THE COURT: All right. Thank y'all.

1 BY MR. JENKINSON

2 Q. Now, following this accident, who provided
3 the care and treatment after you left the emergency
4 room, which doctor?

5 A. Doctors Care.

6 Q. And you were sent there?

7 A. Yes, sir.

8 Q. By workers' comp carrier?

9 A. Yes, sir.

10 Q. How long did you go to Doctors Care?

11 A. I think from -- all the way up till the
12 ladder part of '09. It was like September.

13 Q. Let me ask you this way. Who was the next
14 doctor you went to after Doctors Care?

15 A. The next doctor I went to after Doctors
16 Care was Dr. Triana.

17 Q. And what kind of doctor is he?

18 A. He was a specialist in Georgetown.

19 Q. He's an orthopedic doctor?

20 A. Orthopedic, yes, sir.

21 Q. In Georgetown?

22 A. In Georgetown.

23 Q. Now, who sent you to Dr. Triana?

24 A. Doctors Care.

25 Q. They're the ones who sent you?

1 A. Yes, sir.

2 Q. And when did you see Dr. Triana for the
3 first time?

4 A. It was I think the ladder part of '09,
5 '10.

6 Q. Was that September if that's what it
7 showed?

8 A. Yes, sir, somewhere around September.

9 Q. So between the accident in July and
10 September, you saw Doctors Care?

11 A. Yes, sir.

12 Q. And then you went from Doctors Care --
13 they sent you to Dr. Triana?

14 A. Dr. Triana.

15 Q. Okay. Why did you -- what did you tell
16 Dr. Triana your problem? What all did he help you
17 with?

18 A. Well, he was helping me with my neck and
19 my elbow --

20 Q. Okay.

21 A. -- and --

22 Q. Did he help you with your low back as
23 well?

24 A. Yes, sir. He was getting ready --

25 Q. All of your injuries?

1 A. He was getting ready to work on my lower
2 back, but they referred me over to Dr. Bethea.

3 Q. We're not getting there yet. I want to
4 ask you about Dr. Triana first.

5 A. Oh, okay.

6 Q. Just listen to my question. Let's go back
7 to Doctors Care.

8 A. Okay.

9 Q. While you were going to Doctors Care,
10 there appears in the record in August about a month
11 after the accident where you fell and hit your face.
12 Do you remember telling him that?

13 A. Yes, sir.

14 Q. Did you injure your neck or your back or
15 your shoulder or your elbow whenever you fell?

16 A. No.

17 Q. What did you injure?

18 A. My face.

19 Q. What happened to your face?

20 A. I scarred it up against the railing and
21 had a little gash in it.

22 Q. Just a little gash?

23 A. Yes, sir.

24 Q. Okay. No injuries anywhere else?

25 A. No.

1 Q. But you told the doctor about it?

2 A. Yes, sir.

3 Q. Okay. Did he treat you any differently
4 other -- did he treat that gash on your face, or you
5 didn't even have to have a doctor --

6 A. No. I did it myself.

7 Q. Okay. So you didn't even see a doctor?

8 A. No, sir.

9 Q. You just told him about it?

10 A. I told him about it.

11 Q. Okay. Now, you went to Dr. Triana. What
12 kind of care -- first, before you went -- right
13 before you saw Dr. Triana the first time, did you
14 have any kind of MRI or X-ray studies?

15 A. Yes.

16 Q. And that was in what? In September?

17 A. September.

18 Q. Okay. Who sent you to get the MRI?

19 A. Doctors Care.

20 Q. Doctors Care. Okay. And then when you
21 went to see Dr. Triana, did he have that MRI?

22 A. Yeah. He had the MRI.

23 Q. And that information appears in
24 Dr. Triana's records, doesn't it?

25 A. Yes.

1 Q. Now, did -- that MRI, did it include your
2 neck?

3 A. Yes, sir.

4 Q. Tell us how is your neck -- was your neck
5 bothering you at all during this period of time?

6 A. Yes, sir.

7 Q. How was it hurt?

8 A. It was real hurting.

9 Q. Okay. Now, you also -- was your back
10 hurting?

11 A. Yeah. I was hurting all the way down --
12 over my head all the way down, so...

13 Q. Okay. And you continued treating. Did
14 you have any kind of injections in your neck and back
15 from Dr. Triana?

16 A. I had three.

17 Q. Okay. And where?

18 A. Well, in my neck --

19 Q. Yeah.

20 A. -- and in my back.

21 Q. How about your back? Three in each?

22 A. Yes, sir.

23 Q. That was in the fall and into the winter
24 of 2009?

25 A. Two thousand -- yeah, it was the end of

1 nine, yeah.

2 Q. Towards the end of nine, did you get a
3 notice from the workers' comp carrier to go to
4 another doctor?

5 A. Yes, sir. They sent me to Dr. Bethea in
6 Columbia.

7 Q. Did you know why you were being sent to
8 Dr. Bethea?

9 A. No. I just got a letter saying I needed
10 to go for some reason. My wife -- my old lady told
11 me, said you got to go. I said, well -- we went to
12 Columbia.

13 Q. Were you satisfied with Dr. Triana's care?

14 A. Yes, sir.

15 Q. Did he -- can you tell us whether or not
16 Dr. Triana kept you out of work?

17 A. Yes, sir.

18 Q. He did?

19 A. Yes, he did.

20 Q. Okay. Now, you had to go to Dr. Bethea.
21 You went to see him?

22 A. Yes, sir.

23 Q. I think the first time the record shows
24 you saw him on December the 6th, 2009?

25 A. Yes, sir.

1 Q. Is that right?

2 A. That's right.

3 Q. Now, that appears in the December 30th,
4 2013 defendants' APA at Tab 4. Pages 60 through 66
5 is Dr. Bethea's records.

6 How many times did you go to Dr. Bethea's
7 office to see him?

8 A. Three. Three.

9 Q. Okay. The first time, we'll talk about
10 that first.

11 A. All right.

12 Q. That was in his office. The second time
13 what happened?

14 A. I had surgery on my elbow.

15 Q. Okay. That was surgery on your elbow?

16 A. Yes, sir.

17 Q. And the third time did you go to his
18 office?

19 A. The third time I went, he released me.

20 Q. Okay.

21 A. Took the stitches out.

22 Q. Let's talk about APA page -- I think the
23 first one is December 4th, 2009. Do you remember
24 going to his office?

25 A. Yes, sir.

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1 Q. Now, he talks about Dr. Triana's records.
2 He had those before him. Do you remember that?

3 A. Yes, sir.

4 Q. You're familiar with this record, aren't
5 you?

6 A. Yes, sir, I am.

7 Q. Now, you also were seen by Dr. Grant in
8 Georgetown, he reports, and had the three cervical
9 epidural injections. You told us about those, didn't
10 you?

11 A. Yes, sir.

12 Q. And Dr. Bethea knew about those?

13 A. Yes, sir.

14 Q. He also says that you had not returned to
15 work. You had not gone back to work?

16 A. No, sir.

17 Q. Had you been released by Dr. Triana?

18 A. No, sir.

19 Q. Now, in this did you tell him that you had
20 pain?

21 A. Yes, sir.

22 Q. Did you report to him your pain was as bad
23 as a nine over ten?

24 A. Yes, I did.

25 Q. Where were you hurting?

1 A. In my neck and my back.

2 Q. Okay. Now, he asked about your past
3 medical history.

4 A. Yes, sir.

5 Q. Have you ever had any injury ever in your
6 life to your neck or your back or your elbow?

7 A. No.

8 Q. You ever been to a doctor because of a
9 neck pain or a back pain?

10 A. No.

11 Q. Have you ever been injured where you hurt
12 your back before or your neck?

13 A. No, sir.

14 Q. Never?

15 A. Never.

16 Q. Ever have any pain in your neck before?

17 A. No, sir.

18 Q. And did you tell Dr. Bethea that?

19 A. Yes, sir.

20 Q. Okay. Now, after Dr. Bethea asked you
21 some questions, he did a test on your neck?

22 A. Yes, sir.

23 Q. What did he ask you to do?

24 A. Turn my head.

25 Q. How?

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1 A. To the left and to the right.
2 Q. Okay. And did he ask you to do it up and
3 down?
4 A. Yeah, back and forth.
5 Q. Did he do anything else to your neck?
6 A. No, sir.
7 Q. Did he -- no other tests whatsoever?
8 A. No, sir.
9 Q. Okay. Now, did you tell him it hurt?
10 A. Yes, sir.
11 Q. Which side did it hurt more than the
12 other; do you recall?
13 A. To the left.
14 Q. On the left side?
15 A. Yes, sir.
16 Q. Okay. Now, did you tell him about your
17 elbow?
18 A. Yes, I did.
19 Q. Did he arrange for -- to operate on you in
20 a couple of weeks after that?
21 A. Yes, sir. December 22nd.
22 Q. When he operated on your elbow, did you
23 have to spend the night in the hospital?
24 A. Out surgery. Outpatient.
25 Q. Outpatient?

1 A. Yes, sir.

2 Q. Okay. Now, on Page 3 of his records from
3 December 4 he says that you're at maximum medical
4 improvement. Did he tell you you were well?

5 A. Yes.

6 Q. Sir?

7 A. Yes, sir.

8 Q. He told you -- did he tell you you was --
9 no problem with you?

10 A. He took the stitches out of my elbow.

11 Q. Okay. Now, this is the first visit. The
12 first time you saw him did he tell you you were well?

13 MR. DAVIS: Objection. Hearsay.

14 THE WITNESS: Yeah. He said --

15 THE COURT: Wait a minute. Wait a minute.

16 MR. JENKINSON: I'm referring to the
17 record again of what he said; what he wrote. I'm
18 just asking him what he put in the record that he
19 asked him about. That's not hearsay. It's not
20 offered for the matter -- truth of the matter.

21 THE COURT: No. It's -- if it's in the
22 record, and you say it is, then --

23 MR. JENKINSON: I'll read it exactly.

24 THE COURT: You know, then it's not
25 hearsay because it's part of the record.

1 MR. DAVIS: Thank you.

2 THE COURT: All right.

3 BY MR. JENKINSON

4 Q. I'll ask it this way. Did Dr. Bethea on
5 December the 4th, the first time you saw him, tell
6 you that you were at maximum medical improvement
7 except for the care of your elbow?

8 A. No.

9 Q. Okay. Did he tell you that he would like
10 to see the MRIs that Dr. Triana had done?

11 A. Yes.

12 Q. And did he give you some pain medication,
13 some Darvocet --

14 A. Yes, Darvocet.

15 Q. -- and some other pain medication? Then
16 you had the surgery?

17 A. Yes.

18 Q. The next record, which he saw you in the
19 office after the surgery, was January the 6th, 2010.
20 Do you remember going to him at that time?

21 A. Yes, sir.

22 Q. What did you go back for that time?

23 A. For him to take the sutures out.

24 Q. Stitches out of your elbow?

25 A. Yes, sir.

1 Q. Did you ever go back to him again? Have
2 you seen Dr. Bethea since --

3 A. No, sir.

4 Q. -- January 6, 2010? Have you seen him
5 since?

6 A. Since then.

7 Q. Did he treat your neck or your back at
8 all?

9 A. No.

10 Q. Now, on the second visit on January the
11 6th he talks about the work he did on your elbow?

12 A. Yeah.

13 Q. Okay. Did he -- did you tell him that you
14 still had neck and back pain?

15 A. Yes, sir.

16 Q. Did you tell him you couldn't even walk
17 very far?

18 A. Yes, sir.

19 Q. Did you tell him you were not taking any
20 pain medication right then?

21 A. Yes, sir.

22 Q. Did he ask you to move your head back and
23 forth and up and down again?

24 A. Yes, sir.

25 Q. Did you tell him that when you bend your

1 head to the left, it was more uncomfortable?

2 A. I did.

3 Q. Now, did he tell you you were at maximum
4 medical improvement for your neck injury?

5 A. He didn't say anything.

6 Q. He didn't say anything?

7 A. No, sir.

8 Q. Okay. Now, when you -- when you were at
9 that first visit, how long did these tests take for
10 him to give you?

11 A. A few minutes.

12 Q. Just a few minutes?

13 A. Yes, sir.

14 Q. How about the second time?

15 A. A few minutes.

16 Q. Did he ask you -- any other kind of tests
17 to check your neck?

18 A. Nope.

19 Q. Okay. Now, did you ask him for some pain
20 medication?

21 A. Yes, sir, I did.

22 Q. Where were you having pain?

23 A. In my neck and my back.

24 Q. Was your elbow -- were you having pain --

25 A. It was...

1 Q. -- in your elbow?

2 A. It was throbbing a little bit but it was
3 cool.

4 Q. It was just throbbing a little bit?

5 A. That's all.

6 Q. No real pain?

7 A. No, sir.

8 Q. Not in your elbow?

9 A. Huh-uh.

10 Q. Okay. So you asked him for -- did he give
11 you 60 Darvocet, a prescription for 60 Darvocet?

12 A. He wrote me a prescription for 60
13 Darvocet.

14 Q. Sir?

15 A. He wrote one for 60.

16 Q. Okay. Did he tell you to come back?

17 A. No, sir.

18 Q. And that's all you saw?

19 A. Yeah.

20 Q. Okay. Did he tell you at that occasion
21 that you could go back to work?

22 A. No.

23 Q. Did any -- was there any discussion with
24 him about going back to work?

25 A. No.

1 Q. Did he ask you if you could go back to
2 work?

3 A. No.

4 Q. Okay. So January the 6th, 2011, you went
5 home?

6 A. Yes, sir.

7 Q. Who is the next doctor you saw?

8 A. Triana.

9 Q. When did you go back to Triana?

10 A. September, I think.

11 Q. If the record shows you went in January,
12 right, a few weeks after that?

13 A. Well, I went to see Triana right after
14 that. I don't remember exactly what month it was.

15 Q. Okay. How many times did you see Triana
16 in the first part of 2011 after you left Bethea?

17 A. I saw Dr. Triana three times.

18 Q. And when was the last time you saw him?

19 A. About the fall, the end of the year,
20 somewhere along in there.

21 Q. If the record shows April 28th, would that
22 have been the last time?

23 A. I was about to say my birthday was in May.
24 So it was before that.

25 Q. Okay. But that's the last time you saw

1 Triana?

2 A. Yes, sir.

3 Q. Why didn't you go back to Triana anymore?

4 A. Because they -- they wouldn't pay him.

5 And he said I can't come back unless my insurance
6 pay.

7 MR. DAVIS: Objection hearsay.

8 THE COURT: You can't tell me what the
9 doctor told him.

10 BY MR. JENKINSON

11 Q. You've seen the doctor's records; have you
12 not?

13 A. Yeah.

14 Q. Okay. Did you need back surgery?

15 A. Yes, sir.

16 Q. Did you want to have back surgery?

17 A. Yes.

18 Q. I mean, neck surgery. I'm sorry.

19 A. I wanted it.

20 Q. Did you want to have neck surgery?

21 A. Yeah.

22 Q. And does that appear in Dr. Triana's
23 medical record for December -- or for April 28, 2010?

24 A. Yes, sir.

25 Q. But you didn't have it?

1 A. No.

2 Q. Well, let's move forward a little bit. I
3 think you actually saw Triana on February 25th as
4 well?

5 A. Yeah.

6 Q. Did you get any what you call slips from
7 Dr. Triana that you could go back to work?

8 A. Yes. I turned all the excuses in.

9 Q. Excuses not to go back to work?

10 A. Yes, sir.

11 Q. So he gave you excuses not to go back to
12 work?

13 A. Yes, sir.

14 Q. Even the last time you went?

15 A. Yes, sir.

16 Q. That was in April and you haven't been
17 back to work since?

18 A. No, sir.

19 Q. Now, you had a hearing before Commissioner
20 Roche, I think on July 30th, 2010 on your low back.
21 Do you remember that?

22 A. Yes, sir.

23 Q. And you were receiving benefits, weren't
24 you?

25 A. Yes, sir.

1 Q. And Commissioner Roche in January 2011
2 ruled in your favor, didn't she?

3 A. Yeah, we won.

4 Q. You continued to get benefits, didn't you?

5 A. Yes, sir.

6 Q. And that -- that decision of Commissioner
7 Roche was appealed to the Full Commission, wasn't it?

8 A. Yes, sir.

9 Q. And that ruling came down on July 25th,
10 2011. Did you win or lose?

11 A. I lost.

12 Q. Okay. And we appealed that to the Court
13 of Appeals; did we not?

14 A. Yes, sir.

15 Q. Now, after the Full Commission ruled
16 against you in the end of July, do you remember
17 coming to my office about a Form 17? I'm going to
18 show it to you. Take a look at it. Hold it. I'm
19 going to ask you some questions about it.

20 A. Yeah, I remember this.

21 Q. Okay. And did you sign it? Is that your
22 signature?

23 A. Yeah, it's my signature.

24 Q. Tell the Commissioner why you signed that.

25 A. I signed it because we had lost and I

1 thought -- you know, I wanted to stop them checks.
2 You know what I'm saying? So I signed them.

3 Q. You wanted to stop the checks why?

4 A. Because I lost the case --

5 Q. Okay.

6 A. -- on my back.

7 Q. And you lost it on the 25th of July?

8 A. Yes, sir.

9 Q. And that's the last time you felt like you
10 were entitled to it?

11 A. Yeah. So I came in and signed the paper.

12 Q. And that's why you signed the paper?

13 A. That's why I signed it.

14 Q. Now, I want you to look at it carefully.
15 That is your signature; is it not?

16 A. That's my signature.

17 Q. Now, above it it says that you agree that
18 you were under -- you were able to return to work on
19 2/10 -- of February 10th, 2010. You see that?

20 A. Yeah, sir, I see it.

21 Q. Okay. Do you recall or remember anything
22 about that being on there?

23 A. No. I didn't -- I don't remember that. I
24 signed this paper because I wanted to stop the
25 checks.

1 Q. That's why you signed it?

2 A. Yes, sir.

3 Q. And that's what you've testified before in
4 the other hearings as the reason that you signed it?

5 A. Yes.

6 Q. You realize you could be liable to receive
7 checks and it wasn't your money?

8 A. Yeah. That's why I signed it.

9 Q. Okay.

10 THE COURT REPORTER: Excuse me one moment.

11 THE COURT: Let's go off the record for a
12 second.

13 (COURT REPORTER CHANGED BACKUP AUDIO)

14 THE COURT: Back on the record.

15 BY MR. JENKINSON

16 Q. Mr. Hannah, you were in my office
17 August 2011 when you signed that Form 17?

18 A. Yes, sir.

19 Q. When is the next time you were in my
20 office and saw me?

21 A. It was about a year and a half later.

22 Q. The exact was around the 3rd of January
23 2012, wasn't it?

24 A. I know it was in 2012.

25 Q. I told you we'd gotten notice and we had

1 to go to a hearing, didn't we?

2 A. Yes, sir.

3 Q. I couldn't find you. In December I
4 couldn't -- because I couldn't reach you by phone or
5 anybody. Why is that?

6 A. Well, my phone was off. I didn't have
7 one.

8 Q. Why is that?

9 A. I couldn't afford it at the time.

10 Q. Okay. And I finally had to send somebody
11 for you, I think I did?

12 A. Yes, sir.

13 Q. Now, at that particular time when you came
14 to my office, you came with some news, didn't you?

15 A. Yes, sir.

16 Q. You told me something I never heard about
17 before; isn't that true?

18 A. That's right.

19 Q. Now, as a result of that conversation, you
20 signed an affidavit which was submitted to the
21 Commission for the second hearing before Commissioner
22 Roche on a change of circumstances, and we put that
23 news in that affidavit we filed, didn't we?

24 A. Yes, sir.

25 Q. And that affidavit is dated January the

1 7th. You came back in to sign it, didn't you, so we
2 could file it?

3 A. Yes, sir.

4 Q. Now, let me ask you some questions about
5 that affidavit. It explains that you were the
6 claimant and you filed this case, didn't you?

7 A. Yes, sir.

8 Q. And you also talked about your care and
9 treatment at the emergency room and Doctors Care,
10 didn't you?

11 A. Yes, sir.

12 Q. You also talked about your appointments
13 with Dr. Triana; did you not?

14 A. Yes, sir.

15 Q. And you also talked about the changing
16 of -- abruptly of -- from Dr. Triana to Dr. Bethea by
17 the insurance carrier, didn't you?

18 A. Yes, sir.

19 Q. And then you talked about the hearing.
20 And I'm looking really at paragraph -- by this time
21 down to Paragraph 9. You came to me and told me that
22 after you met with me that you had a problem. What
23 was that?

24 A. My neck started getting worse. I started
25 hurting worse. So I had to go find some medical

1 help.

2 Q. You had to find some help? You never told
3 me that, did you?

4 A. No, sir.

5 Q. And when was that?

6 A. That was about the fall.

7 Q. That was the fall after you signed that
8 Form 17?

9 A. Yes, sir.

10 Q. So that was the fall of 2011?

11 A. Yeah, '11.

12 Q. Who did you go to for some medical help?

13 A. I went to doctor -- at Charleston Medical
14 Center down in Georgetown County.

15 Q. What kind of doctor was he?

16 A. A family doctor.

17 Q. And why did you go to him?

18 A. Because I started hurting and I needed
19 some help. So I had to do something.

20 Q. What was hurting?

21 A. My neck and my back.

22 Q. And you went to --

23 A. Yes, sir.

24 Q. How long did you treat with --

25 A. Dr. Daniels.

1 Q. Pardon?
2 A. Daniels. Daniels.
3 Q. Yeah. How long did you treat with him?
4 A. About six months.
5 Q. So that would put you into about May of
6 2012?
7 A. Yes, sir.
8 Q. What happened next?
9 A. Dr. Daniels referred me over to
10 Dr. Brennan.
11 Q. He is a neurosurgeon?
12 A. Yes, sir, in Florence.
13 Q. Where was he located?
14 A. In Florence.
15 Q. Okay. Did you go to see Dr. Brennan?
16 A. Yes, sir.
17 Q. Why did you to see Dr. Brennan?
18 A. Dr. Daniels sent me over there because he
19 couldn't do no more good for my neck or my back and
20 that. So he sent me over to the specialist.
21 Q. Okay. And did Dr. Brennan treat your
22 neck?
23 A. Yes, sir.
24 Q. He did not treat your back, did he?
25 A. No, sir.

1 Q. He only treated your neck?

2 A. Yes, sir.

3 Q. Now, at this particular point in time, did
4 you have the money for a doctor?

5 A. No, sir.

6 Q. How did -- whose insurance did you use?

7 A. My wife's.

8 Q. She had some coverage by this time?

9 A. She had some coverage.

10 Q. Okay. And Dr. Brennan, the second time
11 you went to see him, did he also do a new MRI?

12 A. Yes, sir.

13 Q. And as a result of that MRI, what did he
14 tell you that he was going to do and what, in fact,
15 did he do?

16 A. He operated on my neck. He tell me I
17 needed it, so he operated on my neck.

18 Q. Okay. And that was in early June 2012?

19 A. 2012.

20 Q. Never told me any of that stuff, did you,
21 during 2012?

22 A. No. I didn't see...

23 Q. Dr. Brennan continued to treat you through
24 the end of 2012, didn't he?

25 A. Yes, sir.

1 Q. And released you?

2 A. Yes, sir.

3 Q. And that's -- can you tell the
4 Commissioner when your condition leveled off and you
5 had reached maximum medical improvement in your neck?

6 A. Around the end of the first -- well, '13.

7 Q. About the time you came to see me --

8 A. Yes, sir.

9 Q. -- you had leveled off? And that's the
10 time Dr. Brennan --

11 A. It -- yeah, it sort of leveled off.

12 Q. The last time he saw you, didn't he?

13 A. Yes, sir.

14 Q. Has your neck been improved because of
15 what Dr. Brennan did, the fusion he did to your neck?

16 A. Yes, sir.

17 Q. Did it help you?

18 A. I think, yes, sir.

19 Q. Okay. Has that situation been pretty
20 leveled off ever since?

21 A. Yes, sir.

22 Q. Okay. Now, in your affidavit you stated
23 that you did not seek any further medical treatment
24 until after the Commission had ruled against you.
25 That's when it starting getting worse that fall?

1 A. That's when it started, yes, sir.

2 Q. Did Dr. Brennan -- well, he couldn't have
3 told you that. I'm sorry. And all of that's in your
4 affidavit; is it not?

5 A. Yes, sir.

6 Q. Okay. Do you remember in your first
7 hearing Mr. Davis asked you about your neck?

8 A. Yes.

9 Q. And he asked you about your low back,
10 didn't he?

11 A. Yes.

12 Q. What did you tell him about your neck?

13 A. I told him my neck was bothering me, but
14 my back was bothering me more.

15 Q. That was the main thing?

16 A. Yes, sir.

17 Q. Do you remember saying, "I can deal with
18 the neck"?

19 A. Yes, sir. I remember telling him that.

20 Q. That was your position when you went
21 before the Commissioner in July of 2010?

22 A. Yes, sir.

23 Q. You were dealing with it then?

24 A. Yes, sir.

25 Q. It was later when it got worse?

1 A. Yes, sir.

2 Q. Now, when you went to see Dr. Daniels, the
3 family doctor, did he help you with your pain by
4 giving you some pain medication?

5 A. Yes, sir.

6 Q. What was he giving you?

7 A. He was writing prescriptions for Morphine,
8 Codeine, Prednisone.

9 Q. Pain medication?

10 A. Yes, sir.

11 Q. And that took you until you went to see
12 Dr. Brennan?

13 A. Yes, sir.

14 Q. He operated at C6-7 and he did an anterior
15 cervical diskectomy, not a fusion; is that correct?

16 A. That's correct.

17 Q. Okay. At some point in this record we
18 found in 2011, I think you had an IME, an independent
19 medical exam?

20 A. Yeah.

21 Q. For your back and neck?

22 A. Yes, sir.

23 Q. Was that in connection with your
24 disability case?

25 A. It was.

1 Q. Okay. And as a result of that IME, did
2 you get on disability?

3 A. Yes, sir.

4 MR. JENKINSON: Mr. Hannah, I think I have
5 asked you all the questions I have for now. Answer
6 any that Mr. Davis or the Commissioner might have for
7 you.

8 THE COURT: All right. Mr. Davis.

9 MR. DAVIS: Thank you.

10 CROSS-EXAMINATION

11 BY MR. DAVIS

12 Q. Mr. Hannah, we were talking about the
13 Form 17 that you signed back in 2011. Do you
14 remember testifying about that just a moment ago?

15 A. Yes, sir.

16 Q. Okay. And so just so we're straight, that
17 is your signature and it looks like it was witnessed
18 by your attorney; is that correct?

19 A. That's my signature.

20 Q. And you signed this after consulting with
21 your attorney; is that correct?

22 A. Yes, sir.

23 Q. Okay. You went into his office, you
24 talked to him and then you signed it in front of him;
25 is that correct?

1 A. I signed it in front of him, yes, sir.

2 Q. Okay. So are you implying -- and maybe I
3 misheard you earlier, that number three when -- here
4 it says you agree you're able to return to work on
5 February 10, 2010 -- that that is somehow incorrect
6 now?

7 A. Well, I'll say it like this, sir. I --
8 when I went into the office, I hadn't talked to my
9 lawyer in a long time. He told me, said I had to
10 sign a -- had a form that needed signed. And he told
11 me, said it was the form to stop my check. So I went
12 ahead signed it.

13 Q. Okay.

14 A. I didn't really pay that much attention to
15 it.

16 Q. You didn't read it?

17 A. I read some of it, but I didn't read all
18 that.

19 Q. Did you talk to your attorney about it?

20 A. Yes, sir, but I didn't --

21 Q. Okay.

22 A. -- ask him nothing about that.

23 Q. And you signed and you can read? You
24 understand the English language; is that right?

25 A. Yes, sir. I can read and understand the

1 language.

2 Q. Okay. So you understand that by signing
3 your name to something that you -- that means you
4 agree with what you're signing?

5 A. Yes, sir. But at the time, like I said, I
6 wanted -- I signed to stop the checks.

7 Q. And we also talked about your fall at home
8 and no question you fell. And did I understand you
9 to say that it wasn't a big deal, it wasn't a bad
10 fall and you didn't hurt yourself? Is that your
11 testimony?

12 A. Yes, sir.

13 Q. Okay. But you did cut your cheek, cut
14 your face? You fell hard enough to cut it?

15 A. Yeah. I scarred my cheek.

16 Q. And it bled; is that correct?

17 A. A little, yes.

18 Q. Okay. And so you found it significant
19 enough to tell both your occupational therapist,
20 which is APA 49, and your physical therapist, APA
21 48 --

22 A. Yes, sir.

23 Q. -- that you'd fallen at home; is that
24 correct?

25 A. Yes, sir.

1 Q. In fact, after that, you got a new
2 medication from your doctor; is that correct?

3 A. Yeah, but it wasn't for the cut. But yes,
4 sir.

5 Q. Okay. So earlier you were telling us
6 about what Dr. Bethea did for you. Now, can you tell
7 us -- earlier I was accused of being a doctor today.
8 So can you tell us what the accepted -- accepted
9 standard of medical care is for the treatment of a
10 suspected cervical spine injury?

11 A. I beg your pardon?

12 Q. Can you tell us what the accepted standard
13 of medical care is for the treatment of a suspected
14 cervical spine injury?

15 MR. JENKINSON: Your Honor, I object.
16 That's a medical conclusion and I don't think he's --
17 it's really an expert witness question of a doctor
18 and not a lay person with limited education.

19 MR. DAVIS: I'm just asking if he had
20 knowledge of that.

21 MR. JENKINSON: I'm not sure I could
22 answer that question.

23 MR. DAVIS: Just merely knowledge. Does
24 he know what --

25 THE COURT: He can answer the question.

1 THE WITNESS: No.

2 BY MR. DAVIS

3 Q. Okay. But you are aware that Dr. Bethea
4 was aware you had had injections in your neck; is
5 that correct?

6 A. Yes.

7 Q. You're aware he looked at your cervical
8 MRI; is that correct?

9 A. No.

10 Q. In fact, he also examined and did range of
11 motion testing, made you move around your neck --

12 A. Yes.

13 Q. -- back and forth and he did that on two
14 separates occasions; is that correct?

15 A. Yes.

16 Q. Okay. You testified you only saw
17 Dr. Triana three times, too; is that right?

18 A. I saw him three times after I saw
19 Dr. Bethea.

20 Q. After. Gotcha. And then, of course, your
21 testimony at the prior hearing was -- and I don't
22 want to misquote it. But it was -- the first hearing
23 you -- your testimony on Page 38 at the first hearing
24 on July 30th, 2010, you said, quote, "I can deal with
25 the neck. It doesn't bother me as bad as my back."

1 A. Yes, sir.

2 Q. Was that your testimony?

3 A. That was it.

4 Q. Okay. And do you recall testifying that
5 your neck -- in fact, twice you testified that your
6 neck was quote, "about the same," end quote, after
7 your release from Dr. Bethea until it worsened in the
8 fall of 2011; is that right?

9 A. Yes, sir.

10 Q. Okay. So clearly, just so we're straight,
11 your neck pain was stable and it definitely worsened
12 in the fall of 2011; is that correct?

13 A. Yeah. As time went on, it started getting
14 worse.

15 Q. But earlier you told us that at the time
16 you last saw Dr. Triana that you were ready to have
17 neck surgery?

18 A. Well, Dr. Triana told me I may need it.

19 Q. But I believe you testified -- and tell me
20 if I'm wrong, but that you wanted to have neck
21 surgery when Dr. Triana recommended it?

22 A. Yes, sir. I will had it.

23 Q. Okay. Now, without going into your -- the
24 reasons for your applying, you applied for Social
25 Security disability; is that correct?

1 A. Yes, sir.

2 Q. You began receiving those benefits in May
3 of 2011; is that correct?

4 A. Yeah, somewhere around there.

5 Q. Okay. Or before then. So you were
6 already approved for disability before your neck
7 worsened, then, if your neck worsened in the fall of
8 2011?

9 A. Yeah. Well, it wasn't approved, but I had
10 already put in.

11 Q. Okay. But you had already started -- you
12 had been approved before your neck worsened; is that
13 correct?

14 A. Yes, sir.

15 Q. Okay. And those were issues related to
16 your lower back; is that right?

17 A. Not sure.

18 Q. Okay. You don't know why --

19 A. Well, I know that they took me in for an
20 examination and she told me that I needed some help,
21 so I started getting some help.

22 Q. Okay. And then, of course, we established
23 you had your neck surgery on June 5th, 2012; is that
24 right?

25 A. Yes, sir.

1 Q. Okay. So if you agreed on the Form 17 you
2 could work on February 10th, 2010, you didn't have
3 your surgery for 847 days after that, after you
4 agreed you could return to work; is that right?
5 That's two years, four months, 847 days; is that
6 right?

7 A. Could you rephrase it?

8 Q. Sure. Now, you signed a document saying
9 you could return to work in February of 2010.

10 A. Okay.

11 Q. And isn't it true that you had your
12 cervical spine surgery 847 days or two years and four
13 months after you agreed you could return to work?

14 A. Yes, sir.

15 Q. Okay. And isn't it also true that at no
16 time did you ask your employer or the workers'
17 compensation carrier or workers' compensation for
18 approval to go treat with Dr. Brennan or receive any
19 treatment for your neck?

20 A. Like I said, I had lost my case with
21 workmen's comp. I had no source of income. I went
22 and tried to find some help.

23 Q. Okay. I understand that, but would you
24 agree, just so we're all clear, that you never asked
25 for permission or approval prior to having the

1 surgery from anyone, not even -- you didn't even let
2 your attorney know; is that correct?

3 A. No, sir. I did it on my own.

4 Q. Okay. And I understand -- you've
5 testified at the last hearing on Page 19: "No
6 problems with your left elbow, the pain is resolved"?

7 A. Yes, sir.

8 Q. And Dr. Bethea did the surgery for that;
9 correct?

10 A. Yes, sir.

11 Q. So you would agree Dr. Bethea did a pretty
12 good job on your elbow if it's not bothering you now?

13 A. It's not really bothering me, no, sir.

14 Q. Okay. But would you agree that Dr. Bethea
15 did a good job treating you for your elbow?

16 A. Pretty much.

17 Q. Okay. I'm sorry. Is that "pretty much"?

18 A. Yes, sir.

19 Q. Okay. And I believe you received weekly
20 workers' compensation checks for 200 -- I'm sorry.
21 \$381.32 a week until August 16th, 2011; is that
22 correct?

23 A. Yes, sir.

24 Q. Just going back to your treatment with
25 Dr. Triana in January of 2010, do you recall

1 reporting to Dr. Triana that the injections you had
2 in your neck helped you quite a bit?

3 A. No. They helped a little.

4 Q. They helped a little?

5 A. Yes, sir.

6 Q. So is that different than what you told
7 Dr. Triana, that they helped quite a bit when you
8 told them that on January 14th, 2010?

9 A. It didn't last.

10 MR. DAVIS: Okay. Those are all my
11 questions. Thank you, Commissioner.

12 THE COURT: Thank you.

13 MR. JENKINSON: I think I've asked all the
14 questions I need to ask today. Thank you, sir.

15 THE COURT: Thank you, sir. You may step
16 down.

17 THE WITNESS: Thank you, Your Honor.

18 (WITNESS EXCUSED.)

19 THE COURT: Other witnesses?

20 MR. JENKINSON: That's our case.

21 THE COURT: All right. Witnesses,
22 Mr. Davis?

23 MR. DAVIS: No witnesses from the
24 defendants.

25 THE COURT: All right. Then that

1 concludes this hearing.

2 (WHEREUPON, THE HEARING WAS CONCLUDED AT 4:05 P.M.)

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1 CERTIFICATE OF REPORTER

2
3 STATE OF SOUTH CAROLINA

4 COUNTY OF RICHLAND

5
6 I, SKYLET KEAN, COURT REPORTER AND NOTARY
7 PUBLIC, FOR THE STATE OF SOUTH CAROLINA, DO HEREBY
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11 TRANSCRIPT CONTAINS A TRUE RECORD OF SAID HEARING.
1213 I FURTHER CERTIFY THAT I AM NEITHER ATTORNEY
14 NOR COUNSEL FOR, NOR RELATED TO NOR EMPLOYED BY ANY
15 OF THE PARTIES CONNECTED TO THE ACTION, NOR AM I
16 FINANCIALLY INTERESTED IN THE ACTION.
1718 WITNESS MY HAND AT COLUMBIA, SOUTH CAROLINA,
19 THIS 3RD DAY OF MARCH 2015.
20
21
2223 SKYLET KEAN, COURT REPORTER
24 NOTARY PUBLIC FOR THE STATE OF
25 SOUTH CAROLINA
MY COMMISSION EXPIRES: 07/30/2024SKYLET KEAN (803)609-0134
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STATE OF SOUTH CAROLINA
BEFORE THE
SOUTH CAROLINA WORKERS' COMPENSATION COMMISSION
WCC No. 0908371

Timothy J. Hannah,)
)
Claimant,)
)
v.)
)
MJV Inc., Butler Trucking,)
)
Employer,)
)
and)
)
Palmetto Timber,)
)
Carrier/Defendants.)
-----)

FULL COMMISSION HEARING

Tuesday, November 17, 2015
11:05 a.m. - 11:23 a.m.

The Full Commission Hearing was heard before Commissioners Aisha Taylor, T. Scott Beck, and Melody James, Chair, at the Workers' Compensation Commission, 1333 Main Street, Suite 500, Columbia, South Carolina, on the 17th day of November, 2016, before M. Sean Cary, Court Reporter and Notary Public in and for the State of South Carolina.



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EXHIBITS

(There were no exhibits marked during the hearing.)

STIPULATIONS

It is stipulated and agreed that this deposition is being taken pursuant to the Administrative Procedures Act and the South Carolina Rules of Civil Procedure.



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1 COURT REPORTER: Today is Tuesday. This is South
2 Carolina Workers' Compensation case number
3 0908371. This is the case of Timothy J.
4 Hannah, Claimant, vs. MJB Inc., Butler
5 Trucking, Employer, and Palmetto Timber,
6 Carrier. The Appellant is the Claimant
7 represented by W.E. Jenkinson, III. The
8 Respondent is represented by R. Mark Davis.
9 Each side is allowed ten minutes for oral
10 argument and the appellant three minutes in
11 reply. You're requested to argue the grounds
12 of exceptions and stay within the record.

13 CHAIR: Mr. Jenkinson.

14 MR. JENKINSON: May it please the Commission. Thank
15 you, Commissioner. This case is rather
16 lengthy, but it's really in two parts. Part
17 one went up, actually, to the Court of Appeals
18 on a lumbar spine issue. And the decision of
19 the full Commission in that case is based
20 solely upon the lumbar spine. This part two,
21 which is before you today, is -- deals with the
22 cervical spine. It -- which is an uncontested
23 injury, unlike the lumbar spine, which was
24 contested. The issue before us today is
25 whether or not Mr. Hannah reached maximum



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1 medical improvement, whether or not he stained
2 -- sustained an impairment as a result of his
3 injury in the payment of his medical expenses.
4 It is unquestioned that the record is long, and
5 what I'd like to do first is focus on the
6 cervical spine injury, the care and treatment
7 of Dr. Triana, Dr. Bethea, and the care and
8 treatment of Dr. Brennan, the neurosurgeon.
9 The main issue on this appeal, really, the crux
10 of it and what it rotates around is the report
11 of Dr. Bethea, which was the basis of, to a
12 great extent, Commissioner McCaskill's opinion.
13 He only saw Mr. Hannah on three occasions. One
14 of them was for surgical procedure. The first
15 one was in December 2009, about six months
16 after the injury. And then in early January
17 6th, 2010. On the third visit, he pretty much
18 summarily found that Hannah had reached maximum
19 medical improvement with a zero impairment. If
20 you conclude Dr. Bethea is correct, this appeal
21 is virtually over. And conversely, if you
22 determine that reliance upon Dr. Bethea is not
23 well founded and conclude that Hannah did not
24 reach maximum medical improvement, as his other
25 two physicians suggested, and needed a fi- --



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1 spinal fusion surgery, then your conclusion
2 would be otherwise so. I want to focus first
3 on Dr. Bethea's conclusions. First, Hannah was
4 treated by Dr. Triana, who was the designated
5 physician: an orthopedist in Georgetown. Dr.
6 Triana had MRIs done. He treated him with
7 epidurals. He treated his -- both injuries in
8 his back for a numbers of months and somehow
9 out of the clear blue, Hannah -- Hannah says,
10 report to a Dr. Bethea for an unknown reasons
11 why. Why the carrier changed and left Triana,
12 we don't know. Maybe they didn't like what he
13 was concluding, which was that he did have
14 injuries to his spine. In any event, he goes
15 up there for surgery on his elbow. When he goes
16 in to see Bethea, Bethea says, nod your head:
17 he did this and did this (indicating), you've
18 reached 'maximum medical improvement. Well,
19 how's your pain? Nine of ten. Well, you need
20 some Darvocet? Yep. Prescribed Darvocet for
21 his pains, said come back in few days and we'll
22 operate on your elbow. He did and he shows
23 back up for a second visit on the 6th of
24 January. How's your pain? I still got my
25 pain. And he noted that he had a bulge in his



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1 cervical spine based on the notes of Dr.
2 Triana. But he says, you know, I'd like to see
3 that MRI, which he never did. Just made a sum-
4 -- summary conclusion. Triana, meanwhile, has
5 -- the same month, two weeks later, continued
6 to see Hannah. Saw him on the 14th of January,
7 25th of February, the 28th of April, and -- and
8 Triana concluded that he needed to stay out of
9 work. Kept him out work. He also was aware
10 that he had been seen by Bethea and what Bethea
11 did. And he said, I would recommend
12 considering a decompression and fusion of the
13 cervical spine, which is exactly what happened
14 back in 2012. Of course, Triana was not
15 allowed or didn't proceed because he was not
16 being paid after that. He was no longer --
17 there was no other medical care treatment
18 provided. Hannah suffered this uncontested
19 injury, which was well documented by Triana.
20 You saw in our brief and you will see why
21 Hannah thought he lost his case. He thought
22 when we'd lost when -- and had Commission
23 Roach's opinion the following June reversed,
24 and he thought, case over. I didn't actually
25 see him until after the Court of Appeals rule



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1 until we got a Form 21 from Mark over in 2012
2 and then -- well, you know, actually, I think
3 I first saw him in -- early January of 2013.
4 Never even saw him in that period of time.
5 When I did, he said, by the way, I've had back
6 surgery. I said, what? And you know the rest
7 of the story. It's in the brief, so. It's
8 critical that you look at the care and
9 treatment of the treating physicians because
10 Bethea was not even a treating physician, and
11 I think it's very important that -- that you
12 consider what they did. Now the next item is
13 the laches argument and the argument involving
14 res judicata. That deals not with the cervical
15 spine, that deals solely with the findings in
16 the adjudication that occurred in the first
17 full Commission hearing. The site that Mr.
18 Davis relies upon, it comes actually from the
19 cervical spine decision -- and matter of fact,
20 the Order of the full Commission in the first
21 hearing says, is restricted to the lumbar spine
22 only. And so they -- it can't be res judicata
23 where you don't have similar circumstances --
24 same parties but difference circumstances, and
25 there was prior adjudication of the cervical



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1 spine. That's why we're here today. So res.
2 judicata would not apply nor would laches,
3 which requires negligence by Mr. Hannah in
4 failing to report. And I think the record
5 clearly shows he was not negligent and that the
6 material -- the employer was materially
7 prejudice. There's been no prejudice shown,
8 and there is no prejudice, so laches would not
9 apply. So finally we -- we come to issue of
10 the hearing Commissioner erring and finding
11 that section 42-15-60 precludes the Claimant
12 from asserting a permanent impairment rating.
13 The affect of Commissioner McCaskill's ruling
14 is that the Claimant's not entitled to any
15 disability or wage loss under the act because
16 he chose his only medical care, and when he
17 did, he was barred from proceeding under the
18 Act. If you look at McCaskill's Order finding
19 of fact 19 and 21, it says, proceeding on his
20 own, Claimant abandoned recourse under the
21 Workers' Compensation Act. And also, he took
22 him out from the Workers' Compensation act so.
23 The basis of Commissioner McCaskill's decision
24 was, when he sought his own medical treatment,
25 he abandoned any relief he could obtain. And



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1 that's not what the section 42-15-60 provides.
2 It doesn't say anything about being able to
3 obtain an impairment rate. Commissioner
4 McCaskill never really considered in his Order
5 and his findings and conclusions anything that
6 Brennan said or Triana did. He only focused on
7 Dr. Bethea. And for the reasons why I've
8 advised, should not have relied upon that
9 decision. And -- and certainly a Claimant is
10 entitled to have his own impairment rating,
11 that the provision in the Act does not preclude
12 him from doing that. It also allows a
13 Commissioner to decide whether or not outside
14 medical care and treatment is appropriate. So,
15 that -- that is something for the Commission,
16 and the Commissioner has discretion to do that.
17 But here he implies that had no discretion once
18 Hannah did what he did, he took himself out of
19 the Act and he's not -- doesn't have the
20 protection of Act and what he deal with Brennan
21 and what Brennan said just doesn't count as far
22 as what we are here about. What we ask is that
23 you conclude that 42-15-60 does not prevent him
24 from choosing his physician and requiring
25 payment, and also that he -- we ask that he be



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1 allowed to receive an award for his impairment.
2 This is man. This is his third full Commission
3 hearing. He had an uncontested injury in a
4 rollover accident. He's been totally and
5 completely disabled as a result of this
6 accident. He's never worked since because of
7 his back injuries to his spine. And he's
8 entitled to compensation for his impairment
9 rating. He's entitled to payment for the
10 reason stated in our brief. Thank you.

11 CHAIR: Thank you, sir. Mr. Davis.

12 MR. DAVIS: Thank you, Madam Chairwoman, members of
13 the panel. This is really an argument -- or
14 the issue is how to un-ring a bell, you can't
15 do it. And there are fairness arguments and
16 then there are legal arguments to make as
17 well. So, let's just look at the fair --
18 fairness argument to give you -- fill in some
19 facts to give you kind of a good perspective
20 of how it unfolded. But of course, Bethea
21 was the authorized treating physician who
22 released Mr. Hannah back in 2010, January of
23 2010: addressed the elbow, addressed the
24 cervical spine. So in the meantime, we had
25 this fight over -- an appeal on the -- the



1 lumbar spine issue. On the -- well, Form 17
2 was signed by the Claimant on the advice of
3 counsel -- or with the advice of counsel
4 saying he could return to work on February
5 10th, 2010. So, you know, essentially at
6 that point, we've had so many hearings,
7 there's a lot of testimony. Mr. Hannah
8 testified at the July 2010 hearing that he
9 could deal with the neck, it doesn't bother
10 me as bad as my back. Just to give you an
11 idea of what the cervical spine injury looked
12 like at that point in time. He also
13 testified his neck was about the same after
14 he had been released from Dr. Bethea until it
15 worsened in the -- the fall, the season fall
16 of 2011. So, using his wife's insurance he
17 goes on his own to Dr. Daniels at Charleston
18 Medical Center. He admits he never sought
19 authorization, permission. He admits he never
20 even told his attorney. Dr. Daniels referred
21 him to Dr. Brennan who proceeded to do a
22 cervical fusion of June -- in June of 2012.
23 So surgery was three years after the accident
24 and two years and four months after Mr.
25 Hannah signed a document saying he could



1 return to work. So that's the fair in this
2 argument. But what does the law actually
3 say? And 42-15-60 obviously addresses medical
4 treatment, and that there -- there are two
5 components to it. One, it allows the carrier
6 to select an unauthorized provider, and it
7 also allows one exception where a Claimant
8 can go get medical treatment on his own, and
9 that's during an emergency: on account of the
10 employer's failure to provide the medical care
11 in an emergency, a physician other than
12 provided by the employer can be reimbursed by
13 the employer if ordered by the Commission.
14 So, that's the law. I was unable to find any
15 other exceptions that would allow -- setting
16 aside the fairness argument, that would allow
17 payment of the surgery that was unknown to
18 not only Defendants, but Mr. Hannah's own
19 attorney at the time. And of course, the
20 other arguments, the res judicata, collateral
21 estoppel, laches -- you know, laches is
22 perfect for the how to un-ring a bell case
23 because that is what laches was created for.
24 And essentially it says, if -- if material
25 prejudice has resulted from a Claimant's



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1 failure to act when he had an opportunity act
2 sooner. Here in this case, Mr. Hannah, was
3 represented by very able counsel. You know,
4 it's unfortunate that maybe he misunderstood
5 the -- the status of his case or the body
6 parts because of the length of time and the
7 protractive nature of the litigation. But
8 that alone does not make it the
9 responsibility of Defendants. Had Defendants
10 known about it or had -- had the claimant
11 sought authorization, they could've done a
12 number of things. They could've sought a
13 independent medical evaluation. They could've
14 sent him back to Dr. Bethea. They could've
15 deposed people, deposed witnesses, done more
16 investigation. All those opportunities were
17 lost. And so now we're -- we're -- we're
18 stuck with the result, unfortunately. So,
19 not only would it be unfair to order
20 Defendants to -- to pay for that surgery, but
21 it would also -- there's also no mechanism
22 under the law to do it. Now, in terms of the
23 res judicata argument, the Order from 2011,
24 full Commission Order dated, July 25th, 2011
25 simply states, the claimant received all



1 proper medical care that would tend to lessen
2 his period of disability. It doesn't specify
3 that it was for the back or the cervical
4 spine or the elbow. Because all those body
5 parts have been at -- at play. Only the
6 cervical spine and the elbow were admitted.
7 Additionally, there were -- there were some
8 discrepancies as to the level of the cervical
9 spine being treated. So, Triana references
10 the cervical spine level C5-6, Brennan did
11 surgery on C6-7 if I'm remembering correctly,
12 two different levels. Of course we took Dr.
13 Brennan's deposition. And his explanation was
14 that Triana must've been mistaken. Now
15 obviously, you know, having mind reading
16 powers over what Triana was thinking several
17 years prior. So, in this case I would just
18 ask that you affirm the -- the Order of
19 Commissioner McCaskill. Thank you very much.

20 MR. JENKINSON: I'll address briefly the items
21 covered by Mr. Davis. First, the Form 17.
22 The Form 17 was not relied upon by
23 Commissioner McCaskill in his decision. It
24 was -- it -- apparently, Commissioner
25 McCaskill accepted Mr. Hannah's understanding



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1 of the 17 and why he signed it and understood
2 why that did not preclude him from recovery.
3 It's not even covered in the Order.
4 Secondly, the act itself, we may have a
5 problem -- may have a problem as far as the
6 payment of the medical expenses but we don't
7 have a problem as far as the impairment is
8 concerned. The act does not preclude a
9 claimant from obtaining a separate independent
10 impairment rating. It's been done for years
11 and years and years, without even any case
12 law on it. It's just a routine thing because
13 the statute is liberally construed. It does
14 not say he could not obtain an impairment
15 rating. And that's exactly what we did from
16 Dr. Brennan, the neurosurgeon who operated on
17 his cervical spine. The laches argument,
18 again, I thought Mr. Davis was fair. He
19 understands Mr. Hannah was confused. It was
20 17 months that I never saw him that he didn't
21 have the benefit of counsel. He thought the
22 party was over and they'd turned out the
23 lights. He didn't know and he was stunned
24 when he came and said, I didn't come back and
25 tell you. And that's what his affidavit



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1 provides: I didn't know., I didn't know I had
2 a case anymore; I didn't understand that one
3 when I left you. So, the question here may
4 not be to pay for Dr. Brennan's medical care,
5 but it certainly would be one were he would
6 be entitled to an impairment rating for an
7 injury he unquestionably had and
8 unquestionably suffers from. In all fairness
9 and justice, he needs to be compensated for
10 it. Thank you.

11 CHAIR: That concludes this case.

12 (There being nothing further, the hearing concluded
13 at 11:23 a.m)
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SOUTH CAROLINA WORKERS' COMPENSATION COMMISSION
W.C.C. FILE NO.: 0908371

Timothy J. Hannah,	)	
Employee,	)	
Claimant,	)	
vs.	)	DEPOSITION OF
	)	TIMOTHY J. HANNAH
MJV, Inc./Butler Trucking, Inc.,	)	
Employer,	)	
and	)	March 30, 2010
Palmetto Timber Fund,	)	
Carrier,	)	
Defendants.	)	

Deposition of **TIMOTHY J. HANNAH**, taken by Doris Tompkins Brown, Certified Verbatim Reporter and Notary Public in and for the State of South Carolina, commencing at 2:40 P.M. on March 30, 2010, at the offices of Jenkinson, Jarrett and Kellahan, 120 West Main Street, Kingstree, South Carolina.

APPEARANCES

FOR THE EMPLOYEE/CLAIMANT:	W. E. Jenkinson, III Jenkinson, Jarrett & Kellahan Post Office Drawer 669 Kingstree, South Carolina

Doris Tompkins Brown

COPY

Certified Verbatim Reporter
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Sumter, South Carolina 29151
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COPY

APPEARANCES CONTINUED

FOR THE CARRIER/DEFENDANTS: R. Mark Davis
McAngus, Goudelock & Courie
Post Office 877
Charleston, South Carolina

* * * * *

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* * * * *

(No exhibits introduced into deposition)

(COURT REPORTER'S NOTE: --- INDICATES INTERRUPTION,
INCOMPLETE PHRASE, TRAILING OFF, INCOMPLETE SENTENCE)

- 1 A. Yes, sir.
- 2 Q. -- long-haul trucking?
- 3 A. Yes, sir.
- 4 Q. Okay. So, your job with Mr. Butler, that was a full-
- 5 time job?
- 6 A. Yes, sir.
- 7 Q. All right. So, are you still working with Butler?
- 8 A. Yes, sir.
- 9 Q. Okay. Are you still a truck driver with him?
- 10 A. Yes, far as I know, sir.
- 11 Q. Okay. Are you still driving semis?
- 12 A. Until the accident. Yes, sir.
- 13 Q. So, until 2000, July of 2009, last year, you drove
- 14 semi-trucks?
- 15 A. For Mr. Butler, yes, sir.
- 16 Q. Mr. Butler. So, after July of 2009, what have you
- 17 done?
- 18 A. Nothing.
- 19 Q. Okay. No work at all?
- 20 A. No, sir.
- 21 Q. Okay. But, as far as you know, if you went back to
- 22 Mr. Butler, you would still have a job there?
- 23 A. Yes, sir.
- 24 Q. Okay. So, how were you paid?
- 25 A. It mostly depended on loadage.

1 A. No, sir.

2 Q. Okay. Through your wife or something?

3 A. Yes, sir.

4 Q. Did you ever have any injections in your lumbar, in
5 your lower back?

6 A. Yes, sir.

7 Q. Okay. You did. How many have you had?

8 A. Three.

9 Q. Three? Did those help?

10 A. For a while, they would help, and then they really,
11 like, would do nothing.

12 Q. Between your left elbow, your neck, your left
13 shoulder, and your lower back, what is bothering you
14 the most at this point?

15 A. Today?

16 Q. Well, yeah, today and recently.

17 A. My back. Yeah, my back.

18 Q. Your back?

19 A. Yes, sir.

20 Q. Okay. That's the most painful thing for you?

21 A. That's about the most painful thing.

22 Q. If Dr. Triana or another doctor told you you needed
23 back surgery, would you want to go through it?

24 A. If it would help, yes, sir.

25 Q. Okay. What if they couldn't give you a guarantee?

1 there. I can't remember his name.

2 Q. Have you had your health insurance pay for any of Dr.
3 Triana's visits?

4 A. Yes, sir.

5 Q. Did you ever talk with anyone with your employer about
6 your back pain?

7 A. No, sir.

8 MR. DAVIS: All right. Those are all of my
9 questions for you. I appreciate your time.

10 MR. JENKINSON: I have no questions.

11 (THERE BEING NO FURTHER QUESTIONS, THE DEPOSITION WAS
12 CONCLUDED AT 3:27 P.M.).

13

MARK TRIANA

Page 1

BEFORE THE SOUTH CAROLINA
WORKERS' COMPENSATION COMMISSION

TIMOTHY J. HANNAH,
EMPLOYEE,
CLAIMANT,

VS.

WCC FILE # 0908371

MJV, INC./BUTLER TRUCKING,
EMPLOYER,
AND
PALMETTO TIMBER SI FUND
C/O WALKER HUNTER AND ASSOCIATES,
CARRIER,
DEFENDANTS.

COPY

DEPOSITION OF: MARK E. TRIANA, D.O.

LOCATION: 2185 NORTH FRASER STREET
GEORGETOWN, SOUTH CAROLINA

DATE: WEDNESDAY, MARCH 31, 2010

TIME: 5:32 P.M. - 6:48 P.M.

COURT REPORTER: LISA MARIE WEESNER

THE DEPOSITION IS TAKEN PURSUANT TO NOTICE AND/OR
AGREEMENT, IN THE ABOVE-ENTITLED CAUSE PENDING IN
THE ABOVE-NAMED COURT AND PURSUANT TO THE
SOUTH CAROLINA RULES OF CIVIL PROCEDURE.

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A P P E A R A N C E S

FOR THE CLAIMANT:
JENKINSON, JARRETT, & KELLAHAN, P.A.
120 WEST MAIN STREET
POST OFFICE DRAWER 669
KINGSTREE, SC 29556
BY: W.E. JENKINSON, III, ESQ.

FOR THE DEFENDANT:
MCANGUS, GOUDELOCK AND COURIE, I.L.C.
78 WENTWORTH STREET, SUITE 200
POST OFFICE BOX 877 (29402-0877)
CHARLESTON SC (29401-1428)
BY: MARK DAVIS, ESQ.

I N D E X

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E X H I B I T S

PG/LN	EX.	DESCRIPTION
38/11	D X 1	7-21-09 DOCTOR'S CARE
38/11	D X 2	8-28-09 DOCTOR'S CARE

** UH-HUH = AFFIRMATIVE
HUH-UH = NEGATIVE

1 Q YOU'VE TESTIFIED MANY TIMES ABOUT THE
2 CARE AND TREATMENT OF PATIENTS WHO RECEIVE
3 INJURIES LIKE TIMOTHY HANNAH?

4 A ABSOLUTELY.

5 Q AND YOU HAVE BEEN QUALIFIED AS AN
6 EXPERT WITNESS AS AN ORTHOPEDIC SURGEON IN STATE
7 AND FEDERAL COURTS?

8 A YES.

9 Q AND, OF COURSE, YOU'RE LICENSED TO
10 PRACTICE AS SUCH IN SOUTH CAROLINA?

11 A YES, SIR.

12 Q WE'D OFFER DR. TRIANA AS AN EXPERT
13 WITNESS IN THE FIELD OF -- OF ORTHOPAEDIC
14 SURGERY.

15 MR. DAVIS: NO OBJECTION.

16 BY MR. JENKINSON:

17 Q HAVE YOU HAD AN OPPORTUNITY TO PROVIDE
18 CARE AND TREATMENT FOR TIMOTHY HANNAH AS A RESULT
19 OF INJURIES HE RECEIVED IN A VEHICULAR ACCIDENT
20 ON JULY 14TH, 2009?

21 A YES, I HAVE.

22 Q DURING THE COURSE OF THIS SWORN
23 TESTIMONY, I WILL ASK YOU TO GIVE AN EXPERT
24 OPINION, OR OPINIONS, AND DO YOU UNDERSTAND THAT
25 IN EVERY INSTANCE YOUR OPINION MUST BE BASED UPON

1 DESCRIBED HIS OLECRANON BURSA THAT I DID EARLIER
2 THAT WAS KIND OF SWOLLEN AND RUBBERY.

3 Q WHAT'S THE REASON YOU BASED UPON WHAT
4 YOU HAD SEEN SO FAR OF HIS WEAK LEFT LEG?

5 A WELL, AT THAT TIME WITH HIM COMPLAINING
6 OF HIS BACK PAIN AND LEG PAIN, I FELT THAT IT WAS
7 COMING FROM HIS BACK --

8 Q THANK YOU, SIR.

9 A -- SOME PATHOLOGY IN HIS BACK.

10 Q SO, WHAT -- WHAT DID YOU DECIDE THAT --
11 THAT FAR AS FURTHER TREATMENT WAS NECESSARY?

12 A WELL, I -- I MEAN, I KNEW HE HAD THIS
13 LITTLE BULGE IN HIS NECK AND HE WAS GETTING NECK
14 AND SHOULDER PAIN AND I WANTED TO SEE HOW HE
15 RESPONDED TO EPIDURAL STEROID INJECTION IN THE
16 CERVICAL SPINE. AND I WAS CONCERNED ABOUT THIS
17 BACK AND LEG COMPLAINTS SO I WANTED TO GET AN
18 M.R.I. OF HIS BACK.

19 Q HOW ABOUT HIS WORK STATUS?

20 A AND WE FELT THAT HE WAS SYMPTOMATIC
21 ENOUGH THAT WE WERE GOING TO KEEP HIM OUT OF WORK
22 AND PUT HIM ON SOME PAIN MEDICINE AND HE HADN'T --
23 HE HAD RUN OUT OF ANY THAT HE HAD HAD BEFORE. AND
24 MY BIGGEST CONCERN WAS THAT HE COULDN'T GO BACK TO
25 WORK BECAUSE HE COULDN'T DRIVE AND ESPECIALLY

1 TAKING NARCOTIC MEDICATION. AND I SPECIFICALLY
2 SAID HE CANNOT LIFT, BEND, PUSH, CRAWL OR RIDE IN
3 VIBRATING VEHICLES UNTIL I SAW HIS M.R.I. OF HIS
4 BACK.

5 Q WAS THAT YOUR OPINION AT THAT TIME TO A
6 REASONABLE DEGREE OF MEDICAL CERTAINTY?

7 A YES.

8 Q NOW, LET'S GO TO THE NEXT VISIT. TELL
9 US ABOUT THAT VISIT -- OCTOBER 29TH.

10 A HE CAME FOR HIS FOLLOW UP OR HIS
11 SCHEDULED FOLLOW UP. HE SAID THE WORKMAN'S COMP
12 COMPANY WOULD NOT AGREE TO TAKE OWNERSHIP OF HIS
13 BACK PAIN. AND THEY WOULD GET HIS -- NOT
14 AUTHORIZE HIS LUMBAR M.R.I. AND HE HAD SAID WELL,
15 HE COULD GO THROUGH HIS REGULAR INSURANCE. AND I
16 SAID WELL, HOWEVER WE NEED TO GET IT PAID, WE NEED
17 TO GET THE M.R.I. OF HIS BACK.

18 Q OKAY. AND HE HAD --

19 A HE HAD GOTTEN ONE EPIDURAL FROM
20 DR. GRANT. SHE'S A PAIN THERAPIST THAT GIVES THE
21 CERVICAL EPIDURALS. AND HE DID FEEL THAT IT HAD
22 HELPED AT LEAST FOR A SHORT PERIOD OF TIME.

23 Q IS IT THE PATIENT'S RESPONSIBLE OR TO
24 YOUR OFFICE IS RESPONSIBILITY TO GET CLEARANCE
25 FOR WORKER'S COMP?

1 SAME TYPE OF PAIN IN HIS LEG AND HIS BACK BEFORE
2 THIS ACCIDENT THAT HE DID AFTERWARDS. AND IT
3 SEEMS TO BE RELATED TO THAT EVENT THAT ALL THIS
4 STARTED. THE FINDINGS ON THE M.R.I. ARE
5 CONSISTENT WITH A -- A RECENT CHANGE IN THE DISC.
6 WHETHER IT'S DE--- DEGENERATIVE OR NOT, THE
7 PROTRUSION OF THE DISC CERTAINLY CORRELATES WITH
8 HIS LEFT LEG SYMPTOM THAT HE STATES STARTED AFTER
9 THIS ACCIDENT. AND SO, I CAN CAUSALLY RELATE THE
10 TWO.

11 Q IS THAT TO A REASONABLE DEGREE OF
12 MEDICAL CERTAINTY AS TO THE ACCIDENT IN JULY
13 14 --

14 A YES --

15 Q -- 2009?

16 A -- IT IS.

17 Q NOW, YOU SAW HIM ON FEBRUARY 25TH.

18 A YES.

19 Q WHAT WAS HIS CONDITION WHEN YOU SAW HIM
20 THEN?

21 A WELL, HE WAS STILL COMPLAINING OF HIS
22 BACK AND LEG PAIN. HE STILL WAS COMPLAINING OF
23 SO--- HIS NECK AND ARM PAIN. IT WAS RADIATING INTO
24 HIS SHOULDER BLADES. I CAN ALSO SAY THAT HE WAS
25 PRETTY UPSET OR ANGRY OVER THE FACT THAT HE HAD

1 SEEN HIS DOCTOR IN COLUMBIA WHO HAD TOOK CARE OF
2 THE OLECRANON BURSA AND TOLD HIM THAT HE HAD NO
3 PROBLEMS WITH HIS NECK OR BACK. SO, HE WAS QUITE
4 IRRITATED WITH THAT -- WITH THAT REPORT. SO, IT
5 DIDN'T SURPRISE ME THAT HE WAS UPSET ABOUT THIS
6 NECK AND BACK AND LEG AND ARM AND EVERYTHING STILL
7 HURTING HIM. BUT HE WAS STILL COMPLAINING OF THE
8 SAME COMPLAINTS IN HIS NECK, HIS NECK, HIS BACK
9 AND HIS LEG.

10 Q IS HIS CONDITION THE SAME AS YOU SAW
11 HIM IN JANUARY OR WAS IT DETERIORATING?

12 A I WOULD SAY -- I WOULDN'T SAY IT'S ANY
13 WORSE THAN JUST SAY HE'S NO BETTER EITHER.

14 Q YOU TALKED TO HIM ABOUT SURGERY AND HE
15 -- YOU'RE NOT -- YOU DON'T THINK -- OR TELL US
16 WHAT THE SITUATION WAS REGARD TO FUTURE SURGERY
17 AS CONCERNED.

18 A WELL, WE TALKED AT LENGTH ABOUT THE FACT
19 THAT -- THAT HIS NECK SYMPTOMS WERE RELIEVED WITH
20 HIS EPIDURAL INJECTIONS WHICH GAVE ME VERY GOOD
21 EVIDENCE OR CONFIDENCE THAT IF WE PROCEEDING WITH
22 SURGERY OF HIS NECK THAT WE CAN GET A GOOD RESULT
23 AND RELIEVE HIS SYMPTOMS. HIS BACK AND -- AND LEG
24 PAIN I HAVE HAD SOME RECENT EXPERIENCE WITH A
25 DEVICE CALLED THE X-STOP WHICH SEPARATES THE

1 DAVIS. I REPRESENT BUTLER TRUCKING WHICH IS A
2 LOCAL COMPANY HERE IN GEORGETOWN. AND THEIR --
3 AND THE SOUTH CAROLINA TIMBER FUND WHO INSURES
4 THEM. I'M THE -- I'M NOT SURE IF I WASN'T
5 LISTENING AT THE BEGINNING, BUT ARE YOU BOARD
6 CERTIFIED IN ORTHOPEDIC SURGERY?

7 A YES, I AM.

8 Q OKAY. AND EARLIER THERE WAS SOME --

9 A AND RE-CERTIFIED.

10 Q OKAY.

11 A I'M THAT OLD.

12 Q EARLIER THERE WAS SOME TALK ABOUT
13 WHETHER WORKER'S COMPENSATION PAID FOR THE
14 INITIAL VISIT AND SUBSEQUENT VISITS. AND I THINK
15 IT'S BEEN ESTABLISHED THAT THEY DID NOT PAY FOR
16 HIS TREATMENT HERE WITH YOU. IS THAT CORRECT?

17 A I HAVE NO KNOWLEDGE OF THAT. I THOUGHT
18 THEY WERE PAYING FOR THIS TREATMENT.

19 Q OKAY. WELL --

20 A I MEAN, THE ONLY THING THAT I KNOW THAT
21 THEY DENIED PAYMENT FOR WAS HIS LUMBAR M.R.I.

22 Q OKAY. WELL, AND -- AND I UNDERSTAND --
23 WELL, TWO OF YOUR RECORDS MENTION THE CARRIER NOT
24 TAKING OWNERSHIP OF THE LUMBAR PAIN.

25 A YES.

SOUTH CAROLINA WORKERS' COMPENSATION COMMISSION

W.C.C. FILE NO. 0908371

- - -

TIMOTHY HANNAH, :
Employee, :
Claimant, :
vs. :
MJV/BUTLER TRUCKING, INC., :
Employer, :
and :
PALMETTO TIMBER S.I. FUND :
c/o WALKER, HUNTER & :
ASSOCIATES, Inc., :
Carrier, :
Defendants. :

- - -

Wednesday, June 2, 2010.

- - -

ORAL DEPOSITION OF JAMES F. BETHEA, M.D.,
taken at 1301 Taylor Street, Suite 3-O, Columbia,
South Carolina, commencing at 6:00 p.m., before
Cynthia First, a Federally Approved Registered
Professional Reporter, Certified Realtime Reporter
and Notary Public.

- - -

EVERYWORD, INC.
P.O. Box 1459
Columbia, South Carolina 29201
803-212-0012

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Representing the Defendant

(INDEX AT REAR OF TRANSCRIPT.)

- - -

1 A Okay. My name is James F. Bethea and
2 I've been in private practice of orthopedic surgery
3 in Columbia since 1982. I was certified by the
4 American Board of Orthopaedic Surgery in 1984.

5 Q And you currently practice here in
6 Columbia, South Carolina?

7 A That's correct.

8 Q And what's the name of your practice?

9 A Columbia Orthopedic Specialists.

10 Q And your clinical practice consists of
11 what?

12 A Orthopedic surgery.

13 Q Any specialties?

14 A It depends on what day of the week it is.

15 Q So a little bit of everything? General
16 orthopedics?

17 A Necks, backs, shoulders, elbows, feet,
18 hands.

19 Q And did you have the opportunity to treat
20 and evaluate Mr. Timothy Hannah?

21 A I did. I saw him for the first time
22 December 4th, 2009.

23 Q So the first time you saw him would have
24 been approximately five months after his truck
25 accident on July 14th, 2009; is that right?

1 A Approximately five months, yes, sir.

2 Q Now, I understand you treated him for
3 left elbow and cervical spine injuries; is that
4 correct?

5 A Yeah, I saw him for his neck, left
6 shoulder, left elbow and lower back.

7 Q And you were authorized by the workers'
8 compensation carrier to treat Mr. Hannah; is that
9 correct?

10 A That's correct.

11 Q Now, I understand you've actually
12 performed surgery on Mr. Hannah's left elbow; is
13 that correct?

14 A That's correct. That surgery was done
15 December 22nd, 2009.

16 Q And in your records it looks like
17 January 6th, 2010, in your narrative, you placed
18 Mr. Hannah at maximum medical improvement; is that
19 right?

20 A That's correct.

21 Q And also later in a Form 14-B, a form
22 filed with the Commission, you assigned an
23 impairment rating concerning Mr. Hannah's cervical
24 spine and left elbow; is that correct?

25 A Say that again.

1 Q Sure. In a Form 14-B that you filled out
2 and signed, you assigned -- you addressed
3 Mr. Hannah's impairment rating concerning his
4 cervical spine and left elbow; is that correct?

5 A Can I see the form?

6 Q Sure.

7 A I can't find a copy in this chart.

8 Q I'm showing you the Form 14-B (handing).

9 A Okay. Cervical spine and left elbow.

10 Q And did you complete this form?

11 A I did. That's my signature.

12 Q And on this form, you assigned or stated
13 that Mr. Hannah had a -- sustained a zero percent
14 medical impairment to the cervical spine and a zero
15 percent medical impairment to the left elbow.

16 A That's correct.

17 Q Is that your opinion today?

18 A It is.

19 Q And do you hold that opinion within a
20 reasonable degree of medical certainty?

21 A I do.

22 Q Also, within a reasonable degree of
23 medical certainty, do you feel Mr. Hannah is at
24 maximum medical improvement for his left shoulder
25 and neck injuries as a result of this truck

1 it could have masked a problem, as well, with his
2 back?

3 MR. DAVIS: Objection; speculation.

4 THE WITNESS: I mean, if he injured the
5 back, the back's going to hurt. And I would
6 think the ER physician would be careful enough
7 to evaluate it if he complained about it.

8 BY MR. JENKINSON:

9 Q Have you had patients come in later
10 complaining of back injuries and, in fact, had back
11 injuries after an accident and didn't necessarily
12 report them initially?

13 A That hasn't been my experience.

14 Q You've never had that in 30 years of
15 practice?

16 A Maybe a few days, but not six weeks.

17 Q Now, in workers' comp, workers' comp
18 pretty much dictates what you can treat and what
19 you cannot treat.

20 A That's correct.

21 Q What will you -- I think your form is in
22 this part of your file. What were you told that
23 you could treat Mr. Hannah for?

24 A Let's see. Procedure on left elbow
25 Debbie Craig noted December 11th, 2009.

1 Q Did she tell you you could treat anything
2 else?

3 A That's the only thing.

4 Q And did you treat anything else with
5 Mr. Hannah, other than his left elbow?

6 A Well, I evaluate all his other problems,
7 too.

8 Q And you do not treat any problems except
9 for the one you were authorized?

10 A Let's see. That's correct.

11 Q And if Doctors Care was only authorized
12 to treat his left elbow and his cervical spine,
13 that's all they can treat?

14 A That's correct.

15 Q And if Mr. Hannah had other complaints
16 that didn't fit those criteria of left elbow and
17 cervical spine, like his lumbar spine, they'd say,
18 "We're not authorized. That's not our problem"?

19 MR. DAVIS: Objection; calls for
20 speculation.

21 BY MR. JENKINSON:

22 Q Is that the way the system works with the
23 insurance carrier?

24 A That's the way it works, yes.

25 Q And they tell you what you can do and

1 authorization to proceed with something else.

2 Q Yes, sir. And if workers' comp says no,
3 that's just too bad?

4 MR. DAVIS: Objection.

5 THE WITNESS: Well, I think the doctor
6 has a moral obligation to seek the treatment
7 whether he's going to get paid or not.

8 BY MR. JENKINSON:

9 Q Let's go back. I want to call your
10 attention to your first visit. He was referred to
11 you for an elbow problem. Is there any particular
12 reason you know why his care was transferred from
13 Dr. Triana to you for the elbow and --

14 A I think mainly for a second opinion.

15 Q Second opinion?

16 A (Witness nods head.)

17 Q And is that what your file reflects?

18 A Well, I don't know what you mean by that,
19 but that's sort of the attitude I took in looking
20 through his information and examining him.

21 Q In your file, does it anywhere reflect
22 that he was sent to you for a second opinion or was
23 he switched from Dr. Triana to you for the care and
24 treatment?

25 A I don't think that was clear.

1 Q It's nowhere in there that reflects that
2 he was seeking a second opinion, was it?

3 A That was my impression why he was sent.

4 Q He was actually -- the authorization was
5 to treat his left elbow, was it not?

6 MR. DAVIS: Objection.

7 THE WITNESS: Let me look back and see.

8 BY MR. JENKINSON:

9 Q Make sure.

10 A I've got something from December 11th.
11 Let's see. He was seen here December 4, so that
12 would be after that.

13 I don't have anything prior to his office
14 visit, at least on this side of his chart. Let me
15 see if I can find anything else. Do you have
16 something I don't have?

17 Q No, sir. I just want to understand it.
18 I'm unaware of any second opinion. I was asking
19 you if there's anything in your file that reflects
20 that you were asked to do a second opinion or you
21 were asked to treat his elbow.

22 A Usually I get a patient before the
23 patient is sent here, but I don't see it right
24 here. Let me see. Okay. Let's see. Now, the
25 letter I have says he was sent for an IME.

1 Q Independent medical exam?

2 A That's correct. And that's all I have.

3 Q Do you do a lot of IMEs for workers' comp
4 insurance companies?

5 A Gosh, I guess I do probably two or three
6 a week.

7 Q Two or three a week?

8 A Yes.

9 Q Do they come from all over the state?

10 A They can. Usually from the Columbia
11 area.

12 Q Is that your primary area of practice,
13 doing IMEs for insurance carriers?

14 A No, sir.

15 Q Let's go back to this original
16 December 4th, 2009 record so that the Commissioner
17 will understand what you understood.

18 A Okay.

19 Q He presented turning over a truck, and
20 then had a laceration of his elbow, and x-rays were
21 done, as you put in here. And that was a history
22 you took from him and from the medical records?

23 A That's correct.

24 Q Were you aware of any previous medical
25 history in which Timothy Hannah injured or suffered

1 amputation of his right little finger, the tip of
2 it, I think, or maybe the whole finger; do you
3 recall?

4 A Let me see. That's the only thing I
5 have.

6 Q All right. Your impression was neck
7 pain, left shoulder pain, infected left elbow and
8 low back pain?

9 A That's correct.

10 Q Now, on page 3 of your December 4, 2009
11 notes, in the middle, "I would like to see the MRI
12 scans that have been done. He has one of his
13 cervical spine and it may be that he has one done
14 of his lumbar spine."

15 A Right.

16 Q Why did you want to see one of his lumbar
17 spine?

18 A Because he was complaining about his
19 lower back.

20 Q What would that have told you?

21 A Well, it would have told me if there had
22 been any trauma, like a fracture to his lower back.

23 Q Okay. How about trauma like a protruding
24 disk?

25 A Well, it would have shown that, too. The

1 December 22nd.

2 A Correct.

3 Q And 14, 15 days later, he was good to go
4 and had reached maximum medical improvement?

5 A That's correct.

6 Q Had you taken the sutures out?

7 A I'm trying to think. Let me look back
8 and see. We must have.

9 Q It does not reflect it in your records?

10 A I don't think so.

11 Q So he was --

12 A Well, I state at the top, "The incision
13 was well healed," so the sutures were removed.

14 Q Sir?

15 A Right here, line 2; first paragraph, I
16 said the sutures were removed.

17 Q Okay. He had sensitivity.

18 How about his range of motion and use of
19 his elbow? Did you make any examination of his
20 elbow with regard to extension, flexion and use of
21 his elbow, rotation?

22 A I don't think I have that recorded.

23 Q But yet you were able to state that he
24 could return to work without any evaluation of his
25 elbow injury?

1 A Well, I wouldn't say he wasn't evaluated.
2 I would say it's not recorded.

3 Q So you just said he reached -- 13, 14
4 days later, he was ready to go back to work?

5 A Let's see what I said.

6 Q Now, you also found no impairment to his
7 cervical spine?

8 A I think what I said was for three weeks
9 after I saw him, he is going to have to limit use
10 of left upper extremity to five pounds.

11 Q Did you feel the need to see him again?

12 A No, sir.

13 Q And you also found that he had reached
14 maximum medical improvement with no impairment as
15 to the cervical spine?

16 A That's correct.

17 Q And you made no findings as to his lumbar
18 spine?

19 A That's correct.

20 Q The only thing you were able to state is
21 that, in the last paragraph on your report of
22 January 6th, "I was unable to locate a lumbar MRI
23 scan, but I would be interested in reviewing it if
24 it were available."

25 A Right.

1 Q So you have no opinion as to his lumbar
2 spine in your final report?

3 A Well, I think I had a record from
4 Dr. Triana's office that an MRI scan had been done.

5 Q Right.

6 A And that's what I suggested I look at.

7 Q What difference would that make? Why did
8 you feel a need to see it if he'd already said he
9 had no problem?

10 A Yeah. I'm trying to cover all bases.

11 Q What would you --

12 A I would be surprised if it showed
13 anything, but I wanted to see it to cover all
14 bases.

15 Q If it showed something, would that change
16 your opinion?

17 A There's a possibility, if there was a
18 fracture.

19 Q If it was not a fracture but it was a
20 bulging disk, would that change your opinion?

21 A It may not.

22 Q Would a bulging disk result in
23 radiculopathy and weakness in the left leg?

24 A If it's a severely bulged disk.

25 Q Now, you also gave him Darvocet --

1 A Right.

2 Q -- to be taken every four hours as needed
3 for pain.

4 A That's correct.

5 Q So he was still having pain?

6 A Yes, sir.

7 Q And that pain was in his lumbar spine,
8 his cervical spine and elbow?

9 A Yes, sir.

10 Q Still in all the locations?

11 A Correct.

12 Q Significant enough for him to be taking
13 Darvocet?

14 A Yes, sir.

15 Q And when you did the 14-B form that you
16 were asked about earlier, you did not see him on
17 that occasion. You just looked at your records and
18 filled it in?

19 A That's correct.

20 Q Now, when you look at the records of
21 Dr. Triana, Dr. Triana first saw him on
22 September 30th, 2009. Do you have that record?

23 A I think I do. I'll see if I can find it.

24 Q I have a copy of it. It will be easier
25 for you. Hold on a second. This was the

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E X H I B I T S

(None marked.)

Before the South Carolina
Workers Compensation Commission

Timothy Hannah,
Employee,
Claimant,

V. WCC File # 0908371

MJV/Butler Trucking, Inc.,
Employer,
and
Palmetto Timber S.I. Fund c/o
Walker Hunter & Associates, Inc.,
Carrier,
Defendants.

Deposition of: James B. Brennan, M.D.

Location: 1204 East Cheves Street
Florence, South Carolina

Date: Wednesday, May 1, 2013

Time: 12:29 P.M. - 1:36 P.M.

Court Reporter: Lisa Marie Weesner

The deposition is taken pursuant to notice and/or
agreement, in the above-entitled cause pending in
the above-named court and pursuant to the
South Carolina rules of civil procedure.

Lisa Marie Weesner
Court Reporting Services
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Phone: (843) 229-4401
Fax: (843) 407-6108
Email - weesner0901@gmail.com

A P P E A R A N C E S

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E X H I B I T S

Pg/Ln	Ex.	Description
14/08	D x 1	Brennan - Statement/Records
17/09	D x 6	CT Scan Report - 7/14/09
21/15	D x 4	Doctor's Care Record
21/15	D x 5	Occupational Therapist Record
23/15	D x 2	Form 14B - Bethea
27/20	D x 3	Triana's Statement
38/24	P x 1	Georgetown ER Record
45/02	P x 2	MRI Report - 5/31/2012

** uh-huh = affirmative
 huh-uh = negative

1 S T I P U L A T I O N S

2 It is stipulated between Counsel that
3 this deposition is being taken pursuant to the
4 South Carolina rules of civil procedure; and that
5 all objections, except as to the form of the
6 question, are reserved until the time of trial.

7 It is also stipulated between Counsel for the
8 respective parties and the deponent that the
9 deponent will exercise the right to read and sign
10 this transcript.

11 Thereupon,

12 James B. Brennan, M.D.,
13 being first duly sworn by the court reporter, as
14 hereinafter certified, testified as follows:

15 E X A M I N A T I O N

16 BY MR. DAVIS:

17 Q All right. Dr. Brennan, my name is Mark
18 Davis and I -- I represent MJV, which is a trucking
19 company, and their insurance company. Today, I'm
20 going to be ask you some questions about your
21 treatment of Mr. Timothy Hannah, which I understand,
22 came to you, I believe it was, in May of 2012?

23 A Yes, I believe so.

24 Q And he was referred to you by his family
25 doctor. Is that correct?

1 A Yes. I believe it was Dr. Daniels.

2 Q Alfred Daniels?

3 A Yes. I believe that was the referral
4 slip.

5 Q Okay. Just for the -- the benefit of --
6 of the record, would you mind just briefly going
7 over your -- your background, training, education?

8 A Sure. I did my medical school training at
9 Albany Medical College in Albany, New York. I did a
10 general surgery internship at University of Oklahoma
11 Health Sciences Center in Oklahoma City, followed by
12 a five-year neurosurgery residency at the same
13 institution. And then I did a one-year spine
14 fellowship at Washington University, Saint Louis at
15 Barnes-Jewish Hospital. And since July of 2000,
16 I've been employed here at Florence Neurosurgery and
17 Spine. I'm board certified in 2004.

18 Q Okay. And -- and we're here at your --
19 your practice, Florence Neurosurgery and Spine. Is
20 that correct?

21 A Yes. Yeah, I'm sorry.

22 Q Is your practice all clinical or do you do
23 other things as well?

24 A Majority clinical.

25 Q Okay. What is -- do you have a

1 speciality?

2 A I do general neurosurgery, but being I did
3 the spine surgery fellowship, I probably do, you
4 know, more spine than -- than general.

5 MR. DAVIS: Okay. All right. I think
6 we'll -- we both agree, or can stipulate, that
7 Dr. Brennan's an expert in the field of
8 Neurosurgery.

9 MR. JENKINSON: Absolutely.

10 BY MR. DAVIS:

11 Q Now, when -- when you saw mister --
12 docto--- when you saw Mr. Hannah, I understand he
13 was -- well, what was he complaining of when he
14 presented to you?

15 A Let me get to my note.

16 Q Sure.

17 A At that time, he presented -- what I say,
18 chronic pain. He had stated that he had had a
19 significant motor-vehicle accident in -- he -- from
20 my notes, April 2009, in which he had left shoulder
21 and arm injuries as well as injuries to his legs.
22 He had chronic pain in his neck, left arm, as well
23 as back, right hip and bilateral lower extremities.
24 So that was his main complaint at that time. And,
25 apparently, his pain was worsening.

1 so -- and he was still at this time, so I
2 recommended that he undergo some injections of his
3 lumbar spine again. And I think at the visit on
4 January 28th, I stated that his carrier would not
5 approve him at that time.

6 Q Uh-huh.

7 A And then, on March 27th, 2013 -- and he
8 was still trying to get approval to get some more
9 injections because he was still having the back
10 pain. You know, his neck still appeared stable at
11 that time, so those -- that's sort of the crux of
12 those two visits.

13 Q Okay. I mean, overall, as far as his
14 recovery from the neck surgery, is he doing poor or
15 fair, good, great?

16 A I think he's doing fair. I think he had
17 some improvement. You know, he had -- he had
18 symptoms for a long time, so I think he still had
19 some mo--- you know, some chronic pain, but he
20 seemed to be pretty happy with his progress --

21 Q Great.

22 A -- but was still noting the back issues as
23 I stated.

24 Q When you mentioned the -- the carrier
25 wouldn't approve the injections, do you have any

Before the South Carolina
Workers Compensation Commission

Timothy Hannah,
Employee,
Claimant,

V.

WCC File # 0908371

MJV/Butler Trucking, Inc.,
Employer,
and
Palmetto Timber S.I. Fund c/o
Walker Hunter & Associates, Inc.,
Carrier,
Defendants.

Deposition of: James J. Brennan, M.D.

Location: 1204 East Cheves Street
Florence, South Carolina

Date: Wednesday, June 26, 2013

Time: 11:43 A.M. - 12:24 P.M.

Court Reporter: Lisa Marie Weesner

The deposition is taken pursuant to notice and/or
agreement, in the above-entitled cause pending in
the above-named court and pursuant to the
South Carolina rules of civil procedure.

Lisa Marie Weesner
Court Reporting Services
1525 Madison Avenue
Florence, SC 29501
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Email - weesner0901@gmail.com

A P P E A R A N C E S

For the Claimant:

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By: R. Mark Davis, Esq.

Also Present: William H. Cox

I N D E X

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E X H I B I T S

Pg/Ln	Ex.	Description
04/17	P x 3	MRI - 9/16/09
05/21	P x 4	Brennan Letter - 5/9/13

** uh-huh = affirmative
huh-uh = negative

1 Q And is the disc and the report correct,
2 meaning both par--- in agreement is par---

3 A Yes. The disc and the report are correct.

4 Q Now, what did you learn from Plaintiff's
5 Exhibit Number 3, with respect to the location of
6 the injury? And, I've assumed, based on
7 Dr. Triana's notes, this was the report he was
8 looking at as well --

9 A Uh-huh.

10 Q -- which is Plaintiff's 3.

11 A Basically, that confirmed to me that the
12 area where I did the surgery, which was C6-7, had
13 been previously injured -- or was consistent with
14 being previously injured by those MRI findings.
15 There was some confusion because I stated
16 Dr. Triana's notes said C5-6, I'm not sure if that's
17 a typo or -- or just a misstatement on his part, but
18 by my review, C6-7 was the injured level by that MRI
19 scan, and probably what Dr. Triana was looking at in
20 his note.

21 (Plaintiff's Exhibit Number 4
22 was premarked for identification.)

23 Q Now, as a result of reviewing those notes,
24 did you send me a letter of May 9th, 2013, which --

25 A Yes.

1 31st.

2 Q Okay.

3 A Yes.

4 Q Okay. So in your review of the 2009 MRI
5 film, does that confirm any problems at -- at C5-6
6 level of the spine?

7 A The -- of -- of the -- the 2012 MRI?

8 Q That's wa--- actually, the 2009?

9 A The 2009 states that there's minimal disc
10 bulge and -- and there was a little bit of mildness
11 degeneration of C5-6, but --

12 Q Okay.

13 A -- severe as C6-7.

14 Q Okay. And I believe that he terms it as a
15 small disc bulge?

16 A Minimal disc bulge is the word, yeah.

17 Q Minimal. Okay. And, of course, we've
18 established Dr. Triana has been referring to the
19 C5-6 level of the spine. Is that correct?

20 A Yes.

21 Q And -- and you mentioned -- is there
22 anyway to know what Dr. Triana was thinking, do you
23 have anyway of knowing of that?

24 A I -- you know, I'm sure I've had reports
25 where either it's gotten transcribed wrong or I

1 stated wrong.

2 Q Uh-huh.

3 A You know, I don't think it was done -- I
4 know Dr. Triana, so I -- I think it was -- from
5 after reviewing the actual films and seeing the
6 report, it was probably some type of typographical
7 error or dictation error.

8 Q Have you talked with Dr. Triana directly
9 about this case?

10 A I've not.

11 Q Okay. And you've had the chance to review
12 his records from back in 2009 and 2010. Is that
13 correct?

14 A Yes.

15 Q Were you aware that on two separate
16 occasions in both the record of September 30th, 2009
17 and record of January 14th, 2010, previously marked
18 as Defendant's Exhibit Number 3, that he mentioned
19 the C5-6 level of the spine in -- in both reports?

20 A Yeah, can I look at that?

21 Q Sure.

22 A Yeah. The only thing I would state on
23 that is -- and I'm just as guilty of it, especially
24 with the new electronic medical records --

25 Q Uh-huh.

1 It's -- it's hard to say.

2 Q Uh-huh.

3 A And like I said, I -- I don't want to
4 assume to question him, but I -- I think it -- you
5 know, from looking at the actual film, C6-7 was the
6 level -- the radiologist reported that it was C6-7
7 and --

8 Q Uh-huh.

9 A -- I'm -- I'm pretty firmly convinced that
10 it's C6-7 and I think that might have just been a
11 carryover of a dicta--- you know, a lot of times --
12 dictation, say, oh, yeah, he had a disc at C5-6 and
13 you re--- you know, it's --

14 Q Yeah.

15 A -- you sort of continue the error.

16 Q Well, that -- that's a guess, you don't
17 really know what he was --

18 A Yeah. I -- I would only assume, yeah.

19 Q Okay. Is it --

20 A But I'm -- but I'm -- thoroughly know that
21 it's -- C6-7 was the level on the MRI from reviewing
22 the film and the reading the report.

23 Q Are -- are you aware that Dr. Triana
24 described the MRI findings at C5-6 as a small disc
25 protrusion, which is the same description as in the

1 MRI of -- of five -- I'm sorry, strike that. Mind
2 if I see the 2009 --

3 A Yeah, this --

4 Q -- MRI? I'm sorry.

5 A -- that's not the one.

6 Q And I'll come over here. He described it
7 as a minimal disc bulge as you stated. Is that
8 correct?

9 A He describes as a degenerated disc at C5-6
10 with small disc protrusion and then he states that
11 it may well be causing his neck and shoulder
12 symptoms, so --

13 Q Okay.

14 A -- and I can't get into his head on that.

15 Q Sure. But wouldn't small disc protrusion
16 be different than a broad-base shallow posterior
17 disc osteophyte complex?

18 A It's -- it's all interpretation. It's how
19 the radiologist saw it, or -- or he saw it. And,
20 like I said, I -- I can't -- I know what I saw and I
21 agree with the m--- with the radiologist report and
22 description --

23 Q Sure.

24 A -- more than his description.

25 Q And -- and there were two different

William B. Naso, MD
James J. Brennan, MD

R. Blake Kline, MD

May 9, 2013

Mr. W.E. Jenkinson, III
Jenkinson, Jarrett & Kellahan, PA
120 West Main Street
Post Office Drawer 669
Kingstree, South Carolina 29556

Dear Mr. Jenkinson:

This letter is in response to your letter dated May 6, 2013 in reference to Mr. Timothy Hannah, data of birth May 30, 1958, in which you asked me to follow up after my recent deposition regarding an MRI scan of his cervical spine dated September 16, 2009.

You have asked that I comment upon whether Mr. Hanna suffered to a reasonable degree of medical certainty, and injury to his cervical spine at C6-7 arising from the motor vehicle accident of July 14, 2009. During the deposition I reviewed a record from Dr. Triana, which reported a degenerated disk at C5-6, which did not appear to be consistent with what I felt, was his injury at the C6-7 level. After reviewing the MRI report, and the actual MRI scan I believe Dr. Triana was mistaken in his dictation. The report and the actual scans clearly show disk problems at C6-7, with lesser changes at C5-6. With that in mind I do believe to a reasonable degree of medical certainty that the patient's injury did arise from the motor vehicle accident of July 14, 2009.

This would also address your second question, in that the care and treatment rendered in 2012, including the surgical procedure was reasonable and necessary to treat his injuries.

As far as a rating I would rate the patient at 28% related to his cervical spine, based upon the AMA guidelines.

I also believe within a reasonable degree of medical certainty that the patient is at increased risk and need for further treatment in the future, including medications,

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min at higher risk for adjacent segment changes, which could require the above-stated interventions.

I hope this addresses all of the issues, and if I can be of any further assistance please feel free to contact me.

Sincerely,

A handwritten signature in dark ink, appearing to read 'JB', is written over the word 'Sincerely,'.

James J. Brennan, M.D.

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM SOUTH CAROLINA
WORKERS' COMPENSATION COMMISSION

Commissioners Melody L. James, T. Scott Beck, and Aisha Taylor

W.C.C. File No. 0908371

Timothy Hannah, Employee, Claimant Respondent,

v.

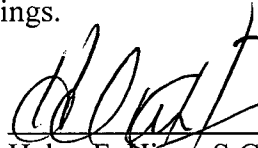
MJV, Inc./Butler Trucking, Employer, and
Palmetto Timber S.I. Fund c/o

Walker, Hunter & Associates, Inc., Carrier, ... Appellants.

PROOF OF COMPLIANCE

The undersigned hereby certifies that the Record on Appeal filed in this matter contains all the material proposed to be included by the parties to this matter and does not include any other material. The undersigned further certifies that the Record on Appeal filed in this matter complies with the South Carolina Supreme Court's April 16, 2014 Order re: Revised Order Concerning Personal Identifying Information and Other Sensitive Information in Appellate Court Filings.

June 16, 2017



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