

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM SOUTH CAROLINA WORKERS'
COMPENSATION COMMISSION

Appellant Panel of Full Commission

WCC Number: 1413546
Appellant Case No. 2018-002283

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SC Court of Appeals

Timothy A. McDuffie, Employee,.....Respondent,

v.

Johnson Food Services, LLC, Employer,

and

Great American Alliance Insurance Co./Strategic Comp., Carrier,.....Appellants.

RECORD ON APPEAL

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DECISION AND ORDER
OF THE
SOUTH CAROLINA WORKERS' COMPENSATION COMMISSION
W.C.C. FILE NUMBER: 1413546

TIMOTHY A. MCDUFFIE, EMPLOYEE, CLAIMANT,

VERSUS

JOHNSON FOOD SERVICES, LLC, EMPLOYER,

AND

GREAT AMERICAN ALLIANCE INSURANCE CO./STRATEGIC COMP., CARRIER,
DEFENDANTS.

HEARING: Held on October 29, 2015 in Columbia,
South Carolina.

APPEARANCES: Claimant represented by Andrew N.
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Columbia, South Carolina 29211.

Defendants represented by E. Ros Huff,
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PURPOSE OF HEARING: To determine issues outlined in Forms 50
and 51, as well as other relief the
Commission determines to be just/proper,
including whether: (a) Mr. McDuffie's
compensable accident has produced both
back and left leg (knee) injury
components; (b) he requires further
treatment for each of these injury
components; (c) maximum medical
improvement has been attained relative
to either injury component; and (d) he
is entitled to any period of temporary
total disability compensation.

DECISION AND ORDER BY: The Honorable Aisha G. Taylor,
Commissioner.

FILED: May 16, 2016

Form 30 dte
5-27-16
CAW

STATEMENT OF THE CASE

On September 19, 2014, Claimant, Timothy A. McDuffie, sustained a compensable accident while performing his job duties for Defendant, Johnson Food Services, LLC, in Richland County, South Carolina. As this Employer and its Carrier, Great American Alliance Insurance Company, acknowledged the compensability of a back injury component, they subsequently authorized Mr. McDuffie's receipt of certain medical treatment through several providers, primarily Drs. Michael W. Peelle of Moore Orthopaedics and Stewart Young of First Care.

By Form 21 dated May 8, 2015, Defendants sought assessment of Mr. McDuffie's degree of residual disability based upon their contention he had reached maximum medical improvement effective December 31, 2014. In response, Mr. McDuffie, per Form 50 dated June 12, 2015, maintained: (a) the consequences of his compensable accident had created both back and left leg injury components; (b) he required further treatment for each of these injury components in accordance with the recommendations of Drs. Christopher G. Mazoue, John F. Johnson, Ezra B. Riber and Nancy R. Lembo, to the extent he had not reached the point of maximum medical improvement; (c) as Defendants had declined to provide this medical care, the current circumstances warranted Commission designation of appropriate treating physicians; and (d) the issue relative to his degree of residual permanent disability was consequently not ripe for determination. This Form 50 prompted

Defendants' filing of a July 10, 2015 Form 51 through which Defendants again denied Mr. McDuffie's need for further medical care.

A hearing relative to Defendants' Form 21 was initially scheduled for July 29, 2015, but postponed in order to allow Defendants to pursue further discovery. When additional time was required to engage in this discovery, Defendants withdrew their Form 21, resulting in the cancellation of an August 31, 2015 hearing.

Although this claim was reset for hearing on October 29, 2015 in Columbia, South Carolina to address the grounds identified by Forms 50 and 51, counsel for Defendants requested postponement of this hearing for the purpose of engaging in additional cross-examination of Dr. Lembo relative to a report generated in conjunction with her October 13, 2015 reexamination of Mr. McDuffie. While Mr. McDuffie's counsel primarily argued the content of the subsequent report was completely consistent with this physician's previously stated opinions, to the extent no further discovery was either justified or necessary, he alternatively agreed to exclude the October 13, 2015 report from evidence, so as to obviate the need for redeposing Dr. Lembo.

In response to this remedial offer of compromise, defense counsel: (a) again prayed for continuance of the hearing pending receipt of his client's consent to this proposed resolution; and (b) argued that, notwithstanding Mr. McDuffie's counsel's offer

to exclude the contested report, this evidence could not be omitted from the record, absent his consent, per S.C. Code Ann. Regs. 67-612 (D) (2012).

By way of reply, Mr. McDuffie's counsel explained: (a) defense counsel's argument, though technically accurate, was clearly inconsistent with the rationale underlying this portion of Reg. 67-612 (i.e., preventing exclusion of evidence based upon reliance of one party on another's listed evidentiary submissions); (b) his client was missing work due to Defendants' refusal to honor physical limitations outlined by nonauthorized physicians (whose opinions as to causally related medical needs constituted the basis for his seeking further treatment); and (c) while he had no objection to allowing defense counsel leave to obtain his clients' consent to the evidentiary exclusion, the current circumstances warranted conducting the scheduled hearing, including the receipt of Mr. McDuffie's testimony (See, Hearing Transcript, pp. 10 - 14). In this regard, defense counsel acknowledged his awareness of Mr. McDuffie's out-of-work status due to medical restrictions, stating: (a) "I want to sit down and talk to the employer, see if we can put him back to work, because the guy did work for a period of time"; and (b) "I would like to accommodate him." (See, Hearing Transcript, p. 15).

After considering counsels' respective arguments, the undersigned concluded the most reasonable/appropriate course of action entailed: (a) proceeding with the hearing on October 29,

2015; and (b) affording Defendants the opportunity to obtain additional deposition testimony from Dr. Lembo (which they ultimately advised was unnecessary given their post-hearing consent to exclusion of her October 13, 2015 report).

During the course of this hearing, the undersigned received testimony from Mr. McDuffie. Defendants elected to rely upon the medical evidence submitted by the respective parties pursuant to the Administrative Procedures Act, including multiple medical depositions, and offered no witnesses.

STIPULATIONS

At the commencement of the hearing, counsel for the respective parties stipulated:

1. The purpose of the hearing was to determine the issues falling within the purview of Forms 50 and 51.
2. Notice of the hearing was timely and properly served upon the parties of interest.
3. Venue, set in Richland County, was proper per S.C. Code Ann. Section 42-17-20 (1976).
4. Determination of Mr. McDuffie's average weekly wage/compensation rate shall be held in abeyance per agreement of the parties.

MEDICAL EVIDENCE/APA SUBMISSIONS

The following documents were submitted into evidence pursuant to the Administrative Procedures Act, without objection, by the respective parties:

<u>Exhibit No.</u>	<u>Description</u>	<u>Page Nos.</u>
APA 1:	September 23, 2014 Statement of Mr. Ernest Roberts	1
APA 2:	June 10, 2015 - July 13, 2015 reports/responses of Dr. Christopher G. Mazoue of the University of South Carolina School of Medicine's Department of Orthopaedic Surgery	2 - 7
APA 3:	January 12, 2015 - October 12, 15 reports/responses of Dr. Ezra B. Riber of Palmetto Pain Management, LLC	8 - 15
APA 4:	June 11, 2015 - July 20, 2015 reports/responses of Dr. John F. Johnson of Southeastern Spine Institute	16 - 19
APA 5:	July 9, 2015 - July 15, 2015 reports/responses of Dr. Nancy R. Lembo of Carolina Spine & Sport Rehabilitation Specialists, P.A.	20 - 23
APA 6:	December 17, 2014 - December 31, 2014 reports of Dr. Michael W. Peelle of Moore Orthopaedics	24 - 27
APA 7:	September 20, 2014 report from Medcare Urgent Care Center	28 - 31
APA 8:	September 20, 2014 reports from Palmetto Health Baptist	32 - 52
APA 9:	September 24, 2014 - November 28, 2014 reports of Dr. Stewart Young of First Care	53 - 67
APA 10:	December 19, 2014 report from InMed Diagnostic Services	68
APA 11:	November 5, 2014 - November 24, 2014 reports from Carolina Physical Therapy	69 - 74

APA 12:	September 24, 2014 - December 31, 2014 reports obtained from Moore Orthopaedics (including September 24, 2014 and November 28, 2014 reports of Dr. Stewart Young, as well as December 17, 2014 - December 31, 2014 reports of Dr. Michael W. Peelle and other forms completed and/or generated in connection with evaluation on these dates)	75 - 100
APA 13:	September 24, 2014 - November 28, 2014 reports/notes from Dr. Stewart Young and First Care	101 - 115
APA 14:	September 23, 2014 records from Palmetto Health Baptist	116 - 119
APA 15:	September 23/24, 2014 report of Dr. Jose Luis Plaza of Palmetto Health Baptist	120 - 121
APA 16:	September 20, 2014 reports/notes from Medicare	122 - 127

Additionally, Defendants submitted the following deposition transcripts: (a) Nancy R. Lembo, DO (September 10, 2015; 62 pgs. including exhibit); (b) Christopher G. Mazoue, M.D. (October 19, 2015; 40 pgs.); (c) John F. Johnson, M.D. (October 22, 2015; 27 pgs.); and (d) Ezra B. Riber, M.D. (October 26, 2015; 74 pgs. including exhibit).

FINDINGS OF FACT

Based upon the testimony of Mr. McDuffie, my review of the documentary evidence submitted by the respective parties pursuant to the Administrative Procedures Act, consideration of the deposition testimony and inspection of the Commission file relative to this claim, I FIND AS FACTS:

1. On September 19, 2014, Mr. McDuffie sustained compensable injuries to his back and left leg when he tripped over an exposed pipe at the Johnson Food Services, LLC facility located at Fort Jackson military base in Richland County, South Carolina. Specifically, he: (a) tripped when his left foot came in contact with the exposed pipe; (b) fell forward prior to catching himself before hitting the ground; (c) perceived a pop while attempting to maneuver his left leg away from the pipe; and (d) soon developed pain involving his back and left leg.

2. At the time he sustained these compensable injuries, Mr. McDuffie was performing duties arising out of and within the course and scope of his employment with Johnson Food Services, LLC, where he has worked for approximately two years.

3. Shortly after sustaining this injury, Mr. McDuffie was directed by his Employer to Medcare Urgent Care Center (September 20, 2014), where he: (a) reported the presence of back and left leg pain following this trauma; (b) exhibited a "[p]ostive . . . [left] leg raised test" response; and (c) received a prescription for Naprosyn in conjunction with instruction to apply warm compresses to his back.

4. When his pain persisted, Mr. McDuffie sought further examination through the Palmetto Health Baptist Emergency Room (September 23, 2014), where he: (a) apprised the attending physician of his injury mechanism ("tripping . . . and catching himself on his left lower extremity but jarring his left lower

back buttock area . . . [with resulting] pain down his left lower extremity"); (b) indicated the previously prescribed Naprosyn had "not been helping much"; (c) displayed "some palpable reproducible tenderness at the left sciatic notch . . . with a positive left legged straight leg raise" test response; and (d) received an additional prescription (Flexeril).

5. On the following day, Mr. McDuffie was examined, per Defendants' directive, by Dr. Stewart Young of First Care, who: (a) noted the presence of "mild medial left knee pain, some left thigh muscular pain and some low back pain"; (b) was similarly apprised of pain with standing/weightbearing on the left leg; (c) performed a physical examination which revealed "pain in the left thigh musculature with weightbearing/walking", "tenderness over the MCL area" and lumbar paraspinous tenderness/spasm; and (d) placed him on sedentary duty work status.

6. Inspection of Dr. Young's September 29, 2014 and October 13, 2014 treatment notes further confirms: (a) persistent reports of both left knee and back pain; (b) the presence of both left leg and low back symptoms on clinical examination; and (c) this physician's attempt to treat these symptoms with physical therapy.

7. Upon reexamining Mr. McDuffie following several physical therapy sessions (November 28, 2014), Dr. Young: (a) noted this therapy had not only proved ineffective, but also "made his left knee worse"; (b) observed the "left lumbar

paraspinous musculature [was] . . . tense and tender to palpation", "pain . . . [and tenderness] in the medial anterior knee just lateral to the patella" and "tense"/"tender" left thigh musculature; and (c) restricted him to sedentary work duties, while recommending orthopaedic evaluation for "[p]ersistent low back, left thigh, and left knee pain"

8. Approximately two weeks following this referral (December 17, 2014), Defendants directed Mr. McDuffie for evaluation by Dr. Michael W. Peelle of Moore Orthopaedics, who: (a) noted the September 19, 2014 tripping injury, as well as resulting pain involving his back, left buttock, left thigh and left leg; (b) observed limited lumbar flexion "with reproduction of buttock and hamstring pain on the left side", "a positive straight leg raise test in the seated position", "spinous process tenderness" and a "[n]egative Waddell sign"; (c) did not reference any focused examination of the left knee; (d) offered a diagnosis of left lower extremity radiculopathy, for which he felt an MRI scan was warranted; and (e) restricted his work activities ("[n]o bending or stooping"; 20 lb. lifting/carrying limitation).

9. Although Mr. McDuffie remained symptomatic, at the time of a December 31, 2014 follow-up visit, Dr. Peelle: (a) indicated the lumbar MRI scan did not reveal any disc pathology; (b) offered no additional treatment; and (c) discharged him to resume full duty work activities effective January 5, 2015.

10. At that juncture, Mr. McDuffie sought further evaluation (January 12, 2015) from Dr. Ezra B. Riber of Palmetto Pain Management, LLC, who: (a) was apprised of persistent low back pain radiating into the left buttock, as well as left knee pain; (b) observed the low back pain was "most closely reproduced with returning upright . . . [from forward flexion] and with extension of less than 10°"; (c) confirmed he displayed left knee pain, particularly with flexion, experienced "some low back and gluteal discomfort on the left" in response to straight leg raise testing and had difficulty standing on his heels/toes; (d) determined the lumbar symptoms were the product of a post-traumatic facet syndrome, for which he identified a facet treatment algorithm that included medial branch blocks; and (e) also recommended performance of an intra-articular left knee injection.

11. On June 9, 2015, Mr. McDuffie was evaluated by Dr. Nancy R. Lembo of Carolina Spine & Sport Rehabilitation Specialists, P.A., who: (a) noted he continued to experience left sided low back pain radiating "into the posterior left side to his knee" following the September, 2014 tripping injury; (b) found that he displayed "left sided lumbar paraspinal hypertrophy and pain with lumbar extension"; (c) characterized his symptoms to be consistent with lumbar facet and myofascial pain; (d) recommended proceeding with a "lumbar facet joint injection vs. medial branch block to indentify [the] . . . pain generator"; (e)

indicated this treatment course was "consistent with" his physical examination and imaging findings; and (f) also felt resumption of Naprosyn and a trial of Robaxin, in conjunction with a 30 lb. lifting limitation, were appropriate.

12. Mr. McDuffie then (June 10, 2015) underwent focused examination of his left knee by Dr. Christopher G. Mazoue of the University of South Carolina School of Medicine's Department of Orthopaedics Surgery, who: (a) was apprised of the September 19, 2014 mechanism of injury, as well as the nature of his left knee pain; (b) elicited both medial joint line tenderness and a very positive medial McMurray's test response on clinical examination; (c) expressed "concern . . . about a medial meniscus tear of his left knee"; and (d) recommended obtaining an MRI of the left knee.

13. Additionally, through questionnaire responses dated July 13, 2015, Dr. Mazoue confirmed: (a) "the mechanism of injury which Mr. McDuffie described (tripping over a pipe with his left leg followed by jarring while attempting to maintain his balance and avoid falling to the floor) was sufficient to create not only Mr. McDuffie's documented left leg symptoms, but also left medial meniscal pathology"; (b) the "documented left leg symptoms, including references to pain in the area of his left knee, are most probably consistent with this September 19, 2014 mechanism of injury"; (c) "[g]iven Mr. McDuffie's mechanism of injury, as well as his documented symptoms of both radicular left leg pain

and left medial knee pain . . . at least a portion of his current left leg symptoms most probably result from a left knee injury component"; (d) "the left knee symptoms and clinical abnormalities identified in [his] June 10, 2015 report most probably result from the consequences of Mr. McDuffie's September 19, 2014 compensable accident"; and (e) "the treatment modalities . . . [he had] recommended, including an MRI scan and reevaluation to assess treatment options, are reasonable, medically necessary and geared toward lessening the ultimate period of disability produced by Mr. McDuffie's September 19, 2014 compensable accident"

14. During the course of an October 19, 2015 deposition, Dr. Mazoue verified/explained: (a) Mr. McDuffie exhibited "a moderate level of discomfort to palpation" of the medial joint line on examination (See, Dr. Mazoue Deposition, p. 11); (b) his McMurray's test response was "significantly positive" (See, Dr. Mazoue Deposition, p. 13); (c) both the medial joint line tenderness and McMurray's test response have "an objective and subjective portion" (See, Dr. Mazoue Deposition, p. 12); (d) Mr. McDuffie's mechanism of injury "was very consistent with the development of a meniscus tear, and his physical exam was highly consistent with a meniscus tear" (See, Dr. Mazoue Deposition, p. 18); and (e) this "high likelihood of meniscus tear" had prompted his recommendation for an MRI scan (Id.).

15. This orthopaedic surgeon further confirmed: (a) the information contained on Mr. Ernest Roberts' September 23, 2014 statement (Claimant's APA, p. 1) generally coincided with his understanding as to Mr. McDuffie's mechanism of injury (See, Dr. Mazoue Deposition, p. 21); (b) it was not uncommon for leg pain associated with an injury of type to have multiple sources (See, Dr. Mazoue Deposition, p. 22); (c) a meniscal tear does not preclude one from exhibiting a relatively normal range of motion (See, Dr. Mazoue Deposition, p. 24); (d) the results of prior examinations during Mr. McDuffie's post-injury course of treatment, including Dr. Young's findings, were consistent with the results of his clinical examination (See, Dr. Mazoue Deposition, pp. 23 - 27); (e) the McMurray's test is a recognized standard for assessing the presence of a medial meniscal tear (See, Dr. Mazoue Deposition, pp. 30 - 31); and (f) Mr. McDuffie's response to this clinical test constituted a "highly significant" finding, which he believed to be a reliable indication of meniscal pathology (See, Dr. Mazoue Deposition, pp. 31 - 33).

16. Additionally, Dr. Mazoue testified: (a) Mr. McDuffie's development of increased pain while sitting was consistent with a medial meniscal tear (See, Dr. Mazoue Deposition, p. 35); (b) the absence of a noticeable limp (which he agreed was "variable as it relates to the level of dysfunction at a given moment") did not preclude the presence of a medial meniscal tear (See, Dr. Mazoue Deposition, p. 36); (c) in view of Mr. McDuffie's mechanism of

injury, well-documented post-injury left medial knee pain and significant clinical findings, his symptoms have "an objective pathological basis" (See, Dr. Mazoue Deposition, pp. 30 & 37); and (d) to a reasonable degree of medical certainty, this pathology is likely a medial meniscus tear that most probably results from the September 19, 2014 compensable accident (Id.).

17. On June 11, 2015, Mr. McDuffie was evaluated by Dr. John F. Johnson of Southeastern Spine Institute, who: (a) obtained a history of injury consistent with previous examiners; (b) noted the presence of persistent "low back and buttock pain on the left that radiates down the left lower extremity to just below the popliteal fossa"; (c) identified "tenderness to palpation in the left lower lumbar region", "decreased . . . [r]ange of motion . . . particularly with full extension secondary to pain", "worsening pain [with] . . . leg extension" and a positive straight leg raise test response on the left; (d) indicated these symptoms were "a result of the 09-19-14 accident and very likely reflective of posttraumatic facet syndrome", for which he had not reached maximum medical improvement; and (e) recommended "focused treatment that could include medial branch blocks which would be diagnostic as well as therapeutic."

18. In this regard, pursuant to questionnaire responses dated July 20, 2015, Dr. Johnson verified, to a reasonable degree of medical certainty, that: (a) "the posttraumatic lumbar facet syndrome . . . [he had] diagnosed proximately results from Mr.

McDuffie's September 19, 2014 compensable accident"; (b) "without treatment, Mr. McDuffie's causally related lumbar symptoms will most probably remain problematic and materially/negatively impact upon his ability to sustain work activities"; (c) "the course of treatment . . . [he had] recommended for Mr. McDuffie's lumbar injury component is reasonable, medically necessary and geared toward lessening the ultimate period of disability produced by his September 19, 2014 compensable accident"; and (d) treatment of the left knee injury component was "likewise reasonable, medically necessary and geared toward lessening [this] . . . ultimate period of disability"

19. When questioned as to the nature/source of Mr. McDuffie's lumbar symptoms, Dr. Johnson confirmed/reiterated: (a) his routine treatment of facetogenic pain, as well as the diagnosis of posttraumatic facet syndrome (See, Dr. Johnson Deposition, pp. 13 - 14); (b) facetogenic pain, particularly if traumatic, does not lend itself to accurate diagnosis through MRI scanning (Id.); (c) the diminished lumbar extension referenced by several examiners, as well as the slightly flexed posture of the spine he observed during this clinical examination, were reflective of facetogenic pain (See, Dr. Johnson Deposition, pp. 12 - 13, 21); (d) both the left buttock/thigh pain and positive straight leg raise responses he (and several other examiners) observed were likewise consistent with posttraumatic facet syndrome (See, Dr. Johnson Deposition, pp. 15 - 16); and (e) Mr.

McDuffie's mechanism of injury was likewise consistent with the production of posttraumatic facetogenic pain (See, Dr. Johnson Deposition, pp. 14 - 15).

20. Dr. Johnson further explained: (a) Mr. McDuffie's clinical presentation was valid and the product of a genuine effort (See, Dr. Johnson Deposition, pp. 17 - 18); (b) the presence of 5/5 muscle strength was not only anticipated, but also "in no way inconsistent with [his] . . . diagnosis of post-traumatic facet syndrome" (See, Dr. Johnson Deposition, p. 18); (c) given the fact Mr. McDuffie's posttraumatic facet syndrome and left knee pathology had received no focused treatment, the progressive worsening of lumbar symptoms recently documented by Dr. Riber was an expected consequence of his accident (See, Dr. Johnson Deposition, pp. 18 - 20); (d) failure to treat his left knee injury component has "[a]bsolutely" fueled "the continued presence of the facet syndrome and likely prolong[ed] . . . it" (See, Dr. Johnson Deposition, p. 20); and (e) Mr. McDuffie requires treatment of the left knee in tandem with focused care of his posttraumatic facet syndrome (See, Dr. Johnson Deposition, pp. 19 - 20, 23-24).

21. Additionally, Dr. Johnson verified: (a) as Mr. McDuffie was attempting to remain employed through performance of regular duty work activities, he did not discourage this effort (See, Dr. Johnson Deposition, pp. 21 - 22); (b) he had developed "trust" in Dr. Riber's opinions through their professional experience ("I

think he does a fine job") (See, Dr. Johnson Deposition, pp. 20 - 21); (c) his agreement with the work restrictions imposed by Dr. Riber (Id.); (d) the validity of Mr. McDuffie's description of his persistent lumbar symptoms (See, Dr. Johnson Deposition, p. 25); and (e) his adherence to the opinions expressed in his July 20, 2015 questionnaire responses (See, Dr. Johnson Deposition, pp. 22 - 23).

22. Pursuant to questionnaire responses dated July 20, 2015, Drs. Riber and Lembo likewise: (a) attributed Mr. McDuffie's lumbar symptoms to the consequences of his compensable accident; (b) verified "failure to treat this lumbar injury component would materially/negatively impact upon . . . [Mr. McDuffie's] ability to sustain work activities"; (c) his need for focused treatment of not only these lumbar symptoms, but also the left knee injury component (which they verified to be "reasonable, medically necessary and geared toward lessening the ultimate period of disability produced by his September 19, 2014 compensable accident"); and (d) offered each of these opinions to a reasonable degree of medical certainty.

23. Inspection of Dr. Lembo's September 10, 2015 deposition testimony confirms: (a) Mr. McDuffie's reported symptoms were consistent with his described mechanism of injury and her clinical findings (See, Dr. Lembo Deposition, p. 13); (b) he exhibited both objective evidence of muscle spasm and pain with lumbar extension, which she indicated were consistent with an

injury caused by his compensable accident (See, Dr. Lembo Deposition, pp. 20, 22, 44 - 45 and 52); (c) the presence of painful extension was a "significant" factor in her diagnosis, as this finding is "consistent with a facet pain generator" (See, Dr. Lembo Deposition, p. 44); (d) facetogenic pain, which she "commonly . . . see[s] in [her] . . . practice" is not diagnosed through MRI scanning (See, Dr. Lembo Deposition, p. 43); and (e) she reaffirmed her July 20, 2015 opinion that Mr. McDuffie's posttraumatic lumbar facet syndrome proximately results from his September 19, 2014 compensable accident (See, Dr. Lembo Deposition, p. 49).

24. Additionally, after being apprised of Mr. McDuffie's persistent lumbar symptoms and associated functional difficulties, Dr. Lembo verified: (a) his causally related pain was interfering with daily activities (See, Dr. Lembo Deposition, p. 49); (b) her prior questionnaire response relative to the likelihood his "causally related lumbar symptoms . . . remain[ing] problematic and materially/negatively impact[ing] . . . upon his ability to sustain work activities" remained accurate (See, Dr. Lembo Deposition, p. 50); (c) these symptoms were "most likely not going to . . . improve . . . absent treatment" (See, Dr. Lembo Deposition, pp. 50 - 51); (d) his receipt of any accommodations in connection with his employment was not consistent with unrestricted work activity (See, Dr. Lembo Deposition, p. 55); and (e) Mr. McDuffie's causally related

symptoms warranted imposition of a 30 pound lifting restriction (See, Dr. Lembo Deposition, pp. 24, 35 and 54).

25. On October 12, 2015, Mr. McDuffie was reexamined by Dr. Riber, who: (a) noted "his pain and dysfunction had become progressively worse"; (b) again observed "his pain is more closely reproduced with returning upright . . . [from forward flexion] and extension most closely reproduces his pain"; (c) similarly detected "low back, gluteal and hamstring discomfort" in response to straight leg raise testing; (d) perceived slight gait disturbance; (e) reiterated his prior diagnosis of a posttraumatic lumbar facet syndrome, as well as the need for medial branch blocks; and (f) imposed several work restrictions, including "no twisting, stooping or bending and no lifting greater than 10 pounds."

26. During the course of his October 26, 2015 deposition, Dr. Riber explained: (a) Mr. McDuffie displayed no "pain behavior", which he characterized as an "over-dramatic", "unbelievable" or suspicious presentation (See, Dr. Riber Deposition, pp. 17 - 18, 20 and 45); (b) he observed no evidence of symptom magnification and had "no reason to doubt . . . the physiological legitimacy of any pain . . . [Mr. McDuffie] report" (See, Dr. Riber Deposition, pp. 46 and 48); (c) he had previously treated posttraumatic facet syndromes on "hundreds" of occasions prior to examining Mr. McDuffie (estimating "at least" 20% of the backs he sees involve a facet syndrome) (See, Dr. Riber

Deposition, pp. 49 and 59); (d) he would not rely upon an MRI scan to diagnosis a facet syndrome, as "[y]ou can have a perfectly normal MRI and have a very clear-cut facet syndrome" (See, Dr. Riber Deposition, pp. 49 - 50); (e) diagnosis of this condition is instead "based on the mechanism of injury, which is part of the history, the complaints and then the exam" (See, Dr. Riber Deposition, p. 49); and (f) facetogenic pain can include "some nerve involvement" that produces leg pain (See, Dr. Riber Deposition, pp. 50 - 51).

27. Dr. Riber further verified: (a) lumbar extension "loads the facet joints", to the extent that when an individual "either return[s] . . . upright or extend[s], . . . a facet joint issue . . . [will] declare itself" (See, Dr. Riber Deposition, p. 55); (b) his clinical observation of pain with lumbar extension was consistent with the relevant clinical findings identified in Dr. Lembo's June 9, 2015 report, as well as Dr. Johnson's June 11, 2015 report (See, Dr. Riber Deposition, pp. 55 - 56); (c) Mr. McDuffie's positive straight leg raise response was also consistent with the diagnosis of posttraumatic facet syndrome (See, Dr. Riber Deposition, pp. 51 - 52); (d) his updated (October 12, 2015) examination remained reflective of a posttraumatic facet syndrome (See, Dr. Riber Deposition, pp. 39 - 40); (e) Mr. McDuffie's lumbar symptoms resulted from his September 19, 2014 compensable accident (See, Dr. Riber Deposition, pp. 27 & 61); (f) treatment for this back injury

component would begin with medial branch blocks, with consideration of radiofrequency rhizotomy depending upon his response to these blocks (See, Dr. Riber Deposition, pp. 29, 60 & 64); (g) improvement of Mr. McDuffie's back injury component would be enhanced by receipt of treatment for his left knee (See, Dr. Riber Deposition, p. 61; (h) his receipt of treatment for the back injury component was reasonable, medically necessary and aimed toward lessening the ultimate period of disability stemming from the September 19, 2014 compensable accident (See, Dr. Riber Deposition, pp. 61 - 62); and (i) the restrictions he had assigned were not only geared toward preventing Mr. McDuffie "from getting any worse until he gets some treatment", "but also reasonable and medically necessary" in this instance (See, Dr. Riber Deposition, pp. 36 and 62).

28. Although he obviously attempted to perform full duty work in accordance with Dr. Peelle's instruction, Mr. McDuffie: (a) continued to experience back and left leg symptoms; (b) encountered problems engaging in these job activities, noting receipt of assistance and instances where he "couldn't even . . . stand straight up . . . [and/or his] back had locked up" (See, Hearing Transcript, pp. 35 - 36); (c) has more recently missed time from work because his "back was giving [him] . . . problems" (See, Hearing Transcript, p. 37); (d) was instructed by his Employer to obtain "a doctor's slip" in order to resume work following these recent absences (See, Hearing Transcript, p. 38);

(e) provided his Employer with this required documentation following medical reevaluation in October, 2015 (See, Hearing Transcript, p. 39); (f) was nonetheless afforded no opportunity to resume restricted work activities, despite compliance with his Employer's directive (Id.); (g) received no explanation as to why his restrictions would not be accommodated other than ". . . I couldn't come back 'til their insurance people talked to my lawyer" (Id.); and (h) remained "willing to come back". (Id.).

29. Mr. McDuffie's testimony also confirms: (a) the duties incidental to his job as a Cook II include "cooking in the big pots, cleaning up, putting the pots and pans . . . in the aisles, putting them in the warmers, serving on the line . . . [and] going to the meat room to get the meat" (See, Hearing Transcript, p. 20); (b) these work activities require lifting weights that not only exceed 10 lbs. (the limitation identified by Dr. Riber and endorsed by Dr. Johnson), but also the 30 lb. restriction referenced by Dr. Lembo ("chicken is like the most heaviest thing that we'll pick up. It's probably like 40 to 45 pounds.") (Id.); (c) he is also obliged to twist (See, Hearing Transcript, p. 21); (d) the left knee pain had been present "from the beginning" (See, Hearing Transcript, p. 37); (e) while Dr. Young had "looked at [his] . . . knee", there had heretofore been no focused treatment of this injury component by any physician to whom he was directed by Defendants (See, Hearing Transcript, pp. 28 and 42 - 43); and (f) his symptoms had never abated following receipt

of the full duty work release from Dr. Peelle (See, Hearing Transcript, p. 47).

30. After thoroughly reviewing all evidence of record and observing Mr. McDuffie during the course of the hearing, I specifically find: (a) his testimony, including description of the injury mechanism and the nature/location of all symptoms associated with this accident, are wholly consistent with the medical evidence; (b) this medical evidence certainly confirms the onset of low back and left leg pain shortly after sustaining the admittedly compensable September 19, 2014 trauma; (c) while the apparent absence "of structural abnormalities on his MRI" led Dr. Peelle to discharge him from active care, Drs. Johnson, Riber and Lembo unanimously confirmed a scan of this nature is not diagnostic of facetogenic pain; (d) these medical specialists also convincingly verified/explained the positive correlation between their diagnosis of posttraumatic facet syndrome with not only his relevant clinical findings (including diminished lumbar extension), but also the September 19, 2014 mechanism of injury; (e) these specialists, who each regularly encounter facetogenic pain in their respective practices, likewise reliably established his need for previously unprovided facet-directed treatment; and (f) this treatment, aimed toward a posttraumatic facet syndrome diagnosed by Drs. Johnson, Riber and Lembo, proximately results from the consequences of his September 19, 2014 compensable accident.

31. I further find: (a) the evidence, including consistent opinions expressed by Drs. Johnson, Riber and Lembo, convincingly indicates Mr. McDuffie's compensable accident has created a lumbar posttraumatic facet syndrome; (b) this causally related condition has produced not only persistent back pain, but also associated left leg symptoms (See, testimony of Drs. Riber and Johnson); (c) Mr. McDuffie has not reached the point of maximum medical improvement relative to this causally related back injury component; (d) the treatment he requires for this compensable back injury component includes, but is not limited to, the lumbar facet/medial branch blocks identified by these physicians; and (e) Mr. McDuffie's receipt of these additional treatment modalities for his back injury component is reasonable, medically necessary and geared toward lessening the ultimate period of disability produced by the consequences of his September 19, 2014 compensable accident.

32. I also find: (a) the symptoms stemming from Mr. McDuffie's causally related back injury component have negatively impacted upon his ability to engage in unrestricted work activities, notwithstanding Dr. Peelle's previous full duty work release; (b) Dr. Riber (who documented the presence of facetogenic symptoms in January, 2015, as well as the progressive impact of his condition in October, 2015) recommended several work restrictions ("no twisting, stooping or bending and no lifting greater than 10 pounds") in order to avoid further

worsening of these symptoms; (c) these restrictions were subsequently endorsed by Dr. Johnson, who expressed his "trust" in Dr. Riber's judgment as to work status; (d) Dr. Lembo similarly felt Mr. McDuffie was incapable of performing unrestricted work activities, assigning a 30 pound lifting limitation; and (d) the work restrictions assigned by these physicians are inconsistent with certain aspects of Mr. McDuffie's "full duty" work regimen.

33. In this regard, I further find: (a) after his causally related lumbar symptoms necessitated his absence from work in 2015, Mr. McDuffie attempted to resume performance of his job duties; (b) despite his provision of medical documentation authorizing performance of restricted work activities, his Employer has declined to afford him any opportunity to engage in job duties consistent with these medical restrictions; (c) the medical evidence firmly establishes these restrictions result from/are attributable to the consequences of his September 19, 2014 compensable accident; (d) my inspection of the record verifies Mr. McDuffie's continued absence from work was exclusively the product of Defendants' unwillingness to "accommodate" these work restrictions (See, Hearing Transcript, pp. 11, 15 and 37 - 39); (e) although all parties were aware of these work restrictions, as well as Mr. McDuffie's desire to engage in accommodated job duties, Defendants elected not to provide work consistent with these medical limitations; and (f)

these circumstances have produced a continuing period of temporary total disability.

34. Additionally, I find: (a) after sustaining the September 19, 2014 trauma, Mr. McDuffie reported the presence of both back and left leg pain; (b) as time progressed, the left leg pain persisted from his buttocks to his knee; (c) despite Dr. Young's clinical identification of left knee symptoms and recommendation of orthopaedic referral for assessment of "... [p]ersistent low back, left thigh and left knee pain", Defendants' designated physician (Dr. Peelle) did not perform a focused examination of Mr. McDuffie's left knee; and (d) he was consequently obliged to obtain an independent medical evaluation by Dr. Mazoue.

35. I also find Dr. Mazoue (the only orthopaedic surgeon who scrutinized Mr. McDuffie's left knee): (a) discovered significant clinical evidence of medial meniscus pathology; (b) explained these clinical findings had "an objective" element; (c) indicated the September 19, 2014 mechanism of injury "was very consistent with the development of a meniscus tear"; (d) attributed Mr. McDuffie's left knee symptoms to the consequences of his compensable accident; and (e) recommended further treatment, commencing with performance of an MRI scan.

36. I also find: (a) the reliable medical evidence, particularly the opinions expressed by Dr. Mazoue, amply establish a causal relationship between Mr. McDuffie's focal left

knee symptoms and his September 19, 2014 compensable accident; (b) he requires further treatment for this injury component, including an MRI scan and follow-up care through Dr. Mazoue; (c) Mr. McDuffie has not yet achieved maximum medical improvement relative to his causally related left knee injury component; (d) his receipt of further treatment is reasonable, medically necessary and will tend to lessen the period of disability produced by the consequences of the September 19, 2014 compensable accident; and (e) notwithstanding their full awareness of Dr. Mazoue's determination as to the nature/source/medical requirements of Mr. McDuffie's causally related left knee symptoms, as well as the absence of any contrary opinion relative to these symptoms, Defendants chose to deny liability for this left knee injury component.

37. The medical treatment, medications, evaluations, diagnostic testing, physical therapy, etc. which Mr. McDuffie has heretofore received/undergone through any authorized medical providers were reasonable, medically necessary and tended to lessen his ultimate period of disability. I also find Dr. Mazoue's June 10, 2015 evaluation was reasonable, medically necessary and tended to lessen Mr. McDuffie's ultimate period of disability.

CONCLUSIONS OF LAW

IN VIEW OF THESE FINDINGS OF FACT, I CONCLUDE AS MATTERS OF LAW:

1. The parties to this proceeding are subject to and bound by the provisions of the South Carolina Workers' Compensation Act.

2. On September 19, 2014, Mr. McDuffie, an employee within the meaning of S.C. Code Ann. Section 42-1-130 (1976, as amended), sustained compensable injuries to his back and left leg within the meaning of S.C. Code Ann. Section 42-1-160 (2007), while performing duties arising out of and within the course and scope of his employment with Johnson Food Service, LLC, an employer within the meaning of S.C. Code Ann. Section 42-1-140 (1976).

3. As previously noted, the evidence of record (testimony and the opinions expressed, to a reasonable degree of medical certainty, by Drs. Johnson, Riber, Lembo and Mazoue) firmly convincingly/reliably establishes: (a) Mr. McDuffie's persistent back and left leg symptoms proximately result from the consequences of his September 19, 2014 compensable accident; (b) his left leg symptoms involve not only pain stemming from a posttraumatic facet syndrome, but also a distinct left knee injury component of the nature identified by Dr. Mazoue; (c) he has not yet reached the point of maximum medical improvement as to either his back or left leg injury components; and (d) Mr. McDuffie requires not only facet-directed treatment of the back injury component, but also focused care for a likely medial meniscal tear. I consequently conclude Mr. McDuffie has clearly

established: (a) the causal relationship of his current lumbar symptoms to the consequences of his September 19, 2014 compensable accident; (b) his need for treatment of a heretofore untreated causally related posttraumatic facet syndrome; (c) the September 19, 2014 compensable accident also produced a left knee injury component that likewise requires focused treatment; and (d) maximum medical improvement has yet to be attained as to either of these compensable injury components.

4. Defendants are financially responsible for the medical treatment, medications, evaluations, physical therapy, evaluative procedures, diagnostic testing, etc. which Mr. McDuffie has heretofore received/undergone through any authorized healthcare providers as a result of his back injury component, as he received these treatment modalities per the direction of Defendants. I further conclude: (a) the additional medical evaluations which Mr. McDuffie has independently undergone relative to his back injury component were certainly warranted, especially in view of Defendants' denial of liability for further treatment of his causally related posttraumatic facet syndrome; and (b) the assessment by Dr. Mazoue, the only orthopaedic surgeon to actually evaluate Mr. McDuffie's left knee symptoms/pathology, was certainly reasonable, medically necessary and tended to lessen his period of disability within the meaning of S.C. Code Ann. Section 42-15-60 (2007).

5. I further conclude: (a) despite their knowledge (through report, questionnaire responses and deposition testimony) of Dr. Mazoue's opinions relative to Mr. McDuffie's left knee injury component and the absence of any conflicting medical opinion relative to this injury component, Defendants maintain their denial of liability; (b) notwithstanding this denial, they certainly had ample opportunity to obtain assessment of this left knee injury component, but chose not to do so; (c) given the nature of his left knee symptoms, Mr. McDuffie reasonably sought evaluation from Dr. Mazoue (whose qualifications to treat this condition have not been challenged); (d) Mr. McDuffie has developed sufficient confidence in Dr. Mazoue to proceed with surgery by this physician (a likely scenario); and (e) the current circumstances constitute good cause for designation of Dr. Mazoue as Mr. McDuffie's authorized treater relative to the left knee injury component per Section 42-15-60. See also, Clark v. Aiken County Government, 366 S.C. 102, 620 S.E. 2d 99, 104 (Ct. App. 2005); Hall v. United Rentals, Inc., 371 S.C. 69, 636 S.E. 2d 876, 885 (Ct. App. 2006).

6. I similarly conclude: (a) Mr. McDuffie's receipt of treatment for the posttraumatic lumbar facet syndrome diagnosed by Drs. Johnson, Riber and Lembo is reasonable, medically necessary and geared toward lessening his ultimate period of disability per Section 42-15-60; (b) this treatment shall include, but not be limited to, performance of lumbar

facet/medial branch blocks, in accordance with the treatment recommendations outlined by these physicians; (c) Defendants will be afforded the right to provide treatment for Mr. McDuffie's back injury component per Section 42-15-60, but strictly based upon the undersigned's ruling that Mr. McDuffie's diagnosed posttraumatic facet syndrome is causally related to the consequences of his compensable accident, so as to ensure receipt of this treatment; and (d) this obligation to provide ongoing medical treatment shall continue until this Commission determines he has achieved maximum medical improvement.

7. Upon informing counsel of my rulings relative to this dispute, the undersigned inadvertently overlooked their previous agreement to defer establishment of Mr. McDuffie's average weekly wage and compensation rate pending further review of all relevant data. This oversight was subsequently brought to the undersigned's attention via email communication from McDuffie's counsel.

8. Additionally, this email correspondence requested the undersigned to address Mr. McDuffie's entitlement to temporary total disability compensation. In response, counsel for Defendants maintained that as the Form 50 did not specifically request this compensation, the issue was not ripe for determination.

9. In this regard, counsel for the respective parties have directed the undersigned to portions of the hearing transcript

which they believe are particularly relevant to this issue. Based upon my review of the pertinent portions of the hearing transcript, I conclude: (a) while the parties were obviously preoccupied with the issue involving withdrawal of Dr. Lembo's report, Mr. McDuffie's counsel nonetheless indicated his client was not currently working due to his Employer's unwillingness to honor restrictions identified by unauthorized physicians (Drs. Riber and Lembo) (See, Hearing Transcript, p. 11); (b) Defendants were obviously aware of Mr. McDuffie's restricted duty work status, as reflected by their counsel's recognition of a need "to accommodate him" (See, Hearing Transcript, p. 15); (c) Mr. McDuffie provided relatively detailed testimony outlining not only his efforts to resume restricted duty work activities, but also his Employer's inability/failure to provide duties consistent with his medical restrictions (See, Hearing Transcript, pp. 37 - 39); (d) the Form 50 contained "a boilerplate claim for '[a]ppropriate benefits as provided in the [Workers' Compensation] Act for the above ground and other relief as the Workers' Compensation Commission may direct as just and proper" (See, Nettles v. Spartanburg School District #7, 341 S.C. 580, 535 S.E. 2d 146, 149 (Ct. App. 2000)); and (e) in view of this proviso, as well as the parties' mutual recognition of the fact his absence from work was due to Defendants' disinclination "to accommodate" him, Mr. McDuffie's entitlement to temporary total disability compensation is properly before the undersigned

for consideration. See also, Harbin v. Owens-Corning Fiberglas, 316 S.C. 423, 450 S.E. 2d 112, 115 (Ct. App. 1994) ("As to the merits of the pleading issue, Harbin's claim for any and all rights under the Act was a sufficient pleading.").

10. "Under the Workers' Compensation Act, a claimant is entitled to compensation for a total disability resulting from a work-related injury." Last v. MSI Construction Company, Inc., 305 S.C. 349, 409 S.E. 2d 334, 336 (1991). In this regard, the Supreme Court of South Carolina has consistently held that "the loss of earning capacity caused by the physical injury is the pertinent measure of compensable disability." (Id.); See also, Bowen v. Chiquola Manufacturing Company, 238 S.C. 322, 120 S.E. 2d 99 (1961); Shealy v. Algeron Blair, Inc., 250 S.C. 106, 156 S.E. 2d 640 (1967). Consequently, the issue is "whether the injury ha[s]. . . resulted in some loss of. . . [the Claimant's] earning capacity." Orr v. Elastomeric Products, 323 S.C. 342, 474 S.E. 2d 448, 449 (Ct. App. 1996); Last, 409 S.E. 2d at 336.

11. Additionally, a review of the relevant portions of S.C. Code Ann. Section 42-9-260 (1976, as amended), as well as S.C. Code Ann. Regs. 67-505 (2012) and 67-506 (2012), verifies: (a) disability is presumed to continue until an employee has returned to work for the requisite fifteen day period with the employer responsible for the payment of temporary disability compensation; and (b) this compensation remains payable unless the injured employee is either released by the treating physician to work

"without restriction", provided with "limited duty work consistent with. . . [restrictions assigned by] the treating physician" or actively working.

12. Our Appellate Courts have similarly held: (a) the incarceration of an injured worker did not terminate his period of temporary total disability (rejecting an argument that imprisonment, rather than work related injury, produced inability to work). Last, supra; (b) an intervening pregnancy did "not change the fact that . . . [a compensable] injury" continued to prohibit an employee from performing her previous job. Orr, 474 S.E.2d at 449; (c) a "seasonal" employee remained temporarily totally disabled due to injury, notwithstanding his "return to school on a full-time basis . . . [purportedly] removed him from the labor market" Hines v. Hendricks Canning Company, 263 S.C. 399, 211 S.E.2d 220, 223 (1975); and (d) an employer "can be relieved of the liability to pay . . . [temporary total disability compensation] by either offering or procuring" suitable employment for the injured worker. Coleman v. Quality Concrete Products, Inc., 245 S.C. 625, 142 S.E.2d 43, 46 (1965); See also, S.C. Code Ann. Section 42-9-190 (1976).

13. Essentially, "when the injured worker is under work restrictions, the employer must either offer suitable employment within the injured worker's capacity or pay temporary total disability compensation." Pollack v. Southern Wine & Spirits of America, 405 S.C. 9, 747 S.E. 2d 430, 433 (2013) (Court indicated

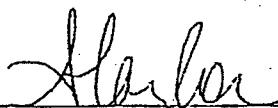
it "d[id] . . . not disagree with (this) . . . proposition"). In this instance, analysis of the evidence of record reveals: (a) Mr. McDuffie work status has been materially restricted as a consequence of his causally related symptoms; (b) these limitations are inconsistent with his regular/full duty work activities; (c) while Johnson Food Service, LLC has been afforded an opportunity to provide suitably restricted work activities, it has declined to do so; and (d) Mr. McDuffie has not yet reached maximum medical improvement. I consequently conclude he has been temporarily totally disabled within the meaning of S.C. Code Ann. Section 42-9-10 (2007), as a matter of law, since his last work date and remains so at this time.

AWARD

ACCORDINGLY, IT IS HEREBY ORDERED that Defendants shall: (a) accept financial responsibility for all medical modalities previously provided/prescribed by any authorized healthcare specialists, as well as for the charges stemming from Dr. Mazoue's June 10, 2015 evaluation; (b) authorize the additional causally related medical treatment, medications, evaluations, diagnostic testing, evaluative procedures, physical therapy, surgical procedures, etc. provided/prescribed by Dr. Mazoue who is hereby designated as Mr. McDuffie's treating physician relative to the left knee injury component for the purposes of this claim; (c) accept financial responsibility for treatment of Mr. McDuffie's lumbar posttraumatic facet syndrome through an

appropriate specialist of its choosing, who shall provide treatment for this condition as a causally related result of Mr. McDuffie's compensable accident; and (d) pay temporary total disability compensation (at the rate specified herein) effective the day following his last active work date until such time as this obligation is relieved by further Order of this Commission.

IT IS SO ORDERED.



Commissioner Aisha Taylor

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).

May 18, 2016

By: Renee Smith, Administrative
Assistant to Commissioner Taylor

DECISION AND ORDER
OF THE
SOUTH CAROLINA WORKERS' COMPENSATION COMMISSION

W.C.C. FILE NUMBER: 1413546

TIMOTHY A. MCDUFFIE, EMPLOYEE, CLAIMANT,

VERSUS

JOHNSON FOOD SERVICES, LLC, EMPLOYER,

AND

GREAT AMERICAN ALLIANCE INSURANCE CO./STRATEGIC COMP., CARRIER,
DEFENDANTS.

HEARING: Held on August 16, 2016 in Columbia,
South Carolina.

APPEARANCES: Claimant represented by Andrew N.
Safran, Esquire, Post Office Box 12089,
Columbia, South Carolina 29211.

Defendants represented by E. Ros Huff,
Jr., Esquire, Huff & Hapeshis, LLC,
Post Office Box 1935, Irmo, South
Carolina 29063.

PURPOSE OF HEARING: Review of the May 16, 2016 Order of The
Honorable Aisha G. Taylor.

DECISION AND ORDER OF THE APPELLATE PANEL

FILED:

October 12th, 2016

Appeal file
11/8/16
CAW
5500.0786

STATEMENT OF THE CASE

This is an appeal from the May 16, 2016 Order of The Honorable Aisha G. Taylor, which determined: (a) the consequences of Claimant's, Timothy A. McDuffie's, September 19, 2014 compensable accident had produced distinct back and left knee injury components; (b) he required focused care for the essentially untreated left knee injury component through Dr. Christopher G. Mazoue, who had not only confirmed the causal relationship of his persistent symptoms, but also the potential need for surgery due to clinical findings consistent with a medial meniscus tear; (c) his compensable accident had also produced a posttraumatic facet syndrome that had not been treated by the physicians designated by Defendant, Great American Alliance/Strategic Comp. and warranted focused medical care per the opinions of Drs. John F. Johnson, Nancy R. Lembo and Ezra B. Riber; (d) Mr. McDuffie had not yet reached maximum medical improvement for either of these injury components; and (e) as his Employer, Johnson Food Services, LLC, had declined to accommodate work restrictions, notwithstanding an obvious awareness of their presence, Mr. McDuffie was entitled to accrued/continuing temporary total disability compensation.

Essentially, Defendants contend Commissioner Taylor erred in: (a) finding Mr. McDuffie had sustained a compensable left leg injury; (b) designating Dr. Mazoue as the authorized treator; (c) concluding Mr. McDuffie was entitled to temporary total

disability compensation; and (d) failing to generate a legally sufficient order.

In response, Mr. McDuffie maintains: (a) the evidence of record, including the nature of his undisputed mechanism of injury and the presence of distinct left knee symptoms documented by one of Defendants' medical providers, as well as Dr. Mazoue's unrefuted opinions relative to the causal relationship of these symptoms and his associated treatment needs, amply supports Commissioner Taylor's determination he sustained a compensable left knee injury that requires focused medical care; (b) her designation of Dr. Mazoue under the present circumstances satisfies the "good cause" proviso contained in S.C. Code Ann. Section 42-15-60 (2007), especially in view of Defendants' unwillingness to even acknowledge this injury component and Mr. McDuffie's confidence in/comfort with the prospect of undergoing surgery with this highly qualified specialist; (c) Defendants' specious argument relative to the temporary total disability compensation award conveniently ignores their admitted acknowledgement of Mr. McDuffie's restricted duty work status (which belies any notion due process was lacking) and unquestioned refusal to accommodate his medical limitations, as well as a clear legal basis for addressing this issue; (d) the May 16, 2016 Order, which contains thirty-seven (37) detailed factual findings and thirteen (13) comprehensive legal

conclusions, meets all applicable criteria; and (e) Commissioner Taylor's rulings should be affirmed in all respects.

After reviewing all pertinent evidence, in light of the relevant legal authorities and arguments of counsel, We hereby fully affirm Commissioner Taylor's determinations based upon the following FINDINGS OF FACT AND CONCLUSIONS OF LAW:

FINDINGS OF FACT

1. On September 19, 2014, Mr. McDuffie sustained compensable injuries to his back and left leg when he tripped over an exposed pipe at the Johnson Food Services, LLC facility located at Fort Jackson military base in Richland County, South Carolina. Specifically, he: (a) tripped when his left foot came in contact with the exposed pipe; (b) fell forward prior to catching himself before hitting the ground; (c) perceived a pop while attempting to maneuver his left leg away from the pipe; and (d) soon developed pain involving his back and left leg.

2. At the time he sustained these compensable injuries, Mr. McDuffie was performing duties arising out of and within the course and scope of his employment with Johnson Food Services, LLC, where he has worked for approximately two years.

3. Shortly after sustaining this injury, Mr. McDuffie was directed by his Employer to Medcare Urgent Care Center (September 20, 2014), where he: (a) reported the presence of back and left leg pain following this trauma; (b) exhibited a "[p]ositive . . . [left] leg raised test" response; and (c) received a prescription.

for Naprosyn in conjunction with instruction to apply warm compresses to his back.

4. When his pain persisted, Mr. McDuffie sought further examination through the Palmetto Health Baptist Emergency Room (September 23, 2014), where he: (a) apprised the attending physician of his injury mechanism ("tripping . . . and catching himself on his left lower extremity but jarring his left lower back buttock area . . . [with resulting] pain down his left lower extremity"); (b) indicated the previously prescribed Naprosyn had "not been helping much"; (c) displayed "some palpable reproducible tenderness at the left sciatic notch . . . with a positive left legged straight leg raise" test response; and (d) received an additional prescription (Flexeril).

5. On the following day, Mr. McDuffie was examined, per Defendants' directive, by Dr. Stewart Young of First Care, who: (a) noted the presence of "mild medial left knee pain, some left thigh muscular pain and some low back pain"; (b) was similarly apprised of pain with standing/weightbearing on the left leg; (c) performed a physical examination which revealed "pain in the left thigh musculature with weightbearing/walking", "tenderness over the MCL area" and lumbar paraspinous tenderness/spasm; and (d) placed him on sedentary duty work status.

6. Inspection of Dr. Young's September 29, 2014 and October 13, 2014 treatment notes further confirms: (a) persistent reports of both left knee and back pain; (b) the presence of both

left leg and low back symptoms on clinical examination; and (c) this physician's attempt to treat these symptoms with physical therapy.

7. Upon reexamining Mr. McDuffie following several physical therapy sessions (November 28, 2014), Dr. Young: (a) noted this therapy had not only proved ineffective, but also "made his left knee worse"; (b) observed the "left lumbar paraspinous musculature [was] . . . tense and tender to palpation", "pain . . . [and tenderness] in the medial anterior knee just lateral to the patella" and "tense"/"tender" left thigh musculature; and (c) restricted him to sedentary work duties, while recommending orthopaedic evaluation for "[p]ersistent low back, left thigh, and left knee pain"

8. Approximately two weeks following this referral (December 17, 2014), Defendants directed Mr. McDuffie for evaluation by Dr. Michael W. Peelle of Moore Orthopaedics, who: (a) noted the September 19, 2014 tripping injury, as well as resulting pain involving his back, left buttock, left thigh and left leg; (b) observed limited lumbar flexion "with reproduction of buttock and hamstring pain on the left side", "a positive straight leg raise test in the seated position", "spinous process tenderness" and a "[n]egative Waddell sign"; (c) did not reference any focused examination of the left knee; (d) offered a diagnosis of left lower extremity radiculopathy, for which he felt an MRI scan was warranted; and (e) restricted his work

activities ("no bending or stooping"; 20 lb. lifting/carrying limitation).

9. Although Mr. McDuffie remained symptomatic, at the time of a December 31, 2014 follow-up visit, Dr. Poelle: (a) indicated the lumbar MRI scan did not reveal any disc pathology; (b) offered no additional treatment; and (c) discharged him to resume full duty work activities effective January 5, 2015.

10. At that juncture, Mr. McDuffie sought further evaluation (January 12, 2015) from Dr. Ezra B. Riber of Palmetto Pain Management, LLC, who: (a) was apprised of persistent low back pain radiating into the left buttock, as well as left knee pain; (b) observed the low back pain was "most closely reproduced with returning upright . . . [from forward flexion] and with extension of less than 10°"; (c) confirmed he displayed left knee pain, particularly with flexion, experienced "some low back and gluteal discomfort on the left" in response to straight leg raise testing and had difficulty standing on his heels/toes; (d) determined the lumbar symptoms were the product of a post-traumatic facet syndrome, for which he identified a facet treatment algorithm that included medial branch blocks; and (e) also recommended performance of an intra-articular left knee injection.

11. On June 9, 2015, Mr. McDuffie was evaluated by Dr. Nancy R. Lembo of Carolina Spine & Sport Rehabilitation Specialists, P.A., who: (a) noted he continued to experience low

sided low back pain radiating "into the posterior left side to his knee" following the September, 2014 tripping injury; (b) found that he displayed "left sided lumbar paraspinal hypertrophy and pain with lumbar extension"; (c) characterized his symptoms to be consistent with lumbar facet and myofascial pain; (d) recommended proceeding with a "lumbar facet joint injection and medial branch block to identify [the] . . . pain generator"; (e) indicated this treatment course was "consistent with" his physical examination and imaging findings; and (f) also felt resumption of Naprosyn and a trial of Robaxin, in conjunction with a 30 lb. lifting limitation, were appropriate.

12. Mr. McDuffie then (June 10, 2015) underwent focused examination of his left knee by Dr. Christopher G. Mazoue of the University of South Carolina School of Medicine's Department of Orthopaedics Surgery, who: (a) was apprised of the September 19, 2014 mechanism of injury, as well as the nature of his left knee pain; (b) elicited both medial joint line tenderness and a very positive medial McMurray's test response on clinical examination; (c) expressed "concern . . . about a medial meniscus tear of his left knee"; and (d) recommended obtaining an MRI of the left knee.

13. Additionally, through questionnaire responses dated July 13, 2015, Dr. Mazoue confirmed: (a) "the mechanism of injury which Mr. McDuffie described" (tripping over a pipe with his left leg followed by jarring while attempting to maintain his balance

and avoid falling to the floor) was sufficient to create not only Mr. McDuffie's documented left leg symptoms, but also left medial meniscal pathology"; (b) the "documented left leg symptoms, including references to pain in the area of his left knee, are most probably consistent with this September 19, 2014 mechanism of injury"; (c) "[g]iven Mr. McDuffie's mechanism of injury, as well as his documented symptoms of both radicular left leg pain and left medial knee pain . . . at least a portion of his current left leg symptoms most probably result from a left knee injury component"; (d) "the left knee symptoms and clinical abnormalities identified in [his] June 10, 2015 report most probably result from the consequences of Mr. McDuffie's September 19, 2014 compensable accident"; and (e) "the treatment modalities . . . [he had] recommended, including an MRI scan and reevaluation to assess treatment options, are reasonable, medically necessary and geared toward lessening the ultimate period of disability produced by Mr. McDuffie's September 19, 2014 compensable accident"

14. During the course of an October 19, 2015 deposition, Dr. Mazoue verified/explained: (a) Mr. McDuffie exhibited "a moderate level of discomfort to palpation" of the medial joint line on examination (See, Dr. Mazoue Deposition, p. 11); (b) his McMurray's test response was "significantly positive" (See, Dr. Mazoue Deposition, p. 13); (c) both the medial joint line tenderness and McMurray's test response have "an objective and

subjective portion" (See, Dr. Mazoue Deposition, p. 12); (d) Mr. McDuffie's mechanism of injury "was very consistent with the development of a meniscus tear, and his physical exam was highly consistent with a meniscus tear" (See, Dr. Mazoue Deposition, p. 18); and (e) this "high likelihood of meniscus tear" had prompted his recommendation for an MRI scan (Id.).

15. This orthopaedic surgeon further confirmed: (a) the information contained on Mr. Ernest Roberts' September 23, 2014 statement (Claimant's APA, p. 1) generally coincided with his understanding as to Mr. McDuffie's mechanism of injury (See, Dr. Mazoue Deposition, p. 21); (b) it was not uncommon for leg pain associated with an injury of type to have multiple sources (See, Dr. Mazoue Deposition, p. 22); (c) a meniscal tear does not preclude one from exhibiting a relatively normal range of motion (See, Dr. Mazoue Deposition, p. 24); (d) the results of prior examinations during Mr. McDuffie's post-injury course of treatment, including Dr. Young's findings, were consistent with the results of his clinical examination (See, Dr. Mazoue Deposition, pp. 23 - 27); (e) the McMurray's test is a recognized standard for assessing the presence of a medial meniscal tear (See, Dr. Mazoue Deposition, pp. 30 - 31); and (f) Mr. McDuffie's response to this clinical test constituted a "highly significant" finding, which he believed to be a reliable indication of meniscal pathology (See, Dr. Mazoue Deposition, pp. 31 - 33).

16. Additionally, Dr. Mazoue testified: (a) Mr. McDuffie's development of increased pain while sitting was consistent with a medial meniscal tear (See, Dr. Mazoue Deposition, p. 35); (b) the absence of a noticeable limp (which he agreed was "variable as it relates to the level of dysfunction at a given moment") did not preclude the presence of a medial meniscal tear (See, Dr. Mazoue Deposition, p. 36); (c) in view of Mr. McDuffie's mechanism of injury, well-documented post-injury left medial knee pain and significant clinical findings, his symptoms have "an objective pathological basis" (See, Dr. Mazoue Deposition, pp. 30 & 37); and (d) to a reasonable degree of medical certainty, this pathology is likely a medial meniscus tear that most probably results from the September 19, 2014 compensable accident (Id.).

17. On June 11, 2015, Mr. McDuffie was evaluated by Dr. John F. Johnson of Southeastern Spine Institute, who: (a) obtained a history of injury consistent with previous examiners; (b) noted the presence of persistent "low back and buttock pain on the left that radiates down the left lower extremity to just below the popliteal fossa"; (c) identified "tenderness to palpation in the left lower lumbar region", "decreased . . . [r]ange of motion . . . particularly with full extension secondary to pain", "worsening pain [with] . . . leg extension" and a positive straight leg raise test response on the left; (d) indicated these symptoms were "a result of the 09-19-14 accident and very likely reflective of posttraumatic facet syndrome", for

which he had not reached maximum medical improvement; and (c) recommended "focused treatment that could include medial branch blocks which would be diagnostic as well as therapeutic."

18. In this regard, pursuant to questionnaire responses dated July 20, 2015, Dr. Johnson verified, to a reasonable degree of medical certainty, that: (a) "the posttraumatic lumbar facet syndrome . . . [he had] diagnosed proximately results from Mr. McDuffie's September 19, 2014 compensable accident"; (b) "without treatment, Mr. McDuffie's causally related lumbar symptoms will most probably remain problematic and materially/negatively impact upon his ability to sustain work activities"; (c) "the course of treatment . . . [he had] recommended for Mr. McDuffie's lumbar injury component is reasonable, medically necessary and geared toward lessening the ultimate period of disability produced by his September 19, 2014 compensable accident"; and (d) treatment of the left knee injury component was "likewise reasonable, medically necessary and geared toward lessening [this] . . . ultimate period of disability"

19. When questioned as to the nature/source of Mr. McDuffie's lumbar symptoms, Dr. Johnson confirmed/reiterated: (a) his routine treatment of facetogenic pain, as well as the diagnosis of posttraumatic facet syndrome (See, Dr. Johnson Deposition, pp. 13 - 14); (b) facetogenic pain, particularly if traumatic, does not lend itself to accurate diagnosis through MRI scanning (Id.); (c) the diminished lumbar extension referenced by

several examiners, as well as the slightly flexed posture of the spine he observed during this clinical examination, were reflective of facetogenic pain (See, Dr. Johnson Deposition, pp. 12 - 13, 21); (d) both the left buttock/thigh pain and positive straight leg raise responses he (and several other examiners) observed were likewise consistent with posttraumatic facet syndrome (See, Dr. Johnson Deposition, pp. 15 - 16); and (e) Mr. McDuffie's mechanism of injury was likewise consistent with the production of posttraumatic facetogenic pain (See, Dr. Johnson Deposition, pp. 14 - 15).

20. Dr. Johnson further explained: (a) Mr. McDuffie's clinical presentation was valid and the product of a genuine effort (See, Dr. Johnson Deposition, pp. 17 - 18); (b) the presence of 5/5 muscle strength was not only anticipated, but also "in no way inconsistent with [his] . . . diagnosis of post traumatic facet syndrome" (See, Dr. Johnson Deposition, p. 18); (c) given the fact Mr. McDuffie's posttraumatic facet syndrome and left knee pathology had received no focused treatment, the progressive worsening of lumbar symptoms recently documented by Dr. Riber was an expected consequence of his accident (See, Dr. Johnson Deposition, pp. 18 - 20); (d) failure to treat his left knee injury component has "[a]bsolutely" fueled "the continued presence of the facet syndrome and likely prolong[ed] . . . it" (See, Dr. Johnson Deposition, p. 20); and (e) Mr. McDuffie requires treatment of the left knee in tandem with focused care.

of his posttraumatic facet syndrome (See, Dr. Johnson Deposition, pp. 19 - 20, 23-24).

21. Additionally, Dr. Johnson verified: (a) as Mr. McDuffie was attempting to remain employed through performance of regular duty work activities, he did not discourage this effort (See, Dr. Johnson Deposition, pp. 21 - 22); (b) he had developed "trust" in Dr. Riber's opinions through their professional experience ("I think he does a fine job") (See, Dr. Johnson Deposition, pp. 20-21); (c) his agreement with the work restrictions imposed by Dr. Riber (Id.); (d) the validity of Mr. McDuffie's description of his persistent lumbar symptoms (See, Dr. Johnson Deposition, p. 25); and (e) his adherence to the opinions expressed in his July 20, 2015 questionnaire responses (See, Dr. Johnson Deposition, pp. 22 - 23).

22. Pursuant to questionnaire responses dated July 20, 2015, Drs. Riber and Lembo likewise: (a) attributed Mr. McDuffie's lumbar symptoms to the consequences of his compensable accident; (b) verified "failure to treat this lumbar injury component would materially/negatively impact upon . . . [Mr. McDuffie's] ability to sustain work activities"; (c) his need for focused treatment of not only these lumbar symptoms, but also the left knee injury component (which they verified to be "reasonable, medically necessary and geared toward lessening the ultimate period of disability produced by his September 19, 2014

compensable accident"); and (d) offered each of these opinions to a reasonable degree of medical certainty.

23. Inspection of Dr. Lembo's September 10, 2015 deposition testimony confirms: (a) Mr. McDuffie's reported symptoms were consistent with his described mechanism of injury and her clinical findings (See, Dr. Lembo Deposition, p. 13); (b) he exhibited both objective evidence of muscle spasm and pain with lumbar extension, which she indicated were consistent with an injury caused by his compensable accident (See, Dr. Lembo Deposition, pp. 20, 22, 44 - 45 and 52); (c) the presence of painful extension was a "significant" factor in her diagnosis, as this finding is "consistent with a facet pain generator" (See, Dr. Lembo Deposition, p. 44); (d) facetogenic pain, which she "commonly . . . see[s] in [her] . . . practice" is not diagnosed through MRI scanning (See, Dr. Lembo Deposition, p. 43); and (e) she reaffirmed her July 20, 2015 opinion that Mr. McDuffie's posttraumatic lumbar facet syndrome proximately results from his September 19, 2014 compensable accident (See, Dr. Lembo Deposition, p. 49).

24. After being apprised of Mr. McDuffie's persistent lumbar symptoms and associated functional difficulties, Dr. Lembo also verified: (a) his causally related pain was interfering with daily activities (See, Dr. Lembo Deposition, p. 49); (b) her prior questionnaire response relative to the likelihood his "causally related lumbar symptoms . . . remain[ing] problematic

and materially/negatively impact[ing] . . . upon his ability to sustain work activities" remained accurate (See, Dr. Lembo Deposition, p. 50); (c) these symptoms were "most likely not going to . . . improve . . . absent treatment" (See, Dr. Lembo Deposition, pp. 50 - 51); (d) his receipt of any accommodations in connection with his employment was not consistent with unrestricted work activity (See, Dr. Lembo Deposition, p. 55), and (e) Mr. McDuffie's causally related symptoms warranted imposition of a 30 pound lifting restriction (See, Dr. Lembo Deposition, pp. 24, 35 and 54).

25. On October 12, 2015, Mr. McDuffie was reexamined by Dr. Riber, who: (a) noted "his pain and dysfunction had become progressively worse"; (b) again observed "his pain is more closely reproduced with returning upright . . . [from forward flexion] and extension most closely reproduces his pain"; (c) similarly detected "low back, gluteal and hamstring discomfort" in response to straight leg raise testing; (d) perceived slight gait disturbance; (e) reiterated his prior diagnosis of a posttraumatic lumbar facet syndrome, as well as the need for medial branch blocks; and (f) imposed several work restrictions, including "no twisting, stooping or bending and no lifting greater than 10 pounds."

26. During the course of his October 26, 2015 deposition, Dr. Riber explained: (a) Mr. McDuffie displayed no "pain behavior", which he characterized as an "over-dramatic",

"unbelievable" or suspicious presentation (See, Dr. Riber Deposition, pp. 17 - 18, 20 and 45); (b) he observed no evidence of symptom magnification and had "no reason to doubt . . . the physiological legitimacy of any pain . . . [Mr. McDuffie] report" (See, Dr. Riber Deposition, pp. 46 and 48); (c) he had previously treated posttraumatic facet syndromes on "hundreds" of occasions prior to examining Mr. McDuffie (estimating "at least" 20% of the backs he sees involve a facet syndrome) (See, Dr. Riber Deposition, pp. 49 and 59); (d) he would not rely upon an MRI scan to diagnosis a facet syndrome, as "[y]ou can have a perfectly normal MRI and have a very clear-cut facet syndrome" (See, Dr. Riber Deposition, pp. 49 - 50); (e) diagnosis of this condition is instead "based on the mechanism of injury, which is part of the history, the complaints and then the exam" (See, Dr. Riber Deposition, p. 49); and (f) facetogenic pain can include "some nerve involvement" that produces leg pain (See, Dr. Riber Deposition, pp. 50 - 51).

27. Dr. Riber further verified: (a) lumbar extension "loads the facet joints", to the extent that when an individual "either return[s] . . . upright or extend[s], . . . a facet joint issue . . . [will] declare itself" (See, Dr. Riber Deposition, p. 55); (b) his clinical observation of pain with lumbar extension was consistent with the relevant clinical findings identified in Dr. Lembo's June 9, 2015 report, as well as Dr. Johnson's June 11, 2015 report (See, Dr. Riber Deposition, pp. 55 - 56); (c) Mr.

McDuffie's positive straight leg raise response was also consistent with the diagnosis of posttraumatic facet syndrome (See, Dr. Riber Deposition, pp. 51 - 52); (d) his updated (October 12, 2015) examination remained reflective of a posttraumatic facet syndrome (See, Dr. Riber Deposition, pp. 39 - 40); (e) Mr. McDuffie's lumbar symptoms resulted from his September 19, 2014 compensable accident (See, Dr. Riber Deposition, pp. 27 & 61); (f) treatment for this back injury component would begin with medial branch blocks, with consideration of radiofrequency rhizotomy depending upon his response to these blocks (See, Dr. Riber Deposition, pp. 29, 60 & 64); (g) improvement of Mr. McDuffie's back injury component would be enhanced by receipt of treatment for his left knee (See, Dr. Riber Deposition, p. 61); (h) his receipt of treatment for the back injury component was reasonable, medically necessary and aimed toward lessening the ultimate period of disability stemming from the September 19, 2014 compensable accident (See, Dr. Riber Deposition, pp. 61 - 62); and (i) the restrictions he had assigned were not only geared toward preventing Mr. McDuffie "from getting any worse until he gets some treatment", "but also reasonable and medically necessary" in this instance (See, Dr. Riber Deposition, pp. 36 and 62).

28. Although he obviously attempted to perform full duty work in accordance with Dr. Peelle's instruction, Mr. McDuffie: (a) continued to experience back and left leg symptoms; (b)

encountered problems engaging in these job activities, noting receipt of assistance and instances where he "couldn't even . . . stand straight up . . . [and/or his] back had locked up" (See, Hearing Transcript, pp. 35 - 36); (c) has more recently missed time from work because his "back was giving [him] . . . problems" (See, Hearing Transcript, p. 37); (d) was instructed by his Employer to obtain "a doctor's slip" in order to resume work following these recent absences (See, Hearing Transcript, p. 38); (e) provided his Employer with this required documentation following medical reevaluation in October, 2015 (See, Hearing Transcript, p. 39); (f) was nonetheless afforded no opportunity to resume restricted work activities, despite compliance with his Employer's directive (Id.); (g) received no explanation as to why his restrictions would not be accommodated other than ". . . I couldn't come back 'til their insurance people talked to my lawyer" (Id.); and (h) remained "willing to come back". (Id.).

29. Mr. McDuffie's testimony also confirms: (a) the duties incidental to his job as a Cook II include "cooking in the big pots, cleaning up, putting the pots and pans . . . in the aisles, putting them in the warmers, serving on the line . . . [and] going to the meat room to get the meat". (See, Hearing Transcript, p. 20); (b) these work activities require lifting weights that not only exceed 10 lbs. (the limitation identified by Dr. Riber and endorsed by Dr. Johnson), but also the 30 lb. restriction referenced by Dr. Lembo ("chicken is like the most heaviest thing

that we'll pick up. It's probably like 40 to 45 pounds.") (id.). (c) he is also obliged to twist (See, Hearing Transcript, p. 21); (d) the left knee pain had been present "from the beginning" (See, Hearing Transcript, p. 37); (e) while Dr. Young had "looked at [his] . . . knee", there had heretofore been no focused treatment of this injury component by any physician to whom he was directed by Defendants (See, Hearing Transcript, pp. 28 and 42 - 43); and (f) his symptoms had never abated following receipt of the full duty work release from Dr. Peelle (See, Hearing Transcript, p. 47).

30. After thoroughly reviewing all evidence of record and acknowledging Commissioner Taylor's observations of Mr. McDuffie during the course of the hearing, We specifically find: (a) his testimony, including description of the injury mechanism and the nature/location of all symptoms associated with this accident, are wholly consistent with the medical evidence; (b) this medical evidence certainly confirms the onset of low back and left leg pain shortly after sustaining the admittedly compensable September 19, 2014 trauma; (c) while the apparent absence "of structural abnormalities on his MRI" led Dr. Peelle to discharge him from active care, Drs. Johnson, Riber and Lembo unanimously confirmed a scan of this nature is not diagnostic of facetogenic pain; (d) these medical specialists also convincingly verified/explained the positive correlation between their diagnosis of posttraumatic facet syndrome with not only his

relevant clinical findings (including diminished lumbar extension), but also the September 19, 2014 mechanism of injury; (e) these specialists, who each regularly encounter facetogenic pain in their respective practices, likewise reliably established his need for previously unprovided facet-directed treatment; and (f) this treatment, aimed toward a posttraumatic facet syndrome diagnosed by Drs. Johnson, Riber and Lembo, proximately results from the consequences of his September 19, 2014 compensable accident.

31. We further find: (a) the evidence, including consistent opinions expressed by Drs. Johnson, Riber and Lembo, convincingly indicates Mr. McDuffie's compensable accident has created a lumbar posttraumatic facet syndrome; (b) this causally related condition has produced not only persistent back pain, but also associated left leg symptoms (See, testimony of Drs. Riber and Johnson); (c) Mr. McDuffie has not reached the point of maximum medical improvement relative to this causally related back injury component; (d) the treatment he requires for this compensable back injury component includes, but is not limited to, the lumbar facet/medial branch blocks identified by these physicians; and (e) Mr. McDuffie's receipt of these additional treatment modalities for his back injury component is reasonable, medically necessary and geared toward lessening the ultimate period of disability produced by the consequences of his September 19, 2014 compensable accident.

32. We also find: (a) the symptoms stemming from Mr. McDuffie's causally related back injury component have negatively impacted upon his ability to engage in unrestricted work activities, notwithstanding Dr. Peelle's previous full duty work release; (b) Dr. Riber (who documented the presence of facetogenic symptoms in January, 2015, as well as the progressive impact of his condition in October, 2015) recommended several work restrictions ("no twisting, stooping or bending and no lifting greater than 10 pounds") in order to avoid further worsening of these symptoms; (c) these restrictions were subsequently endorsed by Dr. Johnson, who expressed his "trust" in Dr. Riber's judgment as to work status; (d) Dr. Lembo similarly felt Mr. McDuffie was incapable of performing unrestricted work activities, assigning a 30 pound lifting limitation; and (e) the work restrictions assigned by these physicians are inconsistent with certain aspects of Mr. McDuffie's "full duty" work regimen.

33. In this regard, We further find: (a) after these causally related lumbar symptoms necessitated his absence from work in 2015, Mr. McDuffie attempted to resume performance of his job duties; (b) despite his provision of medical documentation authorizing performance of restricted work activities, his Employer has declined to afford him any opportunity to engage in job duties consistent with these medical restrictions; (c) the medical evidence firmly establishes these restrictions result

from/are attributable to the consequences of his September 19, 2014 compensable accident; (d) our inspection of the record verifies Mr. McDuffie's continued absence from work was exclusively the product of Defendants' unwillingness to "accommodate" these work restrictions (See, Hearing Transcript, pp. 11, 15 and 37 - 39); (e) although all parties were aware of these work restrictions, as well as Mr. McDuffie's desire to engage in accommodated job duties, Defendants elected not to provide work consistent with these medical limitations; and (f) these circumstances have produced a continuing period of temporary total disability.

34. Additionally, We find: (a) after sustaining the September 19, 2014 trauma, Mr. McDuffie reported the presence of both back and left leg pain; (b) as time progressed, the left leg pain persisted from his buttocks to his knee; (c) despite Dr. Young's clinical identification of left knee symptoms and recommendation of orthopaedic referral for assessment of "[p]ersistent low back, left thigh and left knee pain". Defendants' designated physician (Dr. Peelle) did not perform a focused examination of Mr. McDuffie's left knee; and (d) he was consequently obliged to obtain an independent medical evaluation by Dr. Mazoue.

35. We also find Dr. Mazoue (the only orthopaedic surgeon who scrutinized Mr. McDuffie's left knee): (a) discovered significant clinical evidence of medial meniscus pathology; (b)

explained these clinical findings had "an objective" element; (c) indicated the September 19, 2014 mechanism of injury "was very consistent with the development of a meniscus tear"; (d) attributed Mr. McDuffie's left knee symptoms to the consequences of his compensable accident; and (e) recommended further treatment, commencing with performance of an MRI scan.

36. We also find: (a) the reliable medical evidence, particularly the opinions expressed by Dr. Mazoue, amply establish a causal relationship between Mr. McDuffie's focal left knee symptoms and his September 19, 2014 compensable accident; (b) he requires further treatment for this injury component, including an MRI scan and follow-up care through Dr. Mazoue; (c) Mr. McDuffie has not yet achieved maximum medical improvement relative to his causally related left knee injury component; (d) his receipt of further treatment is reasonable, medically necessary and will tend to lessen the period of disability produced by the consequences of the September 19, 2014 compensable accident; and (e) notwithstanding their full awareness of Dr. Mazoue's determination as to the nature/source/medical requirements of Mr. McDuffie's causally related left knee symptoms, as well as the absence of any contrary opinion relative to these symptoms, Defendants chose to deny liability for this left knee injury component.

37. The medical treatment, medications, evaluations, diagnostic testing, physical therapy, etc. which Mr. McDuffie has

heretofore received/undergone through any authorized medical providers were reasonable, medically necessary and tended to lessen his ultimate period of disability. We also find Dr. Mazoue's June 10, 2015 evaluation was reasonable, medically necessary and tended to lessen Mr. McDuffie's ultimate period of disability.

CONCLUSIONS OF LAW

IN VIEW OF THESE FINDINGS OF FACT, WE CONCLUDE AS MATTERS OF LAW:

1. The parties to this proceeding are subject to and bound by the provisions of the South Carolina Workers' Compensation Act.

2. On September 19, 2014, Mr. McDuffie, an employee within the meaning of S.C. Code Ann. Section 42-1-130 (1976, as amended), sustained compensable injuries to his back and left leg within the meaning of S.C. Code Ann. Section 42-1-160 (2007), while performing duties arising out of and within the course and scope of his employment with Johnson Food Service, LLC, an employer within the meaning of S.C. Code Ann. Section 42-1-140 (1976).

3. As previously noted, the evidence of record (testimony and the opinions expressed, to a reasonable degree of medical certainty, by Drs. Johnson, Riber, Lembo and Mazoue) firmly, convincingly/reliably establishes: (a) Mr. McDuffie's persistent back and left leg symptoms proximately result from the

consequences of his September 19, 2014 compensable accident; (b) his left leg symptoms involve not only pain stemming from a posttraumatic facet syndrome, but also a distinct left knee injury component of the nature identified by Dr. Mazoue; (c) he has not yet reached the point of maximum medical improvement as to either his back or left leg injury components; and (d) Mr. McDuffie requires not only facet-directed treatment of the back injury component, but also focused care for a likely medial meniscal tear. We consequently conclude Mr. McDuffie has clearly established: (a) the causal relationship of his current lumbar symptoms to the consequences of his September 19, 2014 compensable accident; (b) his need for treatment of a heretofore untreated causally related posttraumatic facet syndrome; (c) the September 19, 2014 compensable accident also produced a left knee injury component that likewise requires focused treatment; and (d) maximum medical improvement has yet to be attained as to either of these compensable injury components.

4. Defendants are financially responsible for the medical treatment, medications, evaluations, physical therapy, evaluative procedures, diagnostic testing, etc. which Mr. McDuffie has heretofore received/undergone through any authorized healthcare providers as a result of his back injury component, as he received these treatment modalities per the direction of Defendants. We further conclude: (a) the additional medical evaluations which Mr. McDuffie has independently undergone

relative to his back injury component were certainly warranted especially in view of Defendants' denial of liability for further treatment of his causally related posttraumatic facet syndrome; and (b) the assessment by Dr. Mazoue, the only orthopaedic surgeon to actually evaluate Mr. McDuffie's left knee symptoms/pathology, was clearly reasonable, medically necessary and tended to lessen his period of disability within the meaning of S.C. Code Ann. Section 42-15-60 (2007).

5. We further conclude: (a) despite their knowledge (through report, questionnaire responses and deposition testimony) of Dr. Mazoue's opinions relative to Mr. McDuffie's left knee injury component and the absence of any conflicting medical opinion relative to this injury component, Defendants maintained their denial of liability; (b) notwithstanding this denial, they certainly had ample opportunity to obtain assessment of this left knee injury component, but chose not to do so; (c) given the nature of his left knee symptoms, Mr. McDuffie reasonably sought evaluation from Dr. Mazoue (whose qualifications to treat this condition have not been challenged); (d) Mr. McDuffie has developed sufficient confidence in Dr. Mazoue to proceed with surgery by this physician (a likely scenario); and (e) the current circumstances constitute good cause for designation of Dr. Mazoue as Mr. McDuffie's authorized treater relative to the left knee injury component per Section 42-15-60. See also, Clark v. Aiken County Government, 366 S.C.

102, 620 S.E. 2d 99, 104 (Ct. App. 2005); Hall v. United Rentals, Inc., 371 S.C. 69, 636 S.E. 2d 876, 885 (Ct. App. 2006).

6. We similarly conclude: (a) Mr. McDuffie's receipt of treatment for the posttraumatic lumbar facet syndrome diagnosed by Drs. Johnson, Riber and Lembo is reasonable, medically necessary and geared toward lessening his ultimate period of disability per Section 42-15-60; (b) this treatment shall include, but not be limited to, performance of lumbar facet/medial branch blocks, in accordance with the treatment recommendations outlined by these physicians; (c) Defendants will be afforded the right to provide treatment for Mr. McDuffie's back injury component per Section 42-15-60, but strictly based upon the undersigned's ruling that Mr. McDuffie's diagnosed posttraumatic facet syndrome is causally related to the consequences of his compensable accident, so as to ensure receipt of this treatment; and (d) this obligation to provide ongoing medical treatment shall continue until this Commission determines he has achieved maximum medical improvement.

7. Upon informing counsel of her rulings relative to this dispute, Commissioner Taylor inadvertently overlooked their previous agreement to defer establishment of Mr. McDuffie's average weekly wage and compensation rate pending further review of all relevant data. This oversight was subsequently brought to her attention via email communication from Mr. McDuffie's counsel. As a consequence, the issue relative calculation of Mr.

McDuffie's average weekly wage and compensation is held in abeyance for determination at a later date.

8. Additionally, the email correspondence requested Commissioner Taylor to address Mr. McDuffie's entitlement to temporary total disability compensation. In response, counsel for Defendants maintained that as the Form 50 did not specifically request this compensation, the issue was not ripe for determination.

9. In this regard, counsel for the respective parties directed Commissioner Taylor, as well as this Panel, to portions of the hearing transcript which they believe are particularly relevant to this issue. Based upon our review of the pertinent portions of the hearing transcript, We conclude: (a) while the parties were obviously preoccupied with the issue involving withdrawal of Dr. Lembo's report (a circumstance which is thoroughly addressed in the May 16, 2016 Order), Mr. McDuffie's counsel nonetheless indicated his client was not currently working due to his Employer's unwillingness to honor restrictions identified by unauthorized physicians (Drs. Riber and Lembo) (See, Hearing Transcript, p. 11); (b) Defendants were obviously aware of Mr. McDuffie's restricted duty work status, as reflected by their counsel's recognition of a need "to accommodate him" (See, Hearing Transcript, p. 15); (c) Mr. McDuffie provided relatively detailed testimony outlining not only his efforts to resume restricted duty work activities, but also his Employer's

inability/failure to provide duties consistent with his medical restrictions (See, Hearing Transcript, pp. 37 - 39); (d) the Form 50 contained "a boilerplate claim for '[a]ppropriate benefits as provided in the [Workers' Compensation] Act for the above grounds and other relief as the Workers' Compensation Commission may direct as just and proper" (See, Nettles v. Spartanburg School District #7, 341 S.C. 580, 535 S.E. 2d 146, 149 (Ct. App. 2000)); and (e) in view of this proviso, as well as the parties' mutual recognition of the fact his absence from work was due to Defendants' disinclination "to accommodate" him, Mr. McDuffie's entitlement to temporary total disability compensation is properly before this Commission for consideration. See also, Harbin v. Owens-Corning Fiberglas, 316 S.C. 423, 450 S.E. 2d 112, 115 (Ct. App. 1994) ("As to the merits of the pleading issue, Harbin's claim for any and all rights under the Act was a sufficient pleading.").

10. "Under the Workers' Compensation Act, a claimant is entitled to compensation for a total disability resulting from a work-related injury." Last v. MSI Construction Company, Inc., 305 S.C. 349, 409 S.E. 2d 334, 336 (1991). In this regard, the Supreme Court of South Carolina has consistently held that "the loss of earning capacity caused by the physical injury is the pertinent measure of compensable disability." (Id.); See also, Bowen v. Chiquola Manufacturing Company, 238 S.C. 322, 120 S.E. 2d 99 (1961); Shealy v. Algeron Blair, Inc., 250 S.C. 196, 188

S.E. 2d 640 (1967). Consequently, the issue is "whether the injury ha[s] . . . resulted in some loss of . . . [the Claimant's] earning capacity." Orr v. Elastomeric Products, 323 S.C. 342, 444 S.E. 2d 448, 449 (Ct. App. 1996); Last, 409 S.E. 2d at 336.

11. Additionally, a review of the relevant portions of S.C. Code Ann. Section 42-9-260 (1976, as amended), as well as S.C. Code Ann. Regs. 67-505 (2012) and 67-506 (2012), verifies: (a) disability is presumed to continue until an employee has returned to work for the requisite fifteen day period with the employer responsible for the payment of temporary disability compensation; and (b) this compensation remains payable unless the injured employee is either released by the treating physician to work "without restriction", provided with "limited duty work consistent with . . . [restrictions assigned by] the treating physician" or actively working.

12. Our Appellate Courts have similarly held: (a) the incarceration of an injured worker did not terminate his period of temporary total disability (rejecting an argument that imprisonment, rather than work related injury, produced inability to work). Last, supra; (b) an intervening pregnancy did "not change the fact that . . . [a compensable] injury" continued to prohibit an employee from performing her previous job. Orr, 474 S.E.2d at 449; (c) a "seasonal" employee remained temporarily totally disabled due to injury, notwithstanding his "return to school on a full-time basis . . . [purportedly] removed him from

the labor market" Hines v. Hendricks Canning Company, 263 S.C. 399, 211 S.E.2d 220, 223 (1975); and (d) an employer "can be relieved of the liability to pay . . . [temporary total disability compensation] by either offering or procuring" suitable employment for the injured worker. Coleman v. Quality Concrete Products, Inc., 245 S.C. 625, 142 S.E.2d 43, 46 (1988). See also, S.C. Code Ann. Section 42-9-190 (1976).

13. Essentially, "when the injured worker is under work restrictions, the employer must either offer suitable employment within the injured worker's capacity or pay temporary total disability compensation." Pollack v. Southern Wine & Spirits of America, 405 S.C. 9, 747 S.E. 2d 430, 433 (2013) (Court indicated it "d[id] . . . not disagree with [this] . . . proposition"). In this instance, analysis of the evidence of record reveals: (a) Mr. McDuffie work status has been materially restricted as a consequence of his causally related symptoms; (b) these limitations are inconsistent with his regular/full duty work activities; (c) while Johnson Food Service, LLC has been afforded an opportunity to provide suitably restricted work activities, it has declined to do so; and (d) Mr. McDuffie has not yet reached maximum medical improvement. We consequently conclude he has been temporarily totally disabled within the meaning of S.C. Code Ann. Section 42-9-10 (2007), as a matter of law, since his last work date and remains so at this time.

14. It is axiomatic that the provisions of S.C. Code Ann. Section 42-17-40 (1976, as amended) simply oblige this Commission to make "findings of fact . . . upon the essential factual issues. . . ." Hill v. Jones, 255 S.C. 219, 178 S.E. 2d 142, 143 (1970); Airco, Inc. v. Hollington, 269 S.C. 152, 235 S.E. 2d 804, 808 (1977). While these findings must "be sufficiently definite and detailed to enable the appellate court to properly determine whether the findings of fact are supported by the evidence and whether the law has been correctly applied to those findings . . . [, n]o particular format is required." Brayboy v. Clark Heating Company, Inc., 306 S.C. 56, 409 S.E. 2d 757, 758 (1991).

15. Inspection of Commissioner Taylor's Order clearly verifies: (a) the presence of numerous findings which address all factual issues through exhaustive analysis of the evidence; (b) identification of the evidentiary basis for these factual determinations; (c) adherence to applicable law; and (d) its content obviously satisfies the requirements prescribed by Section 42-17-40, as construed by the South Carolina Supreme Court.

AWARD

ACCORDINGLY, IT IS HEREBY ORDERED that Defendants shall: (a) accept financial responsibility for all medical modalities previously provided/prescribed by any authorized healthcare specialists, as well as for the charges stemming from Dr. Mazoue's June 10, 2015 evaluation; (b) authorize the additional

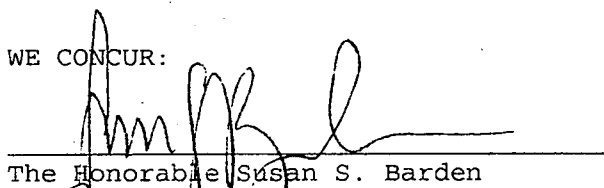
causally related medical treatment, medications, evaluations, diagnostic testing, evaluative procedures, physical therapy, surgical procedures, etc. provided/prescribed by Dr. Elazoue and is hereby designated as Mr. McDuffie's treating physician relative to the left knee injury component for the purposes of this claim; (c) accept financial responsibility for treatment of Mr. McDuffie's lumbar posttraumatic facet syndrome through an appropriate specialist of its choosing, who shall provide treatment for this condition as a causally related result of Mr. McDuffie's compensable accident; and (d) pay temporary total disability compensation effective the day following his last active work date until such time as this obligation is relieved by further Order of this Commission.

IT IS SO ORDERED.

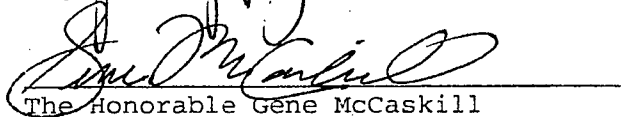


The Honorable T. Scott Beck
Chairman
South Carolina Workers' Compensation
Commission

WE CONCUR:



The Honorable Susan S. Barden



The Honorable 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 Kim Falls on October 12, 2016

STATE OF SOUTH CAROLINA)

COUNTY OF RICHLAND)

Timothy A. McDuffie,)

Employee/Claimant,)

vs.)

Johnson Food Services, LLC,)

Employer,)

and)

Great American Alliance Ins. Co.
and Strategic Comp.,)

Carrier/Defendants.)

BEFORE THE
SOUTH CAROLINA
WORKERS' COMPENSATION COMMISSION
WCC FILE NUMBER: 1413546

ORDER

STATEMENT OF THE CASE

On September 19, 2014, Claimant, Timothy A. McDuffie, sustained a compensable accident while performing his job duties for Defendant, Johnson Food Services, LLC, in Richland County, South Carolina. While this Employer and its Carrier, Great American Alliance Insurance Company/Strategic Comp, initially authorized Mr. McDuffie's receipt of certain medical treatment for an admitted back injury component, disputes arose relative to: (a) his need for treatment of a lumbar facet syndrome diagnosed by Drs. John F. Johnson, Nancy R. Lembo and Ezra B. Riber; (b) the causal relationship of a distinct left knee injury component identified by Dr. Christopher G. Mazoue; and (c) his entitlement to accrued/continuing temporary total disability compensation.

By Order dated May 16, 2016, the Honorable Aisha G. Taylor determined: (a) Mr. McDuffie's September 19, 2014 compensable accident had produced distinct back and left knee injury components; (b) his persistent lumbar symptoms resulted from a posttraumatic facet syndrome that warranted focused treatment; (c) Defendant would "accept financial responsibility

for treatment of Mr. McDuffie's lumbar facet syndrome through an appropriate specialist of its choosing, who shall provide treatment for this condition as a casually related result of Mr. McDuffie's compensable accident"; (d) treatment of the left knee injury component would be provided by Dr. Mazoue; and (e) he was entitled to receive accrued/continuing temporary total disability compensation.

Pursuant to its October 12, 2016 Order, the Appellate Panel fully affirmed Commissioner Taylor's factual findings and legal rulings. While a portion of this Order was then appealed to the South Carolina Court of Appeals, Defendants did not contest the determination: (a) his persistent lumbar symptoms were the product of a causally related posttraumatic facet syndrome; (b) "the treatment he requires for this compensable back injury component shall include, but not be limited to, performance of lumbar facet/medial branch blocks, in accordance with the treatment recommendations outlined by" Drs. Johnson, Lembo and Riber; (c) "Defendants will be afforded the right to provide treatment for Mr. McDuffie's back injury component per . . . [S.C. Code Ann.] Section 42-15-60 . . . [(2007)], but strictly based upon [its] . . . ruling that Mr. McDuffie's diagnosed posttraumatic facet syndrome is causally related to the consequences of his compensable accident, so as to ensure receipt of this treatment"; and (d) they would likewise "accept financial responsibility for treatment of Mr. McDuffie's lumbar post traumatic facet syndrome through an appropriate specialist"

By Motion dated January 11, 2018, Mr. McDuffie: (a) sought to quash Defendants' attempt to direct him for treatment of his back injury component through Dr. Karl A. Lozanne, a neurosurgeon; and (b) requested Commission designation of a treating physician per Section 42-15-60. In response, Defendants maintain: (a) the purpose of the proposed "appointment is for an

evaluation and current recommendations for treatment if any”; (b) Mr. McDuffie “should be compelled to attend the IME in order to assess his current medical condition to determine what medical care is needed if any in this situation”; and (c) “the current circumstances do not warrant the Commission’s designation of a treating physician”.

A hearing relative to his matter was held on February 6, 2018 in Columbia, South Carolina. At that time, the undersigned: (a) received oral argument from counsel for the respective parties; (b) analyzed the contents of the Motion (including attached Exhibits), as well as the Defendants’ Response; and (c) reviewed the pertinent portions of this Commission’s claim file. After due consideration, I grant Mr. McDuffie’s Motion to Quash and designate Dr. J. Kelby Hutcheson of Carolinas Center for the Advanced Management of Pain as his treating physician based upon the following **Findings of Fact and Conclusions of Law**.

FINDINGS OF FACT

1) On September 19, 2014, Mr. McDuffie sustained compensable injuries to his back and left leg when he tripped over an exposed pipe at the Johnson Food Services, LLC facility located at Ft. Jackson military base. Following this injury, he initially received treatment through Dr. Stewart Young of First Care, who prescribed physical therapy in conjunction with medication before recommending orthopaedic evaluation for “[p]ersistent low back, left thigh and left knee . . .” (See, October 12, 2016 Order, Finding of Fact No. 7).

2) Defendants then directed Mr. McDuffie for evaluation by Dr. Michael W. Peelle of Moore Orthopaedics, who: (a) observed several clinical abnormalities that led him to obtain a lumbar MRI scan; (b) indicated this scan did not reveal any disc pathology; (c) offered no

additional treatment; and (d) discharged him effective January 5, 2015. (See, October 12, 2016 Order, Finding of Fact No. 8 and 9).

3) As he remained symptomatic, Mr. McDuffie subsequently underwent evaluations by Drs. Johnson, Riber and Lembo, who each: (a) determined the consequences of his compensable injury had produced a facetogenic pain syndrome; (b) recommended treatment in the form of facet injections/medial branch blocks; and (c) confirmed the nature/degree of his causally related symptoms/pathology prohibited him from engaging in unrestricted work activities. (See, October 12, 2016 Order, Finding of Fact Nos. 10-11 and 17-28).

4) After considering Mr. McDuffie's testimony, as well as the opinions expressed by Drs. Johnson, Riber and Lembo, this Commission specifically found:

(a) his testimony, including description of the injury mechanism and the nature/location of all symptoms associated with this accident, are wholly consistent with the medical evidence; (b) this medical evidence certainly confirms the onset of low back and left leg pain shortly after sustaining the admittedly compensable September 19, 2014 trauma; (c) while the apparent absence "of structural abnormalities on his MRI" led Dr. Peelle to discharge him from active care, Drs. Johnson, Riber and Lembo unanimously confirmed a scan of this nature is not diagnostic of facetogenic pain; (d) **these medical specialists also convincingly verified/explained the positive correlation between their diagnosis of posttraumatic facet syndrome with not only his relevant clinical findings (including diminished lumbar extension), but also the September 19, 2014 mechanism of injury;** (e) these specialists, who each regularly encounter facetogenic pain in their respective practices, likewise reliably established his need for previously unprovided facet-directed treatment; and (f) this treatment, aimed toward a posttraumatic facet syndrome diagnosed by Drs. Johnson, Riber and Lembo, proximately results from the consequences of his September 19, 2014 compensable accident. (See, October 12, 2016 Order, Finding of Fact No. 30)(Emphasis added).

5) This Commission further found:

(a) the evidence, including consistent opinions expressed by Drs. Johnson, Riber and Lembo, convincingly indicates Mr. McDuffie's compensable accident has created a lumbar posttraumatic facet syndrome; (b) this causally related condition has produced not only persistent back pain, but also associated left leg symptoms (See, testimony of Drs. Riber and Johnson); (c) Mr. McDuffie has not reached the point of maximum medical improvement relative to this causally related back injury component; (d) the treatment he requires for this compensable back injury component includes, but is not limited to, the lumbar facet/medial branch blocks identified by these physicians; and (e) Mr. McDuffie's receipt of these additional treatment modalities for his back injury component is reasonable, medically necessary and geared toward lessening the ultimate period of disability produced by the consequences of his September 19, 2014 compensable accident. (See, October 12, 2016 Order, Finding of Fact No. 31) (Emphasis added).

6) Based on this evidence, the Commission concluded:

(a) Mr. McDuffie's receipt of treatment for the posttraumatic lumbar facet syndrome diagnosed by Drs. Johnson, Riber and Lembo is reasonable, medically necessary and geared toward lessening his ultimate period of disability per Section 42-15-60; (b) *this treatment shall include, but not be limited to, performance of lumbar facet/medial branch blocks, in accordance with the treatment recommendations outlined by these physicians;* (c) Defendants will be afforded the right to provide treatment for Mr. McDuffie's back injury component per Section 42-15-60, but *strictly based upon the undersigned's ruling that Mr. McDuffie's diagnosed posttraumatic facet syndrome is causally related to the consequences of his compensable accident, so as to ensure receipt of this treatment;* and (d) this obligation to provide ongoing medical treatment shall continue until this Commission determines he has achieved maximum medical improvement. (See, October 12, 2016 Order, Conclusion of Law No. 6.)(Italics added).

7) This Commission consequently ordered that Defendants shall "accept financial responsibility for treatment of Mr. McDuffie's lumbar posttraumatic facet syndrome through an appropriate specialist of its choosing, who shall provide treatment for this condition as a causally related result of Mr. McDuffie's compensable accident"

8) As confirmed by counsel, following Mr. McDuffie's counsel's March, 2017 request for treatment of the spinal injury component, Defendants attempted to redirect him to Dr. Peelle. In view of this surgeon's previous inability to identify the subsequently diagnosed posttraumatic facet syndrome and indication Mr. McDuffie required no further care, his counsel: (a) informed defense counsel this course of action was inconsistent with the Commission's October 12, 2016 Order; and (b) objected to either reevaluation by Dr. Peelle or his designation as Mr. McDuffie's treater.

9) Per email correspondence dated January 2, 2018, Defendants case nurse advised counsel that Defendants had scheduled a January 12, 2018 appointment for Mr. McDuffie with Dr. Lozanne. (See, Exhibit A). As confirmed by inspection of his curriculum vitae information, Dr. Lozanne, a neurosurgeon, does not personally treat posttraumatic facet syndrome, but rather specializes in surgical care of spinal disorders. (See, Exhibit B).

10) In this connection, the extensive factual findings contained in the October 12, 2016 Order verify: (a) lumbar facet syndrome is initially treated with facet joint injections and/or medial branch blocks; (b) radiofrequency rhizotomy, depending upon the response to these injections/blocks, is also a consideration; (c) this treatment is routinely provided by conservative spine care physicians; and (d) the treatment Defendants are obliged to provide does not involve surgical intervention. (See, October 12 2016 Order, Finding of Fact Nos. 11, 17, 19, 23, 25-27 and 30-31; Conclusion of Law No. 6).

11) While the Commission afforded Defendants the opportunity to designate a physician, it likewise: (a) emphasized Defendants' obligation "to provide treatment"; (b) required that "this treatment shall include, but not be limited to, performance of lumbar

facet/medial branch blocks, in accordance with the treatment recommendations outlined by . . . Drs. Johnson, Riber and Lembo"; and (c) similarly instructed the "treatment" of Mr. McDuffie's lumbar posttraumatic facet syndrome . . . [be provided] through an appropriate specialist" (See, October 12, 2016 Order, Conclusion of Law No. 6 and "AWARD").

12) To date, Defendants have attempted to refer Mr. McDuffie to two surgeons for assessment of a condition (posttraumatic facet syndrome) this Commission has previously found does not require surgery, but instead warrants procedures (injections and possible radiofrequency rhizotomy) performed by nonsurgical spine physicians. Additionally, Defendants have indicated a primary purpose for these evaluation is to determine if **treatment is necessary**, despite this Commission's ruling Mr. McDuffie shall receive this facet "treatment".

CONCLUSIONS OF LAW

1. The parties to this proceeding are subject to and bound by the provisions of the South Carolina Workers' Compensation Act.

2. On September 19, 2014, Mr. McDuffie, an employee within the meaning of S.C. Code Ann. Section 42-1-130 (1976, as amended), sustained compensable injuries to his back and left leg within the meaning of S.C. Code Ann. Section 42-1-160 (2007), while performing duties arising out of and within the course and scope of his employment with Johnson Food Service, LLC, an employer within the meaning of S.C. Code Ann. Section 42-1-140 (1976).

3. While Defendants have appealed several aspects of this Commission's October 12, 2016 Order, they admittedly did not contest the determination as to Mr. McDuffie's back injury component, including: (a) his need for non-surgical treatment . . . [that] includes, but is not limited to, the lumbar facet/medial branch blocks identified by" Drs. Johnson, Lembo and Riber;

(b) “these specialists, who each regularly encounter facetogenic pain in their respective practices, likewise reliably *established his need* for previously unprovided facet-directed treatment”; (c) they were simply “afforded the right to provide treatment for Mr. McDuffie’s back injury component per Section 42-15-60, *but strictly based upon the . . . [Commission’s] ruling that Mr. McDuffie’s diagnosed posttraumatic facet syndrome is causally related to the consequences of his compensable accident so as to ensure receipt of treatment*”; and (d) this treatment of Mr. McDuffie’s lumbar posttraumatic facet syndrome . . . [would be provided] through an appropriate specialist”. (Italics added). These findings/conclusions/rulings consequently constitute the law of this case. See, Hudson v. Lancaster Convalescent Center, 407 S.C 112, 754 S.E. 2d 486, 490 (2012).

4. Given the law of this case, Defendants’ attempts to: (a) direct Mr. McDuffie to a surgeon are inconsistent with this Commission’s prior identification of his treatment needs; and (b) obtain an evaluation to determine **whether** treatment is warranted (“if any”) certainly constitutes an attempt to relitigate a previously resolved issue.

5. Section 42-15-60 empowers this Commission to “override the employer’s choice of providers and order a change in the medical or hospital service provided” in the event a controversy arises between the parties and “good cause” for this designation is established by the employee. See, Carter v. Aiken County Government, 366 S.C. 102, 620 S.E. 2d 99, 104 (Ct. App. 2005); Hall v. United Rentals, 371 S.C. 69, 636 S.E. 2d 876, 885 (Ct. App. 2006).

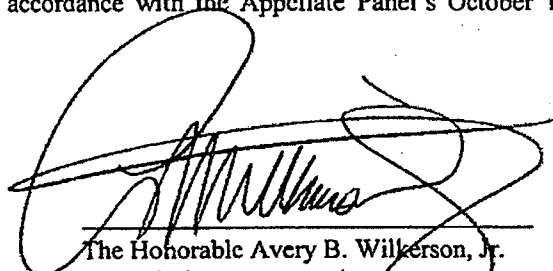
6. Our Appellate Courts have likewise recognized this Commission is vested with the authority to designate a treating physician in accordance with its assessment of an individual’s particular medical needs. Gattis v. Murrell’s Inlet, VFW, 353 S.C. 100, 576 S.E. 2d

191, 198 (Ct. App. 2003). ("Where it deems it necessary, the . . . [C]ommission may override an employer's choice of medical provider. . . ."; See also, Martin v. Rapid Plumbing, 369 S.C. 278, 631 S.E. 2d 547, 555 (Ct. App. 2006).

7. After duly considering the parties' respective positions, in light of the essentially undisputed facts and the law of this case, I conclude: (a) Mr. McDuffie has established "good cause" per Section 42-15-60 for Commission designation of a treating physician; and (b) the current circumstances warrant directing him to Dr. Hutcheson for receipt of treatment in accordance with the Appellate Panel's October 12, 2016 Order.

Accordingly, **IT IS HEARBY ORDERED** that Mr. McDuffie's Motion to Quash is granted. It is further **ORDERED** that Defendants shall accept financial responsibility for Mr. McDuffie's receipt of treatment, in accordance with the Appellate Panel's October 12, 2016 Order, through Dr. Hutcheson.

IT IS SO ORDERED.



The Honorable Avery B. Wilkerson, Jr.
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 Deborah Hutto on March 13, 2018

From: Michelle Estep <michelle@wrightrehab.com>
To: Patricia Walker <pwalker@safranlawfirm.com>
Cc: Andrew N. Safran <msa6831@aol.com>
Subject: T. McDuffie 564615078
Date: Tue, Jan 2, 2018 3:00 pm

Mr. McDuffie has an appt with Dr. Lozanne with Midlands Ortho and Neurosurgery on 1/12/18 at 11:30 am.
The appt is at the Gregg Street entrance of the 1910 Blanding Street. Columbia, SC office.

Please notify Mr. McDuffie with the appt info, confirm his planned attendance and remind him to bring his MRI disc, current medications and a picture ID or the MD will not see him.

I will plan to attend, to receive an update following a private examination, and will update all parties.

Thank you!

Michelle Estep, RN, BSN, CCM
Certified Case Manager
Wright Rehabilitation Services
803 260 6457 p
803 753 0860 f
michelle@wrightrehab.com

Exhibit A

[home](#) | [contact us](#) | [employment](#) | 

☎ 803-256-4107

MIDLANDS
orthopaedics
& NEUROSURGERY
A MEMBER OF ARCIS HEALTHCARE, LLC

Meet Our Physicians

Karl A. Lozanne, M.D.



Undergraduate Study: Brown University

Medical School: Yale University School of Medicine

Residency: University of Pittsburgh Medical Center

Areas of Specialty

General Neurosurgery

Endoscopic endonasal approaches

Minimally invasive spine

Spinal deformity, spinal instrumentation

Peripheral nerves

Brain tumors, cerebrovascular

Exhibit B

<http://www.midorthoneuro.com/doc-loza.php>

1/10/2018

DECISION AND ORDER
OF THE
SOUTH CAROLINA WORKERS' COMPENSATION COMMISSION
W.C.C. FILE NUMBER: 1413546

TIMOTHY A. MCDUFFIE, EMPLOYEE, CLAIMANT,

VERSUS

JOHNSON FOOD SERVICES, LLC, EMPLOYER,

AND

GREAT AMERICAN ALLIANCE INSURANCE CO./STRATEGIC COMP., CARRIER,
DEFENDANTS.

HEARING: Held on June 18, 2018 in Columbia, South
Carolina.

APPEARANCES: Claimant represented by Andrew N.
Safran, Esquire, Post Office Box 12089,
Columbia, South Carolina 29211.

Defendants represented by Benjamin M.
Renfrow, Esquire, Willson, Jones, Carter
& Baxley, P.A., 872 S. Pleasantburg
Drive, Greenville, South Carolina 29607.

PURPOSE OF HEARING: Review of the March 13, 2018 Order of
The Honorable Avery B. Wilkerson, Jr.

DECISION AND ORDER OF THE APPELLATE PANEL

FILED:

November 27, 2018

STATEMENT OF THE CASE

This is an appeal from the March 13, 2018 Order of The Honorable Avery B. Wilkerson, Jr., which determined: (a) Defendants', Johnson Food Service's and Great American Alliance Insurance Company's/Strategic Comp.'s, repeated attempts to direct Claimant, Timothy A. McDuffie, to a spine surgeon were "inconsistent with this Commission's prior identification of his treatment needs"; (b) their current effort to "obtain an evaluation to determine whether treatment is warranted ("if any") certainly constitutes an attempt to relitigate a previously resolved issue"; (c) after considering "the essentially undisputed facts and the law of this case, . . . Mr. McDuffie has established 'good cause' per . . . [the provisions of S.C. Code Ann.] Section 42-15-60 [(2015)] . . . for Commission designation of a treating physician"; and (d) selection of Dr. J. Kelby Hutcheson to serve as Mr. McDuffie's physician was appropriate under the present circumstances.

Essentially, Defendants contend: (a) they have never denied Mr. McDuffie's need for/entitlement to treatment for the back injury component at any time during the course of this claim; (b) their directing Mr. McDuffie to Dr. Karl A. Lozanne, a neurosurgeon, "for an evaluation and current recommendations for treatment **if any**" was not inconsistent with this Commission's explicit directive to "provide treatment"; (c) this second

attempt to compel Mr. McDuffie to undergo surgical evaluation for a posttraumatic facet syndrome, which the Appellate Panel previously found to be a non-surgical condition, rather than provide the mandated "treatment", did not justify Commissioner Wilkerson's designation of a treating physician per Section 42-15-60; (d) his ruling deprived them of an unassailable statutory right to direct medical care; and (e) Commissioner Wilkerson's designation of Dr. Hutcheson inappropriately allowed Mr. McDuffie to choose his own physician;

In response, Mr. McDuffie maintains: (a) the law of this case unequivocally establishes Defendants vigorously contested his entitlement to further treatment of his back injury component following a June 5, 2015 discharge from care by their designated physician, Dr. Michael W. Peelle; (b) as the Appellate Panel explicitly found his posttraumatic facet syndrome required receipt of nonsurgical modalities in the form of, at minimum, "lumbar facet/medial branch blocks", Defendants' attempt to redirect him to Dr. Peelle (a surgeon who had not detected this causally related pathology during his initial course of care), as well as their effort to compel evaluation by Dr. Lozanne to determine whether ("if any") treatment "is needed . . . in this situation", was clearly violative of the Appellate Panel's "treatment" mandate; (c) Commissioner Wilkerson was not only vested with the statutory authority to designate a treating physician, but also properly concluded he had established "good

cause" pursuant to Section 42-15-60 in this instance; and (d) the hearing record does not support Defendants' contention Commissioner Wilkerson's designation of Dr. Hutcheson was either the product of his specific request or inappropriate under the current circumstances.

In rendering the March 13, 2018 rulings, Commissioner Wilkerson found as facts:

1) On September 19, 2014, Mr. McDuffie sustained compensable injuries to his back and left leg when he tripped over an exposed pipe at the Johnson Food Services, LLC facility located at Ft. Jackson military base. Following this injury, he initially received treatment through Dr. Stewart Young of First Care, who prescribed physical therapy in conjunction with medication before recommending orthopaedic evaluation for "[p]ersistent low back, left thigh and left knee" (See, October 12, 2016 Order, Finding of Fact No. 7).

2) Defendants then directed Mr. McDuffie for evaluation by Dr. Michael W. Peelle of Moore Orthopaedics, who: (a) observed several clinical abnormalities that led him to obtain a lumbar MRI scan; (b) indicated this scan did not reveal any disc pathology; (c) offered no additional treatment; and (d) discharged him effective January 5, 2015. (See, October 12, 2016 Order, Finding of Fact No. 8 and 9).

3) As he remained symptomatic, Mr. McDuffie subsequently underwent evaluations by Drs. Johnson, Riber and Lembo, who each:

(a) determined the consequences of his compensable injury had produced a facetogenic pain syndrome; (b) recommended treatment in the form of facet injections/medial branch blocks; and (c) confirmed the nature/degree of his causally related symptoms/pathology prohibited him from engaging in unrestricted work activities. (See, October 12, 2016 Order, Finding of Fact Nos. 10-11 and 17-28).

4) After considering Mr. McDuffie's testimony, as well as the opinions expressed by Drs. Johnson, Riber and Lembo, this Commission specifically found:

(a) his testimony, including description of the injury mechanism and the nature/location of all symptoms associated with this accident, are wholly consistent with the medical evidence; (b) this medical evidence certainly confirms the onset of low back and left leg pain shortly after sustaining the admittedly compensable September 19, 2014 trauma; (c) while the apparent absence "of structural abnormalities on his MRI" led Dr. Peelle to discharge him from active care, Drs. Johnson, Riber and Lembo unanimously confirmed a scan of this nature is not diagnostic of facetogenic pain; (d) these medical specialists also convincingly verified/explained the positive correlation between their diagnosis of posttraumatic facet syndrome with not only his relevant clinical findings (including diminished lumbar extension), but also the September 19, 2014 mechanism of injury; (e) these specialists, who each regularly encounter facetogenic pain in their respective practices, likewise reliably established his need for previously unprovided facet-directed treatment; and (f) this treatment, aimed toward a posttraumatic facet syndrome diagnosed by Drs. Johnson, Riber and Lembo, proximately results from the consequences of

his September 19, 2014 compensable accident.
(See, October 12, 2016 Order, Finding of Fact
No. 30) (Emphasis added).

5) This Commission further found:

(a) the evidence, including consistent opinions expressed by Drs. Johnson, Riber and Lembo, convincingly indicates Mr. McDuffie's compensable accident has created a lumbar posttraumatic facet syndrome; (b) this causally related condition has produced not only persistent back pain, but also associated left leg symptoms (See, testimony of Drs. Riber and Johnson); (c) Mr. McDuffie has not reached the point of maximum medical improvement relative to this causally related back injury component; (d) the treatment he requires for this compensable back injury component includes, but is not limited to, the lumbar facet/medial branch blocks identified by these physicians; and (e) Mr. McDuffie's receipt of these additional treatment modalities for his back injury component is reasonable, medically necessary and geared toward lessening the ultimate period of disability produced by the consequences of his September 19, 2014 compensable accident. (See, October 12, 2016 Order, Finding of Fact No. 31) (Emphasis added).

6) Based on this evidence, the Commission concluded:

(a) Mr. McDuffie's receipt of treatment for the posttraumatic lumbar facet syndrome diagnosed by Drs. Johnson, Riber and Lembo is reasonable, medically necessary and geared toward lessening his ultimate period of disability per Section 42-15-60; (b) this treatment shall include, but not be limited to, performance of lumbar facet/medial branch blocks, in accordance with the treatment recommendations outlined by these physicians; (c) Defendants will be afforded the right to provide treatment for Mr. McDuffie's back injury component per Section 42-15-60, but strictly based upon the undersigned's ruling that Mr. McDuffie's diagnosed posttraumatic

facet syndrome is causally related to the consequences of his compensable accident, so as to ensure receipt of this treatment; and (d) this obligation to provide ongoing medical treatment shall continue until this Commission determines he has achieved maximum medical improvement. (See, October 12, 2016 Order, Conclusion of Law No. 6.) (Italics added).

7) This Commission consequently ordered that Defendants shall "accept financial responsibility for treatment of Mr. McDuffie's lumbar posttraumatic facet syndrome through an appropriate specialist of its choosing, who shall provide treatment for this condition as a causally related result of Mr. McDuffie's compensable accident"

8) As confirmed by counsel, following Mr. McDuffie's counsel's March, 2017 request for treatment of the spinal injury component, Defendants attempted to redirect him to Dr. Peelle. In view of this surgeon's previous inability to identify the subsequently diagnosed posttraumatic facet syndrome and indication Mr. McDuffie required no further care, his counsel: (a) informed defense counsel this course of action was inconsistent with the Commission's October 12, 2016 Order; and (b) objected to either reevaluation by Dr. Peelle or his designation as Mr. McDuffie's treater.

9) Per email correspondence dated January 2, 2018, Defendants case nurse advised counsel that Defendants had scheduled a January 12, 2018 appointment for Mr. McDuffie with Dr. Lozanne. (See, Exhibit A). As confirmed by inspection of

his curriculum vitae information, Dr. Lozanne, a neurosurgeon, does not personally treat posttraumatic facet syndrome, but rather specializes in surgical care of spinal disorders. (See, Exhibit B).

10) In this connection, the extensive factual findings contained in the October 12, 2016 Order verify: (a) lumbar facet syndrome is initially treated with facet joint injections and/or medial branch blocks; (b) radiofrequency rhizotomy, depending upon the response to these injections/blocks, is also a consideration; (c) this treatment is routinely provided by conservative spine care physicians; and (d) the treatment Defendants are obliged to provide does not involve surgical intervention. (See, October 12 2016 Order, Finding of Fact Nos. 11, 17, 19, 23, 25-27 and 30-31; Conclusion of Law No. 6).

11) While the Commission afforded Defendants the opportunity to designate a physician, it likewise: (a) emphasized Defendants' obligation "to provide treatment"; (b) required that "this treatment shall include, but not be limited to, performance of lumbar facet/medial branch blocks, in accordance with the treatment recommendations outlined by . . . Drs. Johnson, Riber and Lembo"; and (c) similarly instructed the "treatment" of Mr. McDuffie's lumbar posttraumatic facet syndrome . . . [be provided] through an appropriate specialist" (See, October 12, 2016 Order, Conclusion of Law No. 6 and "AWARD").

12) To date, Defendants have attempted to refer Mr. McDuffie to two surgeons for assessment of a condition (posttraumatic facet syndrome) this Commission has previously found does **not** require surgery, but instead warrants procedures (injections and possible radiofrequency rhizotomy) performed by nonsurgical spine physicians. Additionally, Defendants have indicated a primary purpose for these evaluation is to determine if **treatment is necessary**, despite this Commission's ruling Mr. McDuffie shall receive this facet "treatment".

Additionally, Commissioner Wilkerson concluded as matters of law:

1. The parties to this proceeding are subject to and bound by the provisions of the South Carolina Workers' Compensation Act.

2. On September 19, 2014, Mr. McDuffie, an employee within the meaning of S.C. Code Ann. Section 42-1-130 (1976, as amended), sustained compensable injuries to his back and left leg within the meaning of S.C. Code Ann. Section 42-1-160 (2007), while performing duties arising out of and within the course and scope of his employment with Johnson Food Service, LLC, an employer within the meaning of S.C. Code Ann. Section 42-1-140 (1976).

3. While Defendants have appealed several aspects of this Commission's October 12, 2016 Order, they admittedly did not contest the determination as to Mr. McDuffie's back injury

component, including: (a) his need for non-surgical treatment . . . [that] includes, but is not limited to, the lumbar facet/medial branch blocks identified by" Drs. Johnson, Lembo and Riber; (b) "these specialists, who each regularly encounter facetogenic pain in their respective practices, likewise reliably established his need for previously unprovided facet-directed treatment"; (c) they were simply "afforded the right to provide treatment for Mr. McDuffie's back injury component per Section 42-15-60, but strictly based upon the . . . [Commission's] ruling that Mr. McDuffie's diagnosed posttraumatic facet syndrome is causally related to the consequences of his compensable accident so as to ensure receipt of treatment"; and (d) this treatment of Mr. McDuffie's lumbar posttraumatic facet syndrome . . . [would be provided] through an appropriate specialist". (Italics added). These findings/conclusions/rulings consequently constitute the law of this case. See, Hudson v. Lancaster Convalescent Center, 407 S.C 112, 754 S.E. 2d 486, 490 (2012).

4. Given the law of this case, Defendants' attempts to: (a) direct Mr. McDuffie to a surgeon are inconsistent with this Commission's prior identification of his treatment needs; and (b) obtain an evaluation to determine **whether** treatment is warranted ("if any") certainly constitutes an attempt to relitigate a previously resolved issue.

5. Section 42-15-60 empowers this Commission to "override the employer's choice of providers and order a change in the medical or hospital service provided" in the event a controversy arises between the parties and "good cause" for this designation is established by the employee. See, Carter v. Aiken County Government, 366 S.C. 102, 620 S.E. 2d 99, 104 (Ct. App. 2005); Hall v. United Rentals, 371 S.C. 69, 636 S.E. 2d 876, 885 (Ct. App. 2006).

6. Our Appellate Courts have likewise recognized this Commission is vested with the authority to designate a treating physician in accordance with its assessment of an individual's particular medical needs. Gattis v. Murrell's Inlet, VFW, 353 S.C. 100, 576 S.E. 2d 191, 198 (Ct. App. 2003). ("Where it deems it necessary, the . . . [C]ommission may override an employer's choice of medical provider. . . ."; See also, Martin v. Rapid Plumbing, 369 S.C. 278, 631 S.E. 2d 547, 555 (Ct. App. 2006).

7. After duly considering the parties' respective positions, in light of the essentially undisputed facts and the law of this case, I conclude: (a) Mr. McDuffie has established "good cause" per Section 42-15-60 for Commission designation of a treating physician; and (b) the current circumstances warrant directing him to Dr. Hutcheson for receipt of treatment in accordance with the Appellate Panel's October 12, 2016 Order.

After reviewing the hearing record, in light of this Commission's prior Order, relevant legal authority and arguments of counsel, We hereby fully affirm Commissioner Wilkerson's factual determinations and ruling based upon the following FINDINGS OF FACT AND CONCLUSIONS OF LAW:

FINDINGS OF FACT

1. On September 19, 2014, Mr. McDuffie sustained compensable injuries to his back and left leg when he tripped over an exposed pipe at the Johnson Food Services, LLC facility located at Ft. Jackson military base in Richland County, South Carolina. Following this injury, he initially received treatment through Dr. Stewart Young of First Care, who prescribed physical therapy in conjunction with medication before recommending orthopaedic evaluation for "[p]ersistent low back, left thigh and left knee pain" (See, October 12, 2016 Order, Finding of Fact Nos. 1 and 7).

2) Defendants then directed Mr. McDuffie for evaluation by Dr. Michael W. Peelle of Moore Orthopaedics, who: (a) observed several clinical abnormalities that led him to obtain a lumbar MRI scan; (b) indicated this scan did not reveal any disc pathology; (c) offered no additional treatment; and (d) discharged him effective January 5, 2015. (See, October 12, 2016 Order, Finding of Fact Nos. 8 and 9).

3) As he remained symptomatic, Mr. McDuffie subsequently underwent evaluations by Drs. John F. Johnson, Ezra B. Riber and

Nancy R. Lembo, who each: (a) determined the consequences of his compensable injury had produced a facetogenic pain syndrome; (b) recommended treatment in the form of facet injections/medial branch blocks; and (c) confirmed the nature/degree of his causally related symptoms/pathology prohibited him from engaging in unrestricted work activities. (See, October 12, 2016 Order, Finding of Fact Nos. 10-11 and 17-28).

4) In response to the effectively unanimous opinions of Drs. Johnson, Riber and Lembo, Defendants: (a) deposed each of these physicians; (b) initially maintained Mr. McDuffie had reached the point of maximum medical improvement effective December 31, 2014 through the filing of a May 8, 2015 W.C.C. Form 21 (later withdrawn following filing of a July 10, 2015 W.C.C. Form 51); and (c) reiterated their position Mr. McDuffie had "been released at MMI by authorized treating physician", in conjunction with a denial of further medical care, through this Form 51. (See, May 16, 2016 Order of the Honorable Aisha G. Taylor, pp. 2-3 and 7; October 12, 2016 Order of the Appellate Panel, Finding of Fact Nos. 19-21, 23-24 and 26-27; July 10, 2015 W.C.C. Form 51).

5) After considering Mr. McDuffie's testimony, as well as the opinions expressed by Drs. Johnson, Riber and Lembo, the Appellate Panel specifically found:

(a) his testimony, including description of the injury mechanism and the nature/location

of all symptoms associated with this accident, are wholly consistent with the medical evidence; (b) this medical evidence certainly confirms the onset of low back and left leg pain shortly after sustaining the admittedly compensable September 19, 2014 trauma; (c) while the apparent absence "of structural abnormalities on his MRI" led Dr. Peelle to discharge him from active care, Drs. Johnson, Riber and Lembo unanimously confirmed a scan of this nature is not diagnostic of facetogenic pain; (d) these medical specialists also convincingly verified/explained the positive correlation between their diagnosis of posttraumatic facet syndrome with not only his relevant clinical findings (including diminished lumbar extension), but also the September 19, 2014 mechanism of injury; (e) these specialists, who each regularly encounter facetogenic pain in their respective practices, likewise reliably established his need for previously unprovided facet-directed treatment; and (f) this treatment, aimed toward a posttraumatic facet syndrome diagnosed by Drs. Johnson, Riber and Lembo, proximately results from the consequences of his September 19, 2014 compensable accident. (See, October 12, 2016 Order, Finding of Fact No. 30) (Emphasis added).

6) The Appellate Panel further found:

(a) the evidence, including consistent opinions expressed by Drs. Johnson, Riber and Lembo, convincingly indicates Mr. McDuffie's compensable accident has created a lumbar posttraumatic facet syndrome; (b) this causally related condition has produced not only persistent back pain, but also associated left leg symptoms (See, testimony of Drs. Riber and Johnson); (c) Mr. McDuffie has not reached the point of maximum medical improvement relative to this causally related back injury component; (d) the treatment he requires for this compensable back injury component includes, but is not limited to, the lumbar facet/medial branch blocks

identified by these physicians; and (e) Mr. McDuffie's receipt of these additional treatment modalities for his back injury component is reasonable, medically necessary and geared toward lessening the ultimate period of disability produced by the consequences of his September 19, 2014 compensable accident. (See, October 12, 2016 Order, Finding of Fact No. 31) (Emphasis added).

7) Based on this evidence, the Appellate Panel concluded:

(a) Mr. McDuffie's receipt of treatment for the posttraumatic lumbar facet syndrome diagnosed by Drs. Johnson, Riber and Lembo is reasonable, medically necessary and geared toward lessening his ultimate period of disability per Section 42-15-60; (b) this treatment shall include, but not be limited to, performance of lumbar facet/medial branch blocks, in accordance with the treatment recommendations outlined by these physicians; (c) Defendants will be afforded the right to provide treatment for Mr. McDuffie's back injury component per Section 42-15-60, but strictly based upon the undersigned's ruling that Mr. McDuffie's diagnosed posttraumatic facet syndrome is causally related to the consequences of his compensable accident, so as to ensure receipt of this treatment; and (d) this obligation to provide ongoing medical treatment shall continue until this Commission determines he has achieved maximum medical improvement. (See, October 12, 2016 Order, Conclusion of Law No. 6.) (Italics added).

8) The Appellate Panel consequently ordered that Defendants shall "accept financial responsibility for treatment of Mr. McDuffie's lumbar posttraumatic facet syndrome through an appropriate specialist of its choosing, who shall provide

treatment for this condition as a causally related result of Mr. McDuffie's compensable accident"

9) As confirmed by counsel, following Mr. McDuffie's counsel's March, 2017 request for treatment of the spinal injury component, Defendants attempted to redirect him to Dr. Peelle. In view of this surgeon's previous inability to identify the subsequently diagnosed posttraumatic facet syndrome and indication Mr. McDuffie required no further care, his counsel: (a) informed defense counsel this course of action was inconsistent with the Commission's October 12, 2016 Order; and (b) objected to either reevaluation by Dr. Peelle or his designation as Mr. McDuffie's treater.

10) Per email correspondence dated January 2, 2018, Defendants' case nurse advised Mr. McDuffie's counsel that they had scheduled a January 12, 2018 appointment for him with Dr. Lozanne. Mr. McDuffie's counsel subsequently filed the January 11, 2018 Motion to Quash, which: (a) included attached curriculum vitae information indicating Dr. Lozanne, a neurosurgeon, did not personally treat posttraumatic facet syndrome, but rather specializes in surgical care of spinal disorders; and (b) simply requested the Commission to "designate an appropriate specialist for treatment in accordance with the October 12, 2016 Order", without identifying any particular medical provider. (See, January 11, 2018 Notice of Motion and Motion to Quash).

11) In response to this Motion, Defendants maintained that, notwithstanding the Appellate Panel's previous ruling relative to Mr. McDuffie's need for/entitlement to treatment of the causally related posttraumatic facet syndrome diagnosed by Drs. Johnson, Riber and Lembo, he was obliged to undergo additional evaluation by Dr. Lozanne "to determine what medical care is needed **if any** in this instance." (See, Defendants' January 22, 2018 "Response to Claimant's Motion to Quash Notice of Medical Appointment and Designate Treating Physician").

12) Inspection of the extensive factual findings contained in the October 12, 2016 Order verifies: (a) lumbar facet syndrome is initially treated with facet joint injections and/or medial branch blocks; (b) radiofrequency rhizotomy, depending upon the response to these injections/blocks, is also a consideration; (c) this treatment is routinely provided by conservative spine care physicians; and (d) the treatment Defendants are obliged to provide does not involve surgical intervention. (See, October 12 2016 Order, Finding of Fact Nos. 11, 17, 19, 23, 25-27 and 30-31; Conclusion of Law No. 6).

13) While the Appellate Panel previously afforded Defendants the opportunity to designate a physician, it likewise: (a) emphasized Defendants' obligation "to provide treatment"; (b) required that "this treatment shall include, but not be limited to, performance of lumbar facet/medial branch blocks, in accordance with the treatment recommendations outlined by . . .

Drs. Johnson, Riber and Lembo"; and (c) similarly instructed the "treatment" of Mr. McDuffie's lumbar posttraumatic facet syndrome . . . [be provided] through an appropriate specialist" (See, October 12, 2016 Order, Conclusion of Law No. 6 and "AWARD").

14) To date, Defendants have: (a) attempted to refer Mr. McDuffie to two surgeons for assessment of a condition (post-traumatic facet syndrome) this Commission has previously found does **not** require surgery, but instead warrants procedures (injections and possible radiofrequency rhizotomy) performed by nonsurgical spine physicians; (b) indicated a primary purpose for these evaluations is to determined if **treatment is necessary**, despite the Appellate Panel's unappealed ruling Mr. McDuffie shall receive this facet "treatment"; and (c) not provided any treatment for the back injury component mandated by the October 12, 2016 Order.

CONCLUSIONS OF LAW

IN VIEW OF THESE FINDINGS OF FACT, WE CONCLUDE AS MATTERS OF LAW:

1. The parties to this proceeding are subject to and bound by the provisions of the South Carolina Workers' Compensation Act.

2. On September 19, 2014, Mr. McDuffie, an employee within the meaning of S.C. Code Ann. Section 42-1-130 (2015), sustained

compensable injuries to his back and left leg within the meaning of S.C. Code Ann. Section 42-1-160 (2015), while performing duties arising out of and within the course and scope of his employment with Johnson Food Service, LLC, an employer within the meaning of S.C. Code Ann. Section 42-1-140 (2015).

3. While Defendants previously appealed several aspects of the Appellate Panel's October 12, 2016 Order, they admittedly did not contest the determination as to Mr. McDuffie's back injury component, including: (a) his need for non-surgical treatment "includes, but is not limited to, the lumbar facet/medial branch blocks identified by" Drs. Johnson, Lembo and Riber; (b) "these specialists, who each regularly encounter facetogenic pain in their respective practices, likewise reliably established his need for previously unprovided facet-directed treatment"; (c) they were simply "afforded the right to provide treatment for Mr. McDuffie's back injury component per Section 42-15-60, but strictly based upon the . . . [Appellate Panel's] ruling that Mr. McDuffie's diagnosed posttraumatic facet syndrome is causally related to the consequences of his compensable accident so as to ensure receipt of treatment"; and (d) this "treatment of Mr. McDuffie's lumbar posttraumatic facet syndrome . . . [would be provided] through an appropriate specialist". These findings/conclusions/rulings consequently constitute the law of this case. See, Hudson v. Lancaster Convalescent Center, 407 S.C 112, 754 S.E. 2d 486, 490 (2012).

4. Given the law of this case, Defendants' attempts to: (a) direct Mr. McDuffie to a surgeon are inconsistent with the Appellate Panel's prior identification of his treatment needs; and (b) obtain an evaluation to determine **whether** treatment is warranted ("if any") certainly constitutes an attempt to relitigate a previously resolved issue.

5. Section 42-15-60 empowers this Commission to "override the employer's choice of providers and order a change in the medical or hospital service provided" in the event a controversy arises between the parties and "good cause" for this designation is established by the employee. See, Carter v. Aiken County Government, 366 S.C. 102, 620 S.E. 2d 99, 104 (Ct. App. 2005); Hall v. United Rentals, 371 S.C. 69, 636 S.E. 2d 876, 885 (Ct. App. 2006).

6. Our Appellate Courts have likewise recognized this Commission is vested with the authority to designate a treating physician in accordance with its assessment of an individual's particular medical needs. Gattis v. Murrell's Inlet, VFW, 353 S.C. 100, 576 S.E. 2d 191, 198 (Ct. App. 2003). ("Where it deems it necessary, the . . . [C]ommission may override an employer's choice of medical provider. . . ."; See also, Martin v. Rapid Plumbing, 369 S.C. 278, 631 S.E. 2d 547, 555 (Ct. App. 2006).

7. After duly considering the parties' respective positions, in light of the essentially undisputed facts and the law of this case, We conclude: (a) Mr. McDuffie has established

"good cause" per Section 42-15-60 for Commission designation of a treating physician; (b) the current circumstances warrant directing him to Dr. Hutcheson for receipt of treatment in accordance with the Appellate Panel's October 12, 2016 Order; and (c) the contents of the record neither support Defendants' assertion Mr. McDuffie was allowed to direct his own care nor their contention designation of Dr. Hutcheson was inconsistent with the terms of Section 42-15-60.

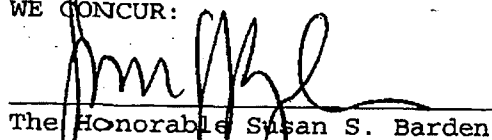
ORDER

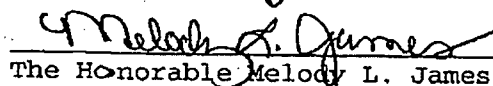
ACCORDINGLY, IT IS HEREBY ORDERED that: (a) Commissioner Wilkerson's March 13, 2018 rulings are affirmed in their entirety; and (b) Defendants shall accept financial responsibility for Mr. McDuffie's receipt of treatment, in accordance with the Appellate Panel's October 12, 2016 Order, through Dr. Hutcheson.

IT IS SO ORDERED.


The Honorable Gene McCaskill
Commissioner
South Carolina Workers' Compensation
Commission

WE CONCUR:


The Honorable Susan S. Barden


The Honorable Melody L. James

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 November 27, 2018

SOUTH CAROLINA WORKERS' COMPENSATION COMMISSION
COLUMBIA, SOUTH CAROLINA
WCC FILE NO. 1413546

EMPLOYEE/CLAIMANT: TIMOTHY McDUFFIE

COPY

EMPLOYER: JOHNSON FOOD SERVICE

CARRIER: GREAT AMERICAN ALLIANCE INSURANCE COMPANY

SOUTH CAROLINA WORKERS' COMPENSATION HEARING

PURSUANT TO NOTICE OF WORKERS' COMPENSATION
HEARING, THE WITHIN HEARING WAS TAKEN ON THE 29TH DAY
OF OCTOBER, 2015, COMMENCING AT THE HOUR OF 11:16 A.M.,
IN COLUMBIA, SOUTH CAROLINA, BEFORE THE HONORABLE AISHA
TAYLOR, ATTENDED BY COUNSEL AS FOLLOWS:

TIMMI A. PARRISH
VERBATIM REPORTER

TIMMI A. PARRISH
COURT REPORTING SERVICES
POST OFFICE BOX 551
ROEBUCK, SC 29376
864-921-8743

APPEARANCES

ANDREW N. SAFRAN, ESQUIRE, OF THE FIRM
ANDREW N. SAFRAN, LLC
POST OFFICE BOX 12089
COLUMBIA, SOUTH CAROLINA 29211

ATTORNEY FOR THE CLAIMANT,

E. ROS HUFF, JR., ESQUIRE, OF THE FIRM
HUFF & HAPESHIS, LLC
POST OFFICE BOX 1935
IRMO, SOUTH CAROLINA 29063

ATTORNEY FOR THE EMPLOYER/CARRIER.

I N D E X

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1 PURSUANT TO NOTICE OF HEARING, THE WITHIN HEARING
2 WAS TAKEN BY THE ABOVE-NAMED COURT REPORTER, A NOTARY
3 PUBLIC FOR THE STATE OF SOUTH CAROLINA, IN COLUMBIA,
4 SOUTH CAROLINA.

5 * * * * * * * * * * * * * * *

6 BY COMMISSIONER TAYLOR:

7 TODAY IS THURSDAY, OCTOBER 29TH, 2015. WE ARE
8 HERE ON WORKERS' COMP FILE NUMBER 1413546. THIS IS
9 THE CLAIM OF MR. TIMOTHY McDUFFIE. HE IS PRESENT
10 HERE TODAY AND REPRESENTED BY MR. ANDREW SAFRAN.
11 THE EMPLOYER IS JOHNSON FOOD SERVICE, AND THE
12 CARRIER IS GREAT AMERICAN ALLIANCE INSURANCE
13 COMPANY. BOTH THE EMPLOYER AND CARRIER ARE
14 REPRESENTED TODAY BY MR. E. ROS HUFF, JR. I HAVE A
15 DATE OF ACCIDENT OF SEPTEMBER 20TH, 2014.

16 WE ARE HERE TODAY SET ON THE CLAIMANT'S FORM
17 50, REQUEST FOR HEARING. PRIOR TO THE HEARING THE
18 COMMISSION DID RECEIVE A MOTION TO POSTPONE FROM THE
19 DEFENDANTS. BEFORE GOING ON THE RECORD WITH
20 ARGUMENTS FOR BOTH THE MOTION AND THE HEARING ARE
21 THERE ANY OBJECTIONS TO THE APAs, JURISDICTION,
22 VENUE, OR ANY OTHER ITEMS? MR. SAFRAN?

23 BY MR. SAFRAN:

24 YOUR HONOR, I DON'T HAVE ANY OBJECTION TO
25 ANYTHING AS FAR AS ANY OF THOSE POINTS. I HAVE

1 INDICATED THAT I'M HAPPY TO WITHDRAW THE REPORT THAT
2 MR. HUFF FELT WAS WHAT WAS NECESSITATING TAKING
3 ANOTHER DEPOSITION OF DR. LEMBO. THAT DOCUMENT
4 WOULD BE LISTED AT PAGES 23 AND 24 OF MY APAs. SO I
5 HAVE NO PROBLEM REMOVING THAT. ADDITIONALLY, YOUR
6 HONOR, AS FAR AS MR. HUFF AND I HAD ALREADY TALKED,
7 I'M GOING TO -- STILL WORKING ON TRYING TO LOOK INTO
8 A LITTLE MORE ABOUT THIS COMP RATE. SO IN THE EVENT
9 OF PAYMENTS, THEY CAN PAY HIM AT WHATEVER RATE THEY
10 THINK. IF IT IS A NUMBER LATER THAT PROVES TO BE
11 SOMEWHAT HIGHER, WE'LL GET THAT STRAIGHTENED OUT,
12 BUT THAT WON'T STOP ANYTHING HAPPENING. BUT OTHER
13 THAN THAT, WE'RE FINE.

14 **BY THE COMMISSIONER:**

15 ALL RIGHT. THANK YOU. MR. HUFF.

16 **BY MR. HUFF:**

17 THANK YOU. COMMISSIONER, I GOING TO ADDRESS
18 THE ISSUE OF THE COMP RATE FIRST. I HAVE NO PROBLEM
19 WORKING WITH ANDY. IF WE HAVE THE WRONG COMP RATE,
20 WE WILL ADJUST IT. I THINK THAT'S ALLOWABLE UNDER
21 THE REGULATIONS, AND IT WOULD BE IMPROPER IF WE HAVE
22 PROPER DOCUMENTATION NOT TO DO THAT. I HAVE NO
23 PROBLEM WITH THAT.

24 OUR SITUATION TODAY IS THAT THIS ACCIDENT WAS
25 BACK IN 2014 AND SUBSEQUENTLY TO THE ACCIDENT --

1 THIS IS AN ACCEPTED ACCIDENT. MEDICAL TREATMENT HAS
2 BEEN PROVIDED FOR THE BODY PARTS AND WE GOT RELEASES
3 FROM THE BODY PARTS. I THINK THE LAST ONE OCCURRED
4 IN DECEMBER OF 2014. IN APRIL OR MAY -- IN MAY OF
5 2015 WE FILED A 21 TO PAY PERMANENCY, AND SUBSEQUENT
6 TO THAT THEN THERE WERE REFERRALS TO MEDICAL
7 PRACTITIONERS FOR OPINIONS BY ANDY, AND THEN ANDY
8 DID SUBMIT THOSE DOCUMENTS TO US. SUBSEQUENT TO
9 THOSE DOCUMENTS BEING SUBMITTED TO US AND HIS FILING
10 OF A 50 FOR A HEARING, WE PROCEEDED TO TAKE THE
11 DEPOSITIONS OF THE PROVIDERS. I HAVE THEM WITH ME
12 TODAY. WE ALSO TOOK THE DEPOSITION OF MR. McDUFFIE
13 IN JULY TO LEARN MORE FACTS BECAUSE THE MEDICAL
14 OPINIONS WERE IN JUNE, I BELIEVE, AND ONE MAY HAVE
15 BEEN EARLIER IN THE YEAR. AND WE TOOK DR. LEMBO'S
16 DEPOSITION ON SEPTEMBER 10TH. SUBSEQUENT TO THAT
17 DEPOSITION SOME NEW REPORTS CAME IN, SO WE
18 RESCHEDULED THE DEPOSITION, AND IT'S SCHEDULED FOR
19 NEXT MONTH, I THINK, ON THE 10TH OR THE 11TH. ALSO,
20 WE TOOK THE DEPOSITION OF DR. MAZOUÉ ON OCTOBER
21 19TH, AND WE HAVE THAT TODAY. WE HAVE THE
22 DEPOSITION OF DON JOHNSON THAT WAS DONE -- THAT WAS
23 DONE ON OCTOBER 12TH. WE HAVE THAT. AND THEN DR.
24 RIBER'S DEPOSITION WAS TAKEN ON OCTOBER 26TH OF THIS
25 YEAR SUBSEQUENT TO A REPORT.

1 WHAT WE ARE ASKING IS PURSUANT TO REGULATION
2 67-412, SUBSECTION "D," WHERE IT SAYS, "ANY REPORT
3 SUBMITTED TO THE OPPOSING PARTY..." IT DOESN'T SAY
4 SUBMITTED TO THE COMMISSION, "...SUBMITTED TO THE
5 OPPOSING PARTY..." NOW, ONCE HE SUBMITS IT TO ME
6 THEN HE WILL COME TO THE HEARING AND PUT IT IN
7 EVIDENCE. BUT IT SAYS, "ANY REPORT SUBMITTED TO THE
8 OPPOSING PARTY IN ACCORD WITH B-1 OR B-2 ABOVE SHALL
9 BE SUBMITTED..." IT'S NOT DISCRETIONARY. HE CAN'T
10 WITHDRAW IT UNLESS I CONSENT TO IT. "...SHALL BE
11 SUBMITTED AS AN APA EXHIBIT AT THE HEARING UNLESS
12 WITHDRAWN WITH THE CONSENT OF THE OTHER PARTY, AND
13 THE NONMOVING PARTY SHALL SUBMIT ONLY THE OTHER
14 REPORTS." I'VE GOT TO TALK TO MY CLIENT. I HAVEN'T
15 BEEN ABLE TO TALK TO MY CLIENT. ALL I'M ASKING OF
16 THIS COMMISSION IS WE'VE GOT THE DEPOSITION
17 SCHEDULED. I WILL HAVE IT EXPEDITED, TURNAROUND IN
18 ONE DAY. I'LL PAY THE EXTRA FEE TO HAVE IT DONE.
19 WE JUST WANT THE OPPORTUNITY TO DEPOSE. I'VE ALSO
20 SAID BEFORE WE WENT ON THE RECORD IF I HAVE AN
21 OPPORTUNITY TO TALK TO MY CLIENT AND THEY SAY WE
22 DON'T NEED IT, DON'T WORRY ABOUT IT. THEN GO TO
23 HEARING. I'M IN COLUMBIA. ANDY IS IN COLUMBIA.
24 THE EMPLOYER IS IN COLUMBIA. THE CLAIMANT IS IN
25 COLUMBIA. I'LL WAIVE NOTICE. JUST GIVE ME A ONE-

1 DAY NOTICE. THE ONLY DAY I'M NOT AVAILABLE NEXT
2 WEEK IS MONDAY. I'M AVAILABLE THROUGH FRIDAY. YOU
3 KNOW, IF I COULD GET THE DEPOSITION -- NOW, ANDY DID
4 HELP ME WHEN WE TOOK THE -- WHEN WE HAD THIS OTHER
5 OPINION THAT CAME IN FROM -- WAS IT RIBER, ANDY? HE
6 GOT IT SCHEDULED FOR US, AND WE TOOK IT AND GOT IT
7 DONE. SO, I'M WORKING TRYING TO GET IT DONE. WE
8 WANT OUR RIGHT PRESERVED, BECAUSE THE WAY THE
9 STATUTE READS IT DOESN'T SAY NEEDS PERMISSION. IT
10 SAYS ANY PARTY -- ANY REPORT SUBMITTED BACK TO THE
11 OPPOSING PARTY IN ACCORD WITH THESE SECTIONS SHALL
12 BE SUBMITTED AS AN APA EXHIBIT. ANY REPORT
13 SUBMITTED TO ME, NOT SUBMITTED TO YOU, SUBMITTED TO
14 ME. HE'LL BRING IT WHEN HE COMES HERE. I KNOW HOW
15 YOU'RE RULING, AND WITH ALL DUE RESPECT THAT'S ALL
16 I'M ASKING.

17 BY THE COMMISSIONER:

18 OKAY. ALL RIGHT.

19 BY MR. SAFRAN:

20 YOUR HONOR, CERTAINLY I'M NOT TAKING A POSITION
21 ONE WAY OR THE OTHER ON THIS, IF YOU WANT TO GIVE
22 HIM THE TIME TO TAKE TO HIS CLIENT.

23 BY MR. HUFF:

24 PLEASE DO.

25 BY MR. SAFRAN:

1 I THINK, ON THE OTHER HAND, I'VE GOT MR.
2 McDUFFIE HERE. I'D AT LEAST LIKE TO TAKE HIS
3 TESTIMONY, BECAUSE THE TWO ISSUES ARE SOMEWHAT
4 SEVERABLE, I THINK. CERTAINLY I HAVE NO PROBLEM
5 WITH MR. HUFF TALKING TO HIS CLIENT AND GETTING BACK
6 WITH YOU ABOUT WHETHER THEY WILL AUTHORIZE HIM TO DO
7 WHATEVER. THE ONLY THING I WILL SAY, JUST FOR THE
8 RECORD, MY BELIEF IS THAT -- AND I DON'T HAVE THAT
9 REG IN FRONT OF ME. BUT I BELIEVE, FRANKLY, THAT
10 THE PURPOSE BEHIND IT IS IF FOR SOME REASON SOMEONE
11 WANTED TO MAKE SURE SOMETHING WAS IN EVIDENCE AND
12 THEY WERE RELYING ON THE FACT THE OTHER PARTY HAD
13 SUBMITTED IT AND THE OTHER PARTY PULLED IT AT THE
14 LAST MINUTE, THEN THEY HADN'T LISTED IT IN THEIR
15 APAs, SO IT WOULD NOT GET IN. SO, THE POINT IS I
16 THINK IT'S TO REALLY STOP SOMEBODY FROM POTENTIALLY
17 AMBUSHING ANOTHER BY SAYING, "OH, YEAH, I PUT IT IN,
18 BUT NOW I'M GOING TO TAKE IT OUT, AND IT'S TOO LATE
19 FOR YOU TO PUT IT IN." THIS IS OBVIOUSLY NOT THAT
20 SITUATION. IF MR. HUFF WANTS TO PUT IT IN, THAT'S
21 FINE. I'M MORE THAN HAPPY FOR HIM TO DO IT, BUT I
22 THINK BY DOING SO THERE WOULD NOT BE ANY NEED FOR
23 THE DEPOSITION BECAUSE OTHERWISE I'M SAYING IT CAN
24 STAY OUT.

25 YOUR HONOR, I THINK THAT, JUST FROM A

1 STANDPOINT OF KIND OF WHERE WE ARE, I WOULD LIKE TO
2 GO AHEAD AND LET'S GET THIS PART AT LEAST DONE. I
3 HAVE NO PROBLEM IF YOU WANT TO GIVE HIM THAT OPTION
4 TO BIFURCATE THAT END OF IT. AS FAR AS THE
5 SITUATION IS CONCERNED, JUST FOR THE RECORD, WE ARE
6 SEEKING TREATMENT. WE ARE SEEKING TREATMENT FOR THE
7 BACK AND THE KNEE. WE ARE SEEKING TREATMENT FOR THE
8 KNEE FROM DR. MAZOUÉ, WHO HAS EXAMINED THIS
9 GENTLEMAN, WHO I THINK ONCE YOU READ HIS DEPOSITION,
10 YOU KNOW, HAS GIVEN A GREAT DEAL OF INSIGHT AS TO
11 EXACTLY WHAT'S GOING ON WITH THIS GENTLEMAN, AND
12 THAT THERE IS A SURGICAL NEED. I THINK YOU WILL
13 HEAR FROM HIM THAT HE WAS VERY FINE WITH DR. MAZOUÉ
14 IN TERMS OF THEM MEETING. AND I THINK ALL THIS DOES
15 IS ADD A LOOP TO IT. THERE IS NO WAY I THINK
16 ANYBODY CAN QUESTION DR. MAZOUÉ'S QUALIFICATIONS TO
17 DO A MENISCAL REPAIR. YOU KNOW, I THINK THIS COULD
18 BE DONE IN SHORT ORDER. THE MRI HAS TO HAPPEN.
19 FRANKLY, THE REASON I DIDN'T GET THE MRI WAS BECAUSE
20 I WAS CONCERNED THAT IF I DID I'D BE GETTING AN
21 OBJECTION FROM MR. HUFF'S CLIENT ABOUT, WELL, YOU
22 KNOW, IT WASN'T EMERGENT, YOU DIDN'T NEED TO GO PAY
23 FOR THAT, AND WE DON'T WANT TO HAVE TO FEEL LIKE
24 WE'RE RESPONSIBLE. YOU KNOW, THOSE AREN'T CHEAP.

25 THE OTHER THING THAT I WANTED TO POINT OUT IS,

1 CANDIDLY, THE REASON WHY HE HAD TO GO BACK TO SEE
2 THESE LOCAL DOCTORS, AND HE'LL TESTIFY TO THIS, IS
3 HE WAS MISSING SOME WORK AND WAS INSTRUCTED HE HAD
4 TO GET A SLIP TO COME BACK. THEY WANTED SOME
5 DOCTOR'S RELEASE. SO I SENT HIM BACK TO THEM SO HE
6 COULD TAKE SOMETHING BACK TO SAY, "OKAY, BEEN TO THE
7 DOCTOR; THESE ARE MY LIMITATIONS." THIS LETTER THAT
8 I'VE MENTIONED FROM MR. HUFF DOES, IN FACT,
9 ACKNOWLEDGE THAT HE PRESENTED THOSE. THEY CHOSE NOT
10 TO HONOR THEM AND SAID, YOU KNOW, "WE'RE NOT GOING
11 TO TAKE THEM BECAUSE THEY'RE NOT AUTHORIZED."

12 YOUR HONOR, I THINK, AGAIN, YOU WILL HAVE --
13 BECAUSE NONE OF THEM ARE EXCEPTIONALLY LONG. YOU
14 WILL HAVE AMPLE OPPORTUNITY IN THESE DEPOSITIONS TO
15 SEE REALLY HOW THREE DIFFERENT SPECIALISTS WHO --
16 YOU KNOW, THEY DON'T HAVE OVERLAPPING PRACTICES, BUT
17 THEY DO THE SAME THING -- HAVE ALL COME TO THE SAME
18 CONCLUSION IN TERMS OF CLINICAL EXAMINATIONS THAT
19 ALL LEAD TO THAT SPOT. AND, YOU KNOW, I THINK THAT
20 BECAUSE OF THAT AND BECAUSE OF THE FACT THAT THERE
21 HAS BEEN NO DESIRE ON THEIR PART WHATSOEVER TO
22 PROVIDE TREATMENT, THAT SEEING THAT HE GETS THIS
23 TREATMENT IN AN EXPEDITIOUS WAY WOULD REALLY BE
24 BEST, MORE OR LESS, ENHANCED BY -- I DON'T CARE IF
25 IT'S DR. RIBER, DR. LEMBO. I'VE TOLD HIM DR.

1 HUTCHINSON IS FINE, IF THEY HAVE TO HAVE SOMEBODY HE
2 HASN'T ALREADY SEEN. BUT THAT'S WHERE WE'RE COMING
3 FROM IN TERMS OF TREATMENT. WE'D LIKE IT DONE, YOU
4 KNOW, AS QUICKLY AS POSSIBLE BECAUSE, AGAIN, HE --
5 WE GOT THIS FIRST OPINION IN JANUARY. I GOT THAT,
6 AND BASICALLY, YOUR HONOR, I GET TOLD TOO MANY
7 TIMES, YOU KNOW, "YOU'RE GOING OUT AND DOING ALL
8 THIS STUFF." AND, YOU KNOW, THEY HAVEN'T BEEN GIVEN
9 AN OPPORTUNITY TO SEE HOW IT'S GOING TO BE. SO I
10 GAVE HIM A PERIOD OF TIME TO SEE IF IT WAS GOING TO
11 GET BETTER, LIKE HE UNDERSTOOD FROM THEIR GUY THAT
12 IT WOULD. UNFORTUNATELY, IT NEVER DID. SO WE
13 FOLLOWED UP, GOT SOME OTHER OPINIONS, BECAUSE, QUITE
14 FRANKLY, I DON'T CARE WHO I GET. I COULD GO GET THE
15 MOST QUALIFIED GUY IN THE WORLD, BUT IF I SEND THEM
16 THERE, THEY'RE NOT GOING TO BELIEVE THEM.
17 UNFORTUNATELY MY EXPERIENCE HAS BECOME THAT IF I
18 COME OVER HERE AND THEY'VE ALREADY PICKED A DOCTOR
19 AND I JUST BRING ONE, THEN IT'S LIKE, "WELL, YOU
20 KNOW, OURS SHOULD CARRY MORE WEIGHT." WELL, THAT
21 MIGHT BE. SO I'M BEING FORCED MORE OFTEN THAN NOT
22 TO HAVE TO GO GET MULTIPLE OPINIONS REALLY JUST SO
23 THE COMMISSION SEES IT'S NOT JUST A SIMPLE
24 DIFFERENCE OF OPINION BETWEEN TWO, IT MIGHT BE THREE
25 OR FOUR AND ONE, MAINLY SO I CAN PROVE THE POINT

1 THAT JUST BECAUSE THEY'VE ANOINTED SOMEBODY DOESN'T
2 MEAN THEY'RE RIGHT. AND SO, THAT'S REALLY WHY THIS
3 WAS DONE IN THE FASHION IT WAS.

4 PLUS, I DISAGREE THAT HE EVER GOT ANY REAL
5 TREATMENT OR RELEASE FOR THE KNEE. THE ONLY DOCTOR
6 THAT I COULD TELL THAT THEY EVER SENT HIM TO THAT
7 LAID EYES OR HANDS ON THAT KNEE WAS DR. YOUNG, WHO
8 WAS BASICALLY A PRIMARY CARE DOCTOR. HE MADE A
9 REFERRAL AT THAT POINT. I DON'T THINK HE EVER
10 RELEASED HIM. HE SAID GO SEE AN ORTHOPEDIST. NOW
11 ALL THE ORTHOPEDISTS ARE RELATIVELY SPECIALIZED, AND
12 DR. PEELE IS A SPINE GUY. HE NEVER LAID EYES ON
13 THAT KNEE. HE NEVER TOUCHED THAT KNEE. AND THE
14 REASON I SENT HIM TO DR. MAZOUÉ IN ADDITION IS
15 BECAUSE, AGAIN, THEY'RE SPECIALIZED. MAZOUÉ IS AN
16 ORTHOPEDIC SPORTS MEDICINE SURGEON WHICH -- WHO
17 FOCUSES ON EXACTLY THAT. I DON'T THINK THEY'VE EVER
18 HAD ANYBODY DO THAT AS FAR AS HIS KNEE IS CONCERNED.
19 AND THIS IS NOT ONE OF THOSE THINGS WHERE A DOCTOR
20 SAYS, YOU KNOW, IT'S EQUIVOCAL. MAZOUÉ SAYS --
21 AGAIN, IT'S HIS OWN GRADING SYSTEM. HE PUT THREE
22 PLUSES NEXT TO IT, WHICH MEANS THE GUY HAD A VERY
23 PRONOUNCED RESPONSE TO THE VERY TEST THAT EVERYBODY
24 LOOKS AT AS THE GOLD STANDARD FOR A MENISCAL TEAR.
25 WE ARE JUST ASKING THAT SOMETHING GET DONE. AGAIN,

1 I'M NOT IN ANY WAY TRYING TO OBJECT OR IMPEDE HIS
2 ABILITY TO TAKE A FEW DAYS TO GET THAT CONSENT, BUT,
3 YOU KNOW, GOING AND DEPOSING HER AGAIN OVER
4 LITERALLY TWO WORDS TO ME IS KIND OF AN EXTREME.

5 BY MR. HUFF:

6 COMMISSIONER, WE'RE LOOKING AT -- LET'S BE
7 HONEST. I'VE BEEN DOING THIS FOR 40 YEARS. ANDY IS
8 A VERY GOOD ATTORNEY. I'M VERY GOOD AT WHAT I DO,
9 AND WE LITIGATE, BUT WE'RE POLITE TO EACH OTHER.
10 ONE OPINION, I CAN UNDERSTAND. TWO OPINIONS? OKAY.
11 THREE, FOUR OPINIONS? NOW, REALIZE THAT HE WAS
12 RELEASED IN DECEMBER. JANUARY HE GOES TO SEE ONE
13 PERSON, I THINK MAZOUÉ. NOBODY IN FEBRUARY, MARCH,
14 APRIL, MAY, ANYTHING, SO WE FILED TO GO TO A HEARING
15 TO GET THE PERMANENCY. NOW, I'M NOT GOING TO GO
16 INTO ANY COMMUNICATION BETWEEN MYSELF AND ANDY ABOUT
17 SETTLEMENT, IF THERE WAS OR IF THERE WAS NOT. BUT
18 THE ONLY THING I KNOW, THE NEXT THING I KNOW THREE
19 DAYS IN A ROW, THREE DIFFERENT OPINIONS. I HAVE THE
20 RIGHT TO CROSS EXAMINE THESE PEOPLE. I WANTED TO BE
21 -- I WOULD LOVE TO HAVE A CLEAN RECORD SO WE DON'T
22 HAVE TO DO ANY APPEAL. THIS IS AN ADMITTED CLAIM.
23 I JUST NEED SOME TIME. I'M NOT ASKING FOR THREE
24 MONTHS. I'VE SCHEDULED THE DEPOSITION. IF I CAN
25 TALK WITH MY CLIENT, MAYBE I CAN CANCEL THE

1 DEPOSITION. BUT I CAN'T CANCEL IT WITHOUT IT, AND
2 I'M TRYING TO AVOID ANY TYPE OF AN APPEAL. I DON'T
3 THINK WE NEED IT. THIS IS AN ADMITTED CLAIM. I
4 WANT TO GET THE DEPOSITION. I WANT TO SIT DOWN AND
5 TALK TO THE EMPLOYER, SEE IF WE CAN PUT HIM BACK TO
6 WORK, BECAUSE THE GUY DID WORK FOR A PERIOD OF TIME.
7 HE DID. I WOULD LIKE TO ACCOMMODATE HIM. I'M JUST
8 SAYING LET'S MAKE IT CLEAN IF WE COULD. IF I COULD
9 JUST GET TO NEXT WEEK, I'LL TRY TO DO IT. MAYBE
10 ANDY -- ANDY WAS NICE ENOUGH TO TALK WITH THE DOCTOR
11 AND GET THE DEPOSITION SCHEDULED SOONER ON THE OTHER
12 CASE. MAYBE HE CAN DO THIS ONE, ALSO, AND I'LL DO
13 IT SOONER. LIKE I SAY, HE WAS ABLE TO GET THE OTHER
14 ONE DONE. THAT'S WHY WE -- WE HAD TWO, AND WE GOT
15 THEM DONE. WE'RE NOT SITTING BACK DRAGGING OUR
16 FEET. BUT WE HAVE A RIGHT TO CROSS EXAMINE, AND I
17 THINK IT'S -- I THINK THE REGULATION IS CRYSTAL
18 CLEAR. IT'S NOT EVEN SUBJECT TO INTERPRETATION.
19 ANY REPORT SUBMITTED TO THE OPPOSING PARTY -- NOT TO
20 THE COMMISSION BUT TO THE OPPOSING PARTY, WHICH WAS
21 ME -- IN ACCORD, ABOVE, SHALL BE SUBMITTED, SHALL
22 BE. YOU CAN'T WITHDRAW IT. YOU DON'T HAVE THE
23 OPTION TO WITHDRAW IT. IT SHALL BE SUBMITTED AS
24 EVIDENCE WITHOUT THE -- UNLESS YOU HAVE THE CONSENT.
25 I CAN'T GIVE CONSENT. I PROBABLY COULD. BUT NOW

1 YOU KNOW, BECAUSE IT'S BEEN DISCUSSED, WHAT THE
2 DOCTOR SAID; YOU PROBABLY READ IT. IT'S PREJUDICIAL
3 IF I DON'T GET TO DO IT.

4 BY THE COMMISSIONER:

5 I HAVEN'T READ IT BECAUSE I DON'T HAVE THE APAS
6 YET. FOR THE RECORD ---

7 BY MR. HUFF:

8 OKAY. IT'S NOT THAT BIG OF A DEAL.

9 BY THE COMMISSIONER:

10 WELL, IT DEPENDS ON WHICH SIDE YOU -- WHOSE
11 PROSPECTIVE YOU'RE LOOKING AT.

12 BY MR. HUFF:

13 I UNDERSTAND THAT.

14 BY THE COMMISSIONER:

15 I WILL -- DR. LEMBO'S TESTIMONY AND HIS
16 TESTIMONY, THEY DON'T HAVE ANYTHING TO DO WITH EACH
17 OTHER. HE'S GOING TO TELL ME WHAT HE'S GOING TO
18 TELL ME REGARDLESS OF WHAT DR. LEMBO SAYS NEXT WEEK.
19 I'M GOING TO GO FORWARD WITH THE HEARING. I WILL
20 LEAVE THE RECORD OPEN FOR DR. LEMBO'S TESTIMONY. I
21 WILL NOT READ ANY MEDICAL EVIDENCE UNTIL THAT SECOND
22 DEPOSITION IS SUBMITTED, IF IT TAKES PLACE. SO I'LL
23 LOOK AT ALL THE MEDICAL EVIDENCE AT THE SAME TIME,
24 BUT I BELIEVE THAT I CAN TAKE MR. McDUFFIE'S
25 TESTIMONY HERE TODAY SINCE WE ARE ALL SET HERE AND

1 READY TO GO.

2 BY MR. HUFF:

3 ALL RIGHT.

4 BY THE COMMISSIONER:

5 ALL RIGHT. MR. SAFRAN, I BELIEVE YOU WENT INTO
6 MOST OF THE MERITS. IS THERE ANYTHING ELSE YOU WANT
7 TO PUT ON YOUR POSITION ON THE RECORD?

8 BY MR. SAFRAN:

9 NONE.

10 BY THE COMMISSIONER:

11 OKAY. MR. HUFF, ANYTHING OUTSIDE OF THE
12 MOTION?

13 BY MR. HUFF:

14 NOTHING, NO.

15 BY THE COMMISSIONER:

16 OKAY, VERY GOOD. MADAM COURT REPORTER, WILL
17 YOU PLEASE SWEAR MR. McDUFFIE.

18 BY THE COURT REPORTER:

19 SIR, IF YOU WILL RAISE YOUR RIGHT HAND, PLEASE.

20 * * * * * * * * * *

21 THE WITNESS WAS DULY SWORN TO TELL THE TRUTH, THE
22 WHOLE TRUTH, AND NOTHING BUT THE TRUTH CONCERNING THE
23 MATTER HEREIN:

24 TIMOTHY McDUFFIE,

25 BEING FIRST DULY SWORN, TESTIFIED ON HIS OATH AS

1 FOLLOWS:

2 BY THE COMMISSIONER:

3 MR. SAFRAN.

4 DIRECT EXAMINATION BY MR. SAFRAN:

5 Q. SPEAK UP A LITTLE BIT, OKAY?

6 A. YES, SIR.

7 Q. WHAT'S YOUR FULL NAME?

8 A. TIMOTHY ADAM McDUFFIE.

9 Q. OKAY. MR. McDUFFIE, WHERE DO YOU LIVE?

10 A. GONZALES GARDENS, APARTMENT B-4.

11 Q. OKAY. HOW OLD ARE YOU?

12 A. THIRTY-SEVEN.

13 Q. ALL RIGHT. AND DO YOU HAVE ANY CHILDREN?

14 A. YES, SIR.

15 Q. AND HOW MANY?

16 A. ONE.

17 Q. AND DO YOU SUPPORT THAT CHILD?

18 A. YES, SIR.

19 Q. WHAT'S YOUR LAST LEVEL OF EDUCATION? WHAT I'M
20 SAYING IS, WHAT'S THE LAST GRADE YOU FINISHED?

21 A. TENTH.

22 Q. OKAY. I'M NOT GOING TO GO THROUGH A BUNCH OF
23 BACKGROUND. YOU WORK CURRENTLY AT JOHNSON FOOD
24 SERVICE?

25 A. YES, SIR.

1 Q. HOW LONG HAVE YOU BEEN THERE?

2 A. TWO AND A HALF YEARS.

3 BY MR. HUFF:

4 I COULDN'T HEAR HIM.

5 WITNESS RESUMES:

6 A. TWO AND SOME -- TWO AND A LITTLE BIT OF MONTHS, TWO
7 YEARS AND A COUPLE MONTHS.

8 DIRECT EXAMINATION RESUMED BY MR. SAFRAN:

9 Q. A LITTLE OVER TWO YEARS?

10 A. MM-HMM.

11 Q. OKAY, ALL RIGHT. WHAT IS YOUR JOB OUT THERE?

12 A. I'M A COOK NOW, COOK II.

13 Q. ALL RIGHT. HOW LONG HAVE YOU BEEN A COOK II, JUST
14 ROUGHLY?

15 A. ABOUT A YEAR.

16 Q. OKAY. DID YOU PREVIOUSLY HAVE AN INJURY AT JOHNSON
17 FOOD SERVICE IN SEPTEMBER OF LAST YEAR?

18 A. NO, SIR.

19 Q. WHAT I'M SAYING, WHEN DID YOU HURT YOURSELF?

20 A. OH, SEPTEMBER LAST YEAR.

21 Q. OKAY, ALL RIGHT. LET ME ASK THIS. AT THAT TIME
22 WERE YOU IN THE SAME POSITION YOU ARE IN NOW AS A
23 COOK II, OR WERE YOU DOING SOMETHING ELSE?

24 A. A COOK II, YES, SIR.

25 Q. ALL RIGHT. NOW, AS A COOK II GENERALLY WHAT DO YOU

1 HAVE TO DO AS PART OF YOUR JOB DURING THE DIFFERENT
2 COURSE OF A DAY?

3 A. COOKING IN THE BIG POTS, CLEANING UP, PUTTING THE
4 POTS AND PANS, PUTTING THEM IN THE AISLES, PUTTING
5 THEM IN THE WARMERS, SERVING ON THE LINE, GOING TO
6 THE MEAT ROOM TO GET THE MEAT FROM THE -- WELL,
7 GOING TO THE MEAT ROOM TO GET THE BOX AND BRING IT
8 TO US. WE PUT THEM IN THE POTS. WE COOK THE FOOD,
9 AND THEN WE PUT THE FOOD IN THE PANS AND PUT IT IN
10 THE PREP BOX, AND THEN WE SERVE IT.

11 Q. LET ME ASK THIS. DURING THE COURSE OF A DAY ARE YOU
12 REQUIRED AT TIMES TO LIFT WEIGHTS, THINGS THAT WEIGH
13 DIFFERENT AMOUNTS?

14 A. YES, SIR.

15 Q. DO YOU HAVE TO LIFT MORE THAN TEN POUNDS?

16 A. YES, SIR.

17 Q. DO YOU HAVE LIFT MORE THAN 20 POUNDS?

18 A. YES, SIR.

19 Q. WHAT'S THE HIGHEST THAT YOU NORMALLY WOULD LIFT AS
20 FAR AS JUST DURING A REGULAR DAY?

21 A. I MEAN, ALL THE BOXES WEIGH LIKE DIFFERENT POUNDS,
22 LIKE 30 TO 25. SOMETIMES WE GET LIKE BOXES OF
23 CHICKEN. CHICKEN IS LIKE THE MOST HEAVIEST THING
24 THAT WE'LL PICK UP. IT'S PROBABLY LIKE 40 TO 45
25 POUNDS. IT'S GOT LIKE FIVE BAGS OF CHICKEN IN IT.

1 Q. OKAY. AND THAT'S A NORMAL DAY?
2 A. YES, SIR.
3 Q. DO YOU HAVE STAND?
4 A. YES, SIR.
5 Q. AND ARE THERE TIMES WHERE YOU HAVE TO DO THINGS
6 WHERE YOU HAVE TO BEND YOUR KNEE?
7 A. YES, SIR.
8 Q. ARE THERE OTHER TIMES WHERE YOU HAVE TO DO THINGS
9 LIKE TWIST IN ORDER TO MOVE THINGS?
10 A. YES, SIR.
11 Q. SO, YOU HAVE TO USE YOUR BODY?
12 A. YES, SIR.
13 Q. ALL RIGHT. TELL THE COMMISSIONER JUST VERY BRIEFLY
14 -- FIRST OF ALL, WHEN THIS HAPPENED, THIS MEANING
15 THE ACCIDENT WE TALKED ABOUT IN SEPTEMBER, I THINK
16 THE 20TH OF LAST YEAR. I THINK I HAD IT DOWN AS THE
17 19TH. SOMETIME, THE 19TH OR 20TH; IS THAT CORRECT?
18 A. YES, SIR.
19 Q. LET ME ASK YOU THIS. WERE YOU ON THAT PARTICULAR
20 DAY WORKING IN THE NORMAL PLACE, OR WERE YOU IN A
21 DIFFERENT PLACE?
22 A. I WAS IN A DIFFERENT PLACE.
23 Q. ALL RIGHT. WHERE WERE YOU WORKING?
24 A. I WAS IN A BUILDING CALLED ELEVEN FIVE, BUT I
25 NORMALLY WORK IN LIKE TEN FOUR ONE.

- 1 Q. OKAY. SO, WERE YOU -- I GUESS, WERE YOU
2 PARTICULARLY FAMILIAR WITH THAT BUILDING?
- 3 A. NO, SIR.
- 4 Q. ALL RIGHT. WHAT HAPPENED THAT DAY THAT WAS
5 DIFFERENT, I GUESS, THAN NORMAL FOR YOU?
- 6 A. IT BASICALLY WAS LIKE A NORMAL DAY, YOU KNOW. WE GO
7 TO DIFFERENT BUILDINGS, BUT WE STILL DO THE SAME
8 THING.
- 9 Q. OKAY. WHAT HAPPENED AS FAR AS ANY INJURY TO YOU?
- 10 A. I WAS CLEANING UP, AND I TURNED AROUND TO GO GET A
11 BROOM, AND IT WAS LIKE A TABLE IN THE AREA, AND I
12 GUESS SOMEBODY HAD TOOK THE TABLE -- 'CAUSE THE
13 TABLE GOT WHEELS ON IT -- TOOK THE TABLE AND USED
14 THE TABLE, AND I DIDN'T KNOW IT. SO I JUST TURNED
15 AROUND TO GO GET A BROOM, AND IT WAS A PIPE STICKING
16 OUT THE GROUND. I THINK IT WAS LIKE -- PROBABLY
17 LIKE AN OLD PLUG OR SOMETHING. I DON'T KNOW. BUT
18 IT'S PROBABLY ABOUT THAT LONG RIGHT THERE.
- 19 Q. WHEN YOU'RE SAYING THAT LONG, YOU'RE SAYING WHAT;
20 ABOUT FOUR OR FIVE INCHES?
- 21 A. THE PIPE. YEAH, ABOUT FOUR OR FIVE INCHES. SO, AND
22 I WAS JUST WALKING, AND THE PIPE HAD CAUGHT MY LEG,
23 AND I DIDN'T KNOW IT. BUT -- AND I JUST KEPT ON
24 WALKING. I WENT TO MOVE MY LEG FORWARD, AND I
25 COULDN'T, SO I WENT TO START TO FALL DOWN, BUT I

1 CAUGHT MYSELF WITH MY HANDS AND PULLED MY LEG, AND I
2 HEARD SOMETHING LIKE A POP. I JUMPED UP, LIKE, OH,
3 LORD, I ALMOST FELL, YOU KNOW, LIKE, I'M HOPING
4 NOBODY DIDN'T SEE THAT. THE LADY WAS LIKE, "I SAW
5 THAT. ARE YOU OKAY?" I WAS LIKE -- I WAS LIKE,
6 "YEAH." SO THEN I WENT TO GO BACK TO WORK, AND, YOU
7 KNOW, A LITTLE WHILE LATER I WAS PUSHING A BROOM,
8 AND THEN I TWISTED A LITTLE BIT, AND I FELT THE
9 PAIN, AND I WAS LIKE ---

10 Q. WHERE WERE YOU FEELING PAIN?

11 A. IN MY SIDE, IN MY BACK, LOWER BACK PART OF MY BACK.
12 AND I WAS LIKE, "OH." SO I WAS LIKE -- SHE WAS LIKE
13 "WHAT'S WRONG?" I WAS LIKE, "I DON'T KNOW." SO I
14 WENT TO DO IT AGAIN, AND I WAS LIKE, "OH." I HAD TO
15 LET THE BROOM GO THIS TIME. I WAS LIKE, "OH." SHE
16 WAS LIKE, "GRAB THE MANAGER," 'CAUSE THE MANAGER WAS
17 ABOUT TO LEAVE. SHE WAS LIKE, "GO TELL HIM WHAT
18 HAPPENED." SO I WENT AND TOLD HIM WHAT HAPPENED.

19 Q. TELL ME THIS. AT THAT POINT YOU'RE POINTING TO YOUR
20 AREA IN YOUR LOW BACK ON YOUR LEFT SIDE?

21 A. YES. YES, SIR.

22 Q. ALL RIGHT. WAS IT JUST THERE, OR WHERE WAS IT GOING
23 AT THAT POINT?

24 A. IT WAS JUST LIKE A -- I REALLY COULDN'T TELL 'CAUSE
25 IT WAS A PAIN.

1 Q. RIGHT.

2 A. YOU KNOW, WHEN IT JUST STARTED, I DIDN'T -- IT WAS
3 LIKE IT JUST WENT LIKE A PAIN, LIKE A LIGHTENING
4 PAIN, LIKE OH. I REALLY DIDN'T KNOW EXACTLY WHERE
5 IT WAS COMING FROM.

6 Q. WAS IT IN ONE SPOT, OR DID IT GO -- JUST SHOW US
7 WHERE IN YOUR PART OF YOUR BODY THAT YOU WERE
8 FEELING IT.

9 A. IT WAS LIKE FROM RIGHT HERE, LIKE ALL THE WAY DOWN
10 TO LIKE THE BACK OF MY KNEE RIGHT HERE.

11 Q. OKAY. SO ---

12 BY MR. HUFF:

13 COULD YOU DESCRIBE THAT BECAUSE THAT WOULD NOT
14 LOOK GOOD IN THE RECORD, RIGHT HERE TO RIGHT HERE.

15 BY MR. SAFRAN:

16 YES.

17 DIRECT EXAMINATION RESUMED BY MR. SAFRAN:

18 Q. LET ME ASK THIS. YOU HELD YOUR HAND -- STARTED IN
19 YOUR BACK HERE, YOUR LOWER BACK?

20 A. AT MY LOWER BACK.

21 Q. ON THE LEFT SIDE?

22 A. DOWN TO MY -- DOWN TO MY HIP AND LIKE TO THE BACK OF
23 MY KNEE.

24 Q. OKAY. SO, FROM YOUR LOWER BACK DOWN INTO YOUR LEFT
25 HIP DOWN TO THE BACK OF YOUR LEFT KNEE?

1 A. YES, SIR.

2 Q. OKAY. YOU CAN SIT DOWN. THAT'S FINE. THANKS. SO,
3 THERE WAS -- YOU REPORTED IT TWICE BASICALLY, TO
4 WHOEVER WAS THERE, YOUR IMMEDIATE PERSON, AND THEN
5 TO ---

6 A. YEAH, HE -- I TOLD HIM. HE WAS ABOUT TO LEAVE OUT
7 THE DOOR, SO HE TOOK ME TO THE OTHER MANAGER. HE
8 WAS LIKE, I NEED -- HE WAS LIKE, "WOULD YOU WANT TO
9 GO TO THE HOSPITAL?" I WAS LIKE, "I DON'T REALLY
10 KNOW 'CAUSE IT'S NO..." -- I DON'T KNOW HOW -- LIKE
11 IT'S ABOUT NINE O'CLOCK. IT WAS ABOUT TIME TO GET
12 OFF. I SAID, "WELL, I DON'T KNOW. IT AIN'T THAT
13 BAD. I JUST WANTED TO LET YOU KNOW." SO, HE WENT
14 LIKE, "OKAY, LET ME GO IN HERE AND TELL THE OTHER
15 MANAGER." HE TOLD HIM, AND HE WAS LIKE, "WELL, JUST
16 MAKE A NOTE OF IT, THAT HE REPORTED IT." SO THEN
17 THE NEXT DAY I CAME TO WORK, AND I WAS -- ALL NIGHT
18 I WAS LIKE TOSSING AND TURNING, COULD NOT SLEEP. I
19 WAS LIKE, "OH, GOD," YOU KNOW, AND I WAS LIKE, "I
20 DON'T KNOW WHAT'S WRONG." SO, I SAID, "WELL, I'M
21 GOING TO TRY TO FIGHT IT OFF." I WENT BACK TO WORK,
22 GOT TO WORK, SIGNED IN, AND PICKED UP A PACK OF
23 MASHED POTATOES, A FULL PAN OF MASHED POTATOES, AND
24 SHE WAS LIKE, "WELL, TAKE THIS TO THE LINE." SO I
25 PICKED IT UP AND TRIED TO TAKE IT TO THE LINE, AND

1 SHE WAS LIKE -- SHE WAS LIKE, "UH-UH, YOU'RE IN
2 PAIN." I WAS LIKE, "MAN, I'LL BE ALL RIGHT. I'LL
3 BE ALL RIGHT." SHE WAS LIKE, "NO. GO TELL THE
4 MANAGER." SHE WAS LIKE, "GO TELL THE MANAGER 'CAUSE
5 YOU HURT." SO I WENT IN THERE AND TOLD HIM. SO
6 THEN HE WROTE UP THE INCIDENT REPORT. SO THEN HE
7 WAS LIKE, "I'M GOING TO HAVE TO TAKE YOU TO
8 MEDCARE."

9 Q. LET ME JUST ASK YOU A FEW THINGS HERE. THEY SENT
10 YOU TO MEDCARE, CORRECT?

11 A. YES, SIR.

12 Q. DID YOU DRIVE, OR DID THEY TAKE YOU?

13 A. THEY TOOK ME.

14 Q. ALL RIGHT. SO THEY TOOK YOU TO MEDCARE?

15 A. YES, SIR.

16 Q. WHEN THIS ACCIDENT HAPPENED, YOU SAID YOU CAUGHT
17 YOURSELF BEFORE YOU ACTUALLY FELL TO THE FLOOR?

18 A. MM-HMM.

19 Q. HAVE YOU EVER TOLD ANYBODY THAT YOU HIT THE FLOOR?

20 A. NO, SIR.

21 Q. ALL RIGHT. AND THE REASON I ASK IS MEDCARE SAID
22 SOMETHING ABOUT LANDING ON YOUR BACK. YOU DIDN'T
23 LAND ON YOUR BACK?

24 A. NO, I NEVER TOLD THEM THAT.

25 Q. OKAY. DID MEDCARE REALLY DO ANYTHING?

1 A. NO. ALL THEY DID WAS TAKE AN X-RAY. HE -- I SHOWED
2 THEM WHERE MY BACK -- I SHOWED THEM WHERE MY PAIN
3 WAS IN MY BACK, AND I TOLD THEM IT WAS GOING TO MY
4 KNEE, YOU KNOW. I WAS LIKE, "I'M HAVING A REAL BAD
5 PAIN GOING TO MY KNEE."
6 Q. AND DON'T SAY WHAT THEY SAID, BUT DID THEY REALLY DO
7 ANYTHING FOR YOU, ---
8 A. NO.
9 Q. --- OTHER THAN JUST DID THE X-RAY?
10 A. THE X-RAY; THAT'S IT. THEY GAVE ME SOME PILLS.
11 Q. ALL RIGHT. WITHIN THE NEXT FEW DAYS DID YOU GO
12 SOMEWHERE ON YOUR OWN?
13 A. YES, SIR.
14 Q. WHERE DID YOU GO?
15 A. TO THE EMERGENCY ROOM AT BAPTIST.
16 Q. AND WHERE DID YOU TELL THEM YOU WERE HAVING PAIN?
17 A. FROM MY LOWER BACK ALL THE WAY DOWN TO MY KNEE.
18 Q. ALL RIGHT. AND AT THAT POINT DID THEY REALLY DO
19 ANYTHING OTHER THAN MEDICATION?
20 A. NO; NO, SIR.
21 Q. ALL RIGHT. DID YOU TELL THE PEOPLE AT WORK YOU HAD
22 GONE ON YOUR OWN?
23 A. YES, SIR.
24 Q. AND WHAT WAS THEIR RESPONSE?
25 A. THEY GOT MAD AND SAID, "YOU'RE NOT SUPPOSED TO GO

1 NOWHERE ON YOUR OWN. YOU GOT TO GO WHERE WE TELL
2 YOU TO GO AT OR WE WON'T BE RESPONSIBLE FOR IT."
3 Q. SO DID THEY THEN SEND YOU SOMEWHERE?
4 A. YES, SIR.
5 Q. WHERE DID YOU GO?
6 A. FIRST CARE ON DECKER BOULEVARD.
7 Q. AND WHO WAS THE DOCTOR YOU SAW OVER THERE?
8 A. DR. YOUNG.
9 Q. OKAY. AND WE'LL SUBMIT THE RECORDS, BUT YOU SAW HIM
10 A FEW TIMES?
11 A. YES, SIR.
12 Q. WHEN HE WOULD EXAMINE YOU, WHERE DID HE BASICALLY
13 KIND OF LOOK AND PUT HIS HANDS?
14 A. ON MY BACK.
15 Q. OKAY. AND DID HE ALSO CHECK YOUR KNEE?
16 A. YEAH, HE LOOKED AT MY KNEE.
17 Q. ALL RIGHT. WERE YOU HAVING PROBLEMS -- WHEN HE
18 WOULD TOUCH YOUR KNEE, WAS IT SORE?
19 A. YEAH, I WOULD TELL HIM THAT IT WAS A PAIN ON THIS
20 SIDE AND ON THE OTHER SIDE.
21 Q. OKAY, ALL RIGHT. EVENTUALLY DID HE TRY YOU IN
22 THERAPY?
23 A. YES, SIR.
24 Q. DID THAT HELP OR NOT?
25 A. NO, IT MADE IT WORSE.

1 Q. ALL RIGHT. AT SOME POINT DID HE KIND OF QUIT SEEING
2 YOU?

3 BY MR. HUFF:

4 I'M GOING TO OBJECT TO THE LEADING.

5 BY MR. SAFRAN:

6 I'LL REPHRASE IT.

7 DIRECT EXAMINATION RESUMED BY MR. SAFRAN:

8 Q. ONCE DR. YOUNG HAD GOTTEN TO A CERTAIN POINT, DID
9 YOU KEEP SEEING HIM, OR WHAT HAPPENED?

10 A. AFTER I WENT BACK AND TOLD HIM THAT THERAPY WAS
11 MAKING ME WORSE, HE HAD -- HE STOPPED THE THERAPY.
12 SO HE WAS LIKE, "WELL, I'M GOING TO REFER YOU TO A
13 BACK SPECIALIST."

14 Q. OKAY. DID YOU THEN GET SENT SOMEWHERE ELSE?

15 A. YES, SIR.

16 Q. WHERE DID YOU GO?

17 A. I CAN'T RECALL THE NAME OF IT, BUT IT WAS OVER THERE
18 OFF OF TWO NOTCH, OVER THERE BY -- BEHIND ARBY'S,
19 OVER THERE BEHIND ARBY'S. IT'S A BACK PLACE OVER
20 THERE SOMEWHERE.

21 Q. DID YOU END UP SEEING A DR. PEELE?

22 A. PEELE; THAT'S IT.

23 Q. OKAY. IS HE AT MOORE, MOORE CLINIC?

24 A. NO, NO. PEELE AT MOORE.

25 Q. RIGHT. THAT'S WHAT I'M ASKING YOU.

1 A. YEAH, I SAW HIM.
2 Q. OKAY. SO YOU SAW HIM?
3 A. YEAH.
4 Q. HE WAS THE ORTHOPEDIST YOU FIRST SAW?
5 A. YEAH.
6 Q. OKAY, OKAY. HOW MANY TIMES DID YOU SEE PEELE?
7 A. TWO TIMES.
8 Q. ALL RIGHT. AFTER THE FIRST ONE, DID YOU HAVE A TEST
9 DONE?
10 A. YES, SIR.
11 Q. ALL RIGHT. AND WHEN YOU WENT BACK AFTER THE SECOND
12 ONE, DID DR. PEELE OFFER YOU ANY MORE TREATMENT?
13 A. NO, SIR.
14 Q. ALL RIGHT. WHAT WAS YOUR UNDERSTANDING AT THAT
15 POINT AS FAR AS WHEN YOUR BACK WAS GOING TO GET
16 BETTER?
17 A. I COULD GO BACK TO WORK FULL DUTY.
18 Q. WERE YOU LED TO BELIEVE THERE WAS ANYTHING THAT WAS
19 GOING TO CONTINUE GIVING YOU PAIN?
20 A. NO.
21 Q. ALL RIGHT.
22 A. NO, SIR.
23 Q. DID YOU STILL HAVE PAIN?
24 A. YES, SIR.
25 Q. ALL RIGHT. AND AT SOME POINT IN THE NEXT MONTH OR

- 1 SO DID YOU SEE A DIFFERENT DOCTOR?
- 2 A. YES, SIR.
- 3 Q. WHO WAS THAT?
- 4 A. DR. -- DR. -- AT BAPTIST -- I MEAN PROVIDENCE. DR.
- 5 ---
- 6 Q. RIBER?
- 7 A. RIBER, YEAH.
- 8 Q. ALL RIGHT. WHEN DR. RIBER SAW YOU THAT FIRST TIME,
- 9 DID HE CHECK YOUR BACK?
- 10 A. YES, SIR.
- 11 Q. DID HE ALSO ACTUALLY CHECK YOUR KNEE?
- 12 A. YES, SIR.
- 13 Q. ALL RIGHT. HIS REPORT WILL SAY WHAT IT SAYS, BUT MY
- 14 QUESTION IS, WOULD YOU BE WILLING TO HAVE THE
- 15 INJECTIONS THAT HE MAY HAVE REFERENCED IN HIS
- 16 REPORT?
- 17 A. YES, SIR.
- 18 Q. UP TO NOW HAVE YOU REALLY HAD ANY INJECTIONS IN YOUR
- 19 BACK OR YOUR KNEE?
- 20 A. NO, SIR.
- 21 Q. HAVE YOU REALLY HAD ANYTHING OTHER THAN SOMEBODY
- 22 GIVING YOU MEDICINE?
- 23 A. NO, SIR.
- 24 Q. OTHER THAN HAVING SOME SCANS OR A SCAN TAKEN OF YOUR
- 25 BACK AND A LITTLE P.T.?

1 A. YES, SIR.

2 Q. YOU THEN LATER SAW SOME OTHER DOCTORS?

3 A. YES, SIR.

4 Q. ALL RIGHT. DID YOU SEE A LADY DOCTOR HERE IN THE
5 COLUMBIA AREA?

6 A. YES, SIR.

7 Q. WHO WAS THAT, IF YOU REMEMBER?

8 A. DR. -- I -- I'M NOT GOOD WITH NAMES, BUT...

9 **BY MR. HUFF:**

10 YOU CAN MENTION THE NAME, ANDY. I HAVE NO
11 PROBLEM.

12 **DIRECT EXAMINATION RESUMED BY MR. SAFRAN:**

13 Q. DR. LEMBO?

14 A. LEMBO, YEAH, A LADY, RIGHT DOWN FROM HARBISON WAY.

15 Q. OKAY, ALL RIGHT. WHAT WAS THE FOCUS OF HER
16 EXAMINATION?

17 A. MY BACK.

18 Q. OKAY. YOU ALSO SAW DR. MAZOUÉ?

19 A. YES, SIR.

20 Q. NOW, WHO IS HE?

21 A. A DOCTOR DOWN IN CHARLESTON.

22 Q. MAZOUÉ.

23 A. MAZOUÉ?

24 Q. YES.

25 A. HOLD UP. OH, MAZOUÉ. OH, USC -- THE DOCTOR FROM

1 USC ABOUT THE KNEE.

2 Q. RIGHT. WHAT WAS THE FOCUS OF HIS EXAM WITH YOU?

3 A. MY KNEE.

4 Q. NOW, YOU DID LET HIM KNOW YOU HAD SOME BACK PAIN?

5 A. YES, SIR.

6 Q. TELL US JUST BRIEFLY, DID HE DO A -- DID HE SPEND

7 SOME TIME WITH YOU?

8 A. YES, SIR.

9 Q. DID HE PUT HIS HANDS ACTUALLY ON YOUR KNEE?

10 A. YES, SIR.

11 Q. DID HE MOVE IT AROUND?

12 A. YES, SIR.

13 Q. AT SOME POINT DID YOU EVER HAVE ANY PAIN WITH YOUR

14 KNEE WHEN HE WAS MOVING IT?

15 A. ABOUT THE WHOLE TIME.

16 Q. OKAY. AND I GUESS MY QUESTION IS, HOW DID YOU COME

17 AWAY FEELING AS FAR AS INFORMATION? DID HE GIVE YOU

18 KIND OF AN EXPLANATION ABOUT WHAT WAS GOING ON WITH

19 YOU?

20 A. YEAH.

21 Q. NOT WHAT HE SAID, BUT DID HE DO THAT?

22 A. YES, SIR. YEAH, HE MADE ME FEEL LIKE -- WELL, I

23 KNOW A LITTLE BIT WHAT'S GOING ON WITH IT, AND AT

24 FIRST I DON'T KNOW WHAT'S GOING ON WITH IT.

25 Q. OKAY. WAS SURGERY SOMETHING THAT AT LEAST CAME UP?

- 1 A. YES, SIR.
- 2 Q. DID YOU FEEL COMFORTABLE ENOUGH WITH HIM TO HAVE
- 3 SURGERY WITH HIM?
- 4 A. YES, SIR.
- 5 Q. OKAY. NOW, YOU ALSO DID SEE THE DOCTOR DOWN IN
- 6 CHARLESTON, DR. JOHNSON?
- 7 A. YES.
- 8 Q. WHAT WAS THE FOCUS OF HIS EVALUATION OF YOU?
- 9 A. MY BACK.
- 10 Q. OKAY. AND, AGAIN, IF INJECTIONS WERE MENTIONED, IS
- 11 THAT SOMETHING THAT YOU WOULD BE WILLING TO DO?
- 12 A. YES, SIR.
- 13 Q. REALLY, HAS THERE BEEN ANYTHING THAT WAS DONE THAT
- 14 WORKERS' COMP SENT YOU TO, WHETHER IT BE MEDCARE,
- 15 DR. YOUNG, THERAPY, OR DR. PEELE, THAT HAS MADE ANY
- 16 OF THIS REALLY ANY BETTER?
- 17 A. NO, SIR.
- 18 Q. WHEN YOU WENT BACK TO WORK ORIGINALLY, YOU WERE ON
- 19 LIGHT DUTY?
- 20 A. YES, SIR.
- 21 Q. WERE THERE TIMES YOU TRIED TO KIND OF DO MORE THAN
- 22 SIT THERE?
- 23 A. YES, SIR.
- 24 Q. WHY?
- 25 A. I'D RATHER WORK THAN JUST BE JUST SITTING THERE

1 DOING NOTHING.

2 Q. ALL RIGHT. AND SINCE YOU WERE RELEASED BY DR.
3 PEELE, TELL US, HAVE YOU GONE THROUGH EVERY DAY
4 DOING EVERYTHING YOU'RE SUPPOSED TO DO, OR HAVE
5 THERE BEEN THINGS DONE DIFFERENTLY?

6 BY MR. HUFF:

7 I'M GOING TO OBJECT TO LEADING AND VAGUE.

8 BY THE COMMISSIONER:

9 SUSTAINED.

10 DIRECT EXAMINATION RESUMED BY MR. SAFRAN:

11 Q. LET ME ASK IT MAYBE A MORE DIRECT WAY. HAVE YOU HAD
12 ANY PROBLEMS DOING ANY OF YOUR WORK ACTIVITIES SINCE
13 YOU'VE BEEN RELEASED BY DR. PEELE?

14 A. YES, SIR.

15 Q. AND DESCRIBE WHAT'S GONE ON.

16 A. CERTAIN DAYS, LIKE I'LL BE COOKING, LIKE I MAY BE
17 DOING SOME CHICKEN OR SOMETHING LIKE THAT, AND MY
18 HEAD COOK, SHE'LL ASK ME AM I ALL RIGHT. I'LL BE
19 LIKE, "I'M HAVING A LITTLE BIT OF PAIN." SO SHE'LL
20 SEND SOMEBODY OVER THERE. OR LIKE WHEN I GO TO --
21 WHEN I'M STIRRING SOME MASHED POTATOES OR SOMETHING,
22 I'M LIKE, "MAN, I NEED A FIVE -- I NEED FIVE
23 MINUTES." YOU KNOW, "LET ME SIT DOWN FOR A MINUTE
24 AND GET MY BACK RIGHT." I SAID, "I FEEL LIKE IT'S
25 ABOUT TO LOCK UP." OR THERE HAVE BEEN DAYS LIKE,

1 YOU KNOW, I BEEN DOING MY WORK AND IT GOT TO THE
2 POINT WHERE I COULDN'T EVEN STAND UP, YOU KNOW,
3 STAND STRAIGHT UP. I HAD TO BE HELPED TO MY CAR OR
4 HAD SOMEBODY TO TAKE ME HOME BECAUSE LIKE MY BACK
5 HAD LOCKED UP, AND THEN I'D BE OUT FOR LIKE A DAY OR
6 TWO. I AIN'T BEEN HAVING NO MEDICINE TO TAKE, SO
7 I'VE BEEN LIKE USING LIKE VICKS VAPORUB AND ICY-HOT
8 AND SOME OTHER NEW STUFF, ALCOHOL I GOT TO RUB ON MY
9 BACK TO TRY TO LOOSEN IT UP. IT LOOSENED UP A
10 LITTLE BIT TO WHERE I CAN GO BACK TO WORK.

11 Q. HAVE YOU BEEN HAVING PROBLEMS WITH YOUR KNEE DURING
12 THAT TIME?

13 A. YEAH.

14 BY MR. HUFF:

15 LET ME OBJECT AGAIN TO A LEADING QUESTION.

16 BY THE COMMISSIONER:

17 SUSTAINED.

18 DIRECT EXAMINATION RESUMED BY MR. SAFRAN:

19 Q. WHERE, OTHER THAN YOUR BACK, IF ANYWHERE, HAVE YOU
20 BEEN HAVING PROBLEMS DURING THAT SAME TIME?

21 A. LIKE ON MY HIP DOWN ALL THE WAY DOWN TO LIKE MY
22 KNEE, TO THE BACK OF MY KNEE.

23 Q. YOU MENTIONED THAT THE KNEE PAIN WAS SOMETHING THAT
24 YOU HAD EARLY ON AFTER THIS HAPPENED?

25 A. TALKING ABOUT AFTER THE ---

1 Q. YEAH, WHEN THE ACCIDENT HAPPENED, YOU STARTED HAVING
2 PAIN DOWN TO YOUR KNEE?
3 A. YEAH, FROM THE BEGINNING.
4 Q. HAS IT CONTINUED TO BE IN THAT -- THE SAME THING
5 DOWN TO YOUR KNEE?
6 A. YES, SIR.
7 Q. OKAY. LET ME ASK YOU, ALSO. SO, THESE OTHER TIMES
8 WHERE YOU MIGHT GO HOME, HAVE TO LEAVE EARLY, YOU
9 WERE ABLE TO COME BACK TO WORK?
10 A. PROBABLY -- PROBABLY NOT THE NEXT DAY.
11 Q. BUT YOU WEREN'T GIVEN A PROBLEM COMING BACK, IS WHAT
12 I'M ASKING?
13 A. OH, NO. THEY JUST ASK ME AM I OKAY, AND I BE LIKE,
14 "YEAH, I'M PRETTY GOOD."
15 Q. ALL RIGHT. MORE RECENTLY DID YOU MISS A COUPLE OF
16 DAYS FROM WORK?
17 A. YEAH.
18 Q. AND WHY DID YOU MISS THOSE DAYS?
19 A. MY BACK WAS GIVING ME PROBLEMS.
20 Q. AND DID YOU CALL IN BEFORE YOU MISSED?
21 A. YEAH, I CALLED IN LIKE 10:00 EVERY MORNING.
22 Q. ALL RIGHT. DID YOU THEN AT SOME POINT TRY TO GO
23 BACK TO WORK?
24 A. YEAH, I HAD CALLED THEM LIKE ANOTHER DAY, AND I WAS
25 LIKE, YOU KNOW, "THIS IS McDUFFIE FROM ELEVEN --

1 FROM TEN FOUR ONE." YOU KNOW, WE WERE STILL OVER
2 THERE, YOU KNOW. "I WAS CALLING IN, YOU KNOW, TO
3 LET Y'ALL KNOW I WAS MISSING A COUPLE DAYS, YOU
4 KNOW. I WANT TO COME BACK." THEN HE WAS LIKE,
5 "WELL, NO, YOU CAN'T COME BACK UNTIL YOU GO TO GET A
6 DOCTOR'S NOTE."
7 Q. ALL RIGHT.
8 A. THEN HE SAID I HAD TO GO SEE MS. MILES.
9 Q. OKAY. SO, IN ORDER TO GO BACK TO WORK, AS I'M
10 HEARING YOU, THEY REQUIRED THAT YOU HAD TO GIVE THEM
11 A DOCTOR'S SLIP?
12 A. YES, SIR.
13 Q. HAD ANY DOCTOR SEEN YOU ---
14 A. YES, SIR.
15 Q. --- FOR THOSE TWO DAYS? I'M TALKING ABOUT ---
16 A. OH, THE DAYS?
17 Q. --- OTHER THAN THE ONES YOU HAD ALREADY BEEN.
18 A. NO.
19 Q. LET ME REPHRASE MY QUESTION. HAD YOU SEEN ANYBODY
20 ELSE FOR YOUR BACK OTHER THAN THE DOCTORS WE'VE
21 TALKED ABOUT TODAY?
22 A. NO, SIR.
23 Q. ALL RIGHT. AND WHEN YOU MISSED THOSE TWO DAYS, YOU
24 DIDN'T GO TO ANY OTHER DOCTOR?
25 A. NO, SIR.

- 1 Q. ALL RIGHT. DID I SEND YOU BACK TO THE TWO DOCTORS
2 HERE IN THE COLUMBIA AREA BECAUSE OF YOUR BACK?
- 3 A. YES, SIR.
- 4 Q. DID YOU GET SLIPS FROM THEM?
- 5 A. YES, SIR.
- 6 Q. DID YOU PRESENT THOSE SLIPS BACK AT WORK AS FAR AS
7 WHAT THEY HAD ASKED YOU TO DO?
- 8 A. YES, SIR.
- 9 Q. HAVE THEY LET YOU COME BACK TO WORK EVEN AFTER
10 PRESENTING THE SLIPS?
- 11 A. NO, SIR.
- 12 Q. SO YOU'RE STILL OUT NOW?
- 13 A. YES, SIR.
- 14 Q. DID YOU LET THEM KNOW YOU WERE READY TO COME BACK?
- 15 A. YES, SIR.
- 16 Q. AND YOU'RE WILLING TO COME BACK?
- 17 A. YES, SIR.
- 18 Q. AND WHAT WERE YOU TOLD AS FAR AS WHY YOU COULDN'T
19 COME BACK?
- 20 A. SHE TOLD ME THAT IT'S NOTHING SHE COULD TELL ME BUT
21 THE ONLY THING SHE COULD TELL ME WAS THAT I COULDN'T
22 COME BACK 'TIL THEIR INSURANCE PEOPLE TALKED TO MY
23 LAWYER. AND SHE SAID, "THAT'S ALL I CAN TELL YOU
24 RIGHT NOW."
- 25 Q. ALL RIGHT. LET ME ASK YOU JUST A COUPLE OF QUICK

1 THINGS. YOU ALREADY STOOD UP, BUT IS THE PAIN
2 YOU'RE STILL HAVING IN THAT SAME AREA AND LOCATION,
3 WHAT YOU ALREADY SHOWED US?

4 A. YES, SIR.

5 Q. AND, AGAIN, IT DOESN'T GO PAST JUST RIGHT BELOW THE
6 KNEE STILL?

7 A. YES, SIR.

8 Q. ALL RIGHT. YOU'VE ALREADY TALKED ABOUT DR. MAZOUÉ.
9 ARE YOU SATISFIED BASED ON THE TWO VISITS YOU'VE HAD
10 EACH WITH DR. LEMBO AND DR. RIBER AS FAR AS THEY'RE
11 CONCERNED?

12 A. YES, SIR.

13 Q. I MEAN, THEY'VE BOTH SEEN YOU TWICE?

14 A. YES, SIR.

15 Q. AND ARE YOU COMFORTABLE WITH EITHER ONE OF THEM?

16 A. YES, SIR.

17 Q. ALL RIGHT.

18 BY MR. SAFRAN:

19 THAT'S ALL I'VE GOT, YOUR HONOR.

20 BY THE COMMISSIONER:

21 OKAY. THANK YOU. MR. HUFF.

22 CROSS EXAMINATION BY MR. HUFF:

23 Q. THE LAST QUESTION YOUR ATTORNEY ASKED YOU WAS ABOUT
24 THE DOCTORS THAT HE SENT YOU TO, CORRECT?

25 A. YES, SIR.

1 Q. OKAY. CAN YOU TELL ME WHO YOU'VE TALKED TO WITH THE
2 EMPLOYER TO REQUEST TO GO BACK TO THE DOCTOR?

3 A. WHO I TALKED TO?

4 Q. YES, IF YOU DID.

5 A. FAR AS I KNOW, THAT I AIN'T -- THE ONLY PERSON I
6 TALKED TO IS LIKE MY HEAD COOKS AND MY FIRST COOK
7 AND THE PERSON THAT RUNS THE BUILDING. THEM THE
8 ONLY PEOPLE THAT, YOU KNOW, THEY'LL ALLOW US TO TALK
9 TO 'CAUSE THEY SAY WE HAVE TO GO THROUGH THE CHAIN
10 OF COMMAND.

11 Q. WHO IN THE CHAIN OF COMMAND DID YOU GO TO AND SAY,
12 "I WANT YOU TO SEND ME BACK TO THE DOCTOR"? I KNOW
13 YOUR ATTORNEY SENT YOU TO FOUR, BUT WHO DID YOU GO
14 TO THE EMPLOYER, IF YOU DID? I'M NOT SAYING YOU DID
15 OR DIDN'T. WHO DID YOU GO TO AND SAY, "I WANT TO GO
16 BACK TO THE DOCTOR"?

17 A. NOBODY.

18 Q. NOBODY. WHILE WORKING WITH OUR EMPLOYER, JOHNSON
19 FOOD SERVICE, DID YOU HAVE ANY OTHER JOBS WITH
20 ANYBODY ELSE, OR IS THIS YOUR ONLY SOURCE OF INCOME?

21 A. ONLY SOURCE OF INCOME.

22 Q. DO YOU KNOW HOW MUCH YOU WERE MAKING AN HOUR?

23 A. NINE THIRTY-TWO.

24 Q. ALL RIGHT. AND HOW MANY HOURS A WEEK WERE YOU
25 WORKING?

- 1 A. SUPPOSED TO BE EIGHT, BUT WE GET OUT THERE ABOUT
2 LIKE SIX AND A HALF, SEVEN.
- 3 Q. OKAY. AND AFTER YOU REPORTED THE ACCIDENT AND AFTER
4 YOU WERE HAVING THESE PROBLEMS, YOU TESTIFIED
5 EARLIER THAT YOU WENT AND TOLD YOUR MANAGER YOU WERE
6 HAVING PROBLEMS, CORRECT?
- 7 A. YOU SAID WHAT; RIGHT AFTER THE ACCIDENT?
- 8 Q. AFTER THE ACCIDENT YOU TOLD THEM YOU HAD A PROBLEM
9 ---
- 10 A. YES, SIR.
- 11 Q. --- WITHIN A DAY OR TWO, CORRECT?
- 12 A. NO, I TOLD HIM THE SAME DAY.
- 13 Q. AND THEY SAID, "WE'RE GOING TO TAKE YOU TO THE
14 DOCTOR," AND THEY TOOK YOU TO THE DOCTOR, CORRECT?
- 15 A. CORRECT.
- 16 Q. AND THEY GAVE YOU TREATMENT TO YOUR KNEE AND TO YOUR
17 BACK WITH TWO DIFFERENT DOCTORS, CORRECT?
- 18 A. NO, NOT CORRECT.
- 19 Q. WHO DID THEY GIVE YOU TREATMENT WITH?
- 20 A. THEY JUST GAVE ME TREATMENT FOR MY BACK, NOT MY
21 KNEE.
- 22 Q. WITH WHO?
- 23 A. WITH -- WITH MEDCARE THE FIRST DAY, MEDCARE, AND
24 THAT'S WITH THE FIRST DOCTOR. YOU SAID WHICH --
25 YOU WANT TO KNOW WHICH DOCTORS THEY HAD TREATED ME

1 WITH?

2 Q. WHAT DOCTOR TREATED YOUR BACK? WAS IT DR. PEELE?

3 A. NO.

4 Q. WHAT DID HE TREAT YOU FOR?

5 A. DR. PEELE, I DIDN'T SEE HIM FIRST. YOU SAID WHO I

6 WAS TREATED FIRST WITH?

7 Q. LISTEN TO MY QUESTION. YOU WENT TO SEE DR. PEELE,

8 CORRECT?

9 A. NOT AT FIRST.

10 Q. I DIDN'T SAY AT FIRST. LISTEN TO MY QUESTION. YOU

11 WENT AND SAW DR. PEELE; IS THAT CORRECT?

12 A. OH, YEAH, I SAW HIM.

13 Q. RIGHT, OKAY. AND HE TREATED YOU FOR A WHILE, RIGHT?

14 A. TWICE.

15 Q. TWO TIMES?

16 A. TWICE.

17 Q. TO WHAT BODY PART?

18 A. MY BACK.

19 Q. ALL RIGHT. WHO DID YOU SEE FOR THE KNEE?

20 A. NOBODY.

21 Q. WHO IS THE OTHER DOCTOR THAT YOU MENTIONED EARLIER;

22 DR. YOUNG? I SEE WHERE YOU SAW HIM ON SEPTEMBER

23 24TH THROUGH NOVEMBER 28TH. THEY SENT YOU TO DR.

24 STEWART YOUNG, DIDN'T THEY?

25 A. AIN'T NOBODY TREAT ME FOR MY KNEE.

- 1 Q. LET ME FIND THE REPORT, IF I MAY. WHO IS DR. PEELE
2 WITH; WHAT GROUP?
- 3 A. DR. PEELE?
- 4 Q. I'M SORRY; I MADE A MISTAKE. LET ME GO BACK AND
5 LOOK AT THIS REPORT. AT MEDCARE URGENT CARE WHO DID
6 YOU SEE?
- 7 A. I CAN'T REMEMBER. I SAW -- I WENT THERE ONCE. I
8 CAN'T REMEMBER THE GUY'S NAME. HE DIDN'T STAY IN
9 THERE VERY LONG, SO I CAN'T REMEMBER HIS NAME.
- 10 Q. WHEN YOU SAW DR. YOUNG, WHAT DID HE SEE YOU -- WHAT
11 BODY PART?
- 12 A. HE SAW ME FOR MY BACK.
- 13 Q. YOUR BACK. WHILE YOU WERE WORKING, YOU WERE
14 RELEASED IN DECEMBER, AND YOU WORKED IN JANUARY,
15 FEBRUARY, MARCH, APRIL, MAY, JUNE, AND FINALLY YOU
16 WENT TO SEE THESE DOCTORS IN JUNE: JOHNSON, LEMBO,
17 AND RIBER. WHAT DOCTOR DID YOU SEE BEFORE YOU WENT
18 TO THOSE THREE DOCTORS? BETWEEN BEING RELEASED IN
19 DECEMBER -- I WANT TO KNOW IN JANUARY, FEBRUARY,
20 MARCH, APRIL, MAY, WHO DID YOU GO SEE?
- 21 A. I DIDN'T GO SEE NOBODY.
- 22 Q. YOU WERE GOING TO WORK?
- 23 A. YES, SIR. THEY SAID I WAS CAPABLE TO GO BACK TO
24 WORK.
- 25 BY MR. HUFF:

1 I HAVE NOTHING FURTHER. THANK YOU.

2 BY MR. SAFRAN:

3 JUST VERY QUICKLY.

4 REDIRECT EXAMINATION BY MR. SAFRAN:

5 Q. YOU ACTUALLY SAW DR. RIBER IN JANUARY? I'M LOOKING
6 AT A REPORT THAT WAS DATED JANUARY 12TH, THE ONE BY
7 PROVIDENCE?

8 A. YES.

9 Q. SO YOU DID SEE HIM IN JANUARY?

10 A. IN JANUARY, YES.

11 Q. OKAY. YOU SAW HIM AGAIN MORE RECENTLY OR IN
12 OCTOBER?

13 A. MORE RECENTLY; YES, SIR. YES, SIR.

14 Q. OKAY. AND LET ME ASK THIS. DR. RIBER -- I'M NOT
15 GOING TO GO INTO WHAT'S IN HIS REPORT, BUT YOU TOLD
16 HIM AT THAT TIME WHAT WAS HURTING?

17 A. YES, SIR.

18 Q. OKAY. AND IT WAS HURTING THEN?

19 A. YES, SIR.

20 Q. WAS IT STILL HURTING WITH DR. LEMBO?

21 A. YES, SIR.

22 Q. WAS IT STILL HURTING WITH DR. JOHNSON?

23 A. YES, SIR.

24 BY MR. HUFF:

25 I'M OBJECTING TO LEADING.

1 BY MR. SAFRAN:

2 THAT'S NOT LEADING.

3 BY MR. HUFF:

4 IT'S LEADING. ASK HIM WHAT YOU TOLD HIM.

5 YOU'RE TELLING HIM WHAT HE SAID.

6 BY THE COMMISSIONER:

7 SUSTAINED.

8 REDIRECT EXAMINATION RESUMED BY MR. SAFRAN:

9 Q. WERE YOU HAVING ANY SYMPTOMS WHEN YOU SAW DR. LEMBO?

10 A. YES, SIR.

11 Q. WERE YOU HAVING ANY SYMPTOMS WHEN YOU SAW DR.

12 JOHNSON?

13 A. YES, SIR.

14 Q. WERE YOU HAVING ANY SYMPTOMS WHEN YOU SAW DR.

15 MAZOUÉ?

16 A. YES, SIR.

17 Q. WERE YOU HAVING ANY SYMPTOMS WHEN YOU SAW DR. RIBER

18 AND LEMBO AGAIN?

19 A. YES, SIR.

20 Q. OKAY. AND I THINK YOU'VE ALREADY TESTIFIED TO THIS.

21 WHILE YOU WERE WORKING BETWEEN SEEING DR. RIBER IN

22 JANUARY AND SEEING THE OTHER DOCTORS AGAIN LATER,

23 SEVERAL MONTHS LATER, ---

24 A. YES, SIR.

25 Q. --- WERE YOU STILL HAVING SYMPTOMS?

1 BY MR. HUFF:

2 I OBJECT. ASK HIM. HE'S SUGGESTING ARE YOU
3 STILL HAVING SYMPTOMS.

4 BY THE COMMISSIONER:

5 I'M GOING TO OVERRULE THIS ONE BECAUSE HE
6 QUALIFIED THIS ONE. HE IS CLARIFYING. HE'S SHORING
7 UP TESTIMONY THAT HAS ALREADY BEEN PUT IN THE
8 RECORD.

9 BY MR. HUFF:

10 THANK YOU, MA'AM.

11 REDIRECT EXAMINATION RESUMED BY MR. SAFRAN:

12 Q. AND I GUESS MY QUESTION IS, WHEN WHAT YOU HAVE
13 DESCRIBED TO THE COMMISSIONER ABOUT THOSE TIMES
14 WHERE SOMEBODY WOULD TELL YOU TO SIT DOWN OR YOU
15 MIGHT ASK FOR SOME HELP OR THEY MIGHT GIVE YOU HELP
16 WITHOUT ASKING OR WHERE YOU MIGHT HAVE TO LEAVE
17 EARLY, WERE THOSE THINGS HAPPENING BETWEEN JANUARY
18 AND WHEN YOU SAW THESE DOCTORS IN JUNE?

19 A. YES, SIR.

20 Q. OKAY. SO, I GUESS MY SIMPLE QUESTION IS, HAD YOUR
21 SYMPTOMS EVER GONE AWAY BETWEEN SEEING DR. PEELE AND
22 SEEING THESE DIFFERENT DOCTORS WHO HAVE WRITTEN DOWN
23 WHATEVER WAS GOING ON WITH YOU?

24 A. NO, THEY HAVEN'T.

25 BY MR. SAFRAN:

1 OKAY. THANK YOU.

2 BY THE COMMISSIONER:

3 MR. HUFF?

4 BY MR. HUFF:

5 I HAVE NOTHING FURTHER.

6 BY THE COMMISSIONER:

7 THANK YOU VERY MUCH, MR. McDUFFIE. YOU MAY

8 SIT DOWN NEXT TO YOUR ATTORNEY. ANY OTHER FACT

9 WITNESSES FOR THE CLAIMANT?

10 BY MR. SAFRAN:

11 NO.

12 BY THE COMMISSIONER:

13 ANY FACT WITNESSES FOR THE DEFENDANTS?

14 BY MR. HUFF:

15 NO, MA'AM.

16 BY THE COMMISSIONER:

17 OKAY. AS I STATED EARLIER, THIS MATTER -- THE
18 RECORD WILL BE HELD OPEN IN THIS MATTER, BUT THIS
19 CONCLUDES THE HEARING TESTIMONY PORTION. BOTH
20 PARTIES ARE REQUESTED TO UPLOAD THEIR APA
21 SUBMISSIONS TO ECASE. I WILL TAKE ORIGINAL
22 DEPOSITION TRANSCRIPTS AT THIS TIME, AND I'LL HOLD
23 THE RECORD FOR THE SECOND DEPOSITION OF DR. LEMBO
24 SHOULD IT BE NECESSARY. I WILL ASK THE PARTIES TO
25 LET ME KNOW AS SOON AS POSSIBLE IF IT IS NOT

1 NECESSARY SO I CAN BEGIN REVIEW. THAT CONCLUDES
2 THIS MATTER. THANK YOU.
3 (THERE BEING NO FURTHER QUESTIONS, THIS HEARINGS WAS
4 CONCLUDED AT THE HOUR OF 12:00 P.M.)

CERTIFICATE OF NOTARY PUBLIC
SOUTH CAROLINA WORKERS' COMPENSATION COMMISSION
COLUMBIA, SOUTH CAROLINA
WCC FILE NO. 1413546

EMPLOYEE/CLAIMANT: TIMOTHY McDUFFIE

EMPLOYER: JOHNSON FOOD SERVICE

CARRIER: GREAT AMERICAN ALLIANCE INSURANCE COMPANY

I, TIMMI A. PARRISH, A NOTARY PUBLIC FOR THE STATE OF SOUTH CAROLINA, DULY COMMISSIONED AND QUALIFIED AS SUCH, DO HEREBY CERTIFY THAT THE FOREGOING 49 PAGES REPRESENTS A TRUE AND ACCURATE TRANSCRIPT OF THE FOREGOING HEARING OF TIMOTHY McDUFFIE, TAKEN ON THE 29TH DAY OF OCTOBER, 2015.

THAT THE WITNESS WAS DULY PLACED UNDER OATH AND ADMONISHED TO SPEAK THE WHOLE TRUTH. THAT THE ORAL HEARING WAS DULY TAKEN AND TRANSCRIBED AS TO THE QUESTIONS PROPOUNDED AND THE ANSWERS GIVEN.

THAT ALL THE OFFERED EXHIBITS, STIPULATIONS AND OBJECTIONS, IF ANY, INVOLVED IN THIS CASE ARE DULY ATTACHED OR INCLUDED HEREIN.

IN WITNESS WHEREOF, I HAVE SET MY HAND AND OFFICIAL SEAL THIS 27TH DAY OF JANUARY, 2016.

TIMMI A. PARRISH
NOTARY PUBLIC FOR SOUTH CAROLINA
MY COMMISSION EXPIRES: 11-20-2018

* THIS TRANSCRIPT MAY CONTAIN QUOTED MATERIAL. SUCH MATERIAL IS REPRODUCED AS READ OR QUOTED BY THE SPEAKER.

**Transcript of the Testimony of
MCDUFFIE V. JOHNSON FOOD SERVICES, ET
AL.**

Date: August 16, 2016



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Page 1

STATE OF SOUTH CAROLINA
BEFORE THE
SOUTH CAROLINA WORKERS' COMPENSATION COMMISSION
WCC No. 1413546

Timothy McDuffie,)
)
Claimant,)
)
v.)
)
Johnson Food Services,)
)
Employer,)
)
and)
)
Great American,)
)
Carrier/Defendants.)
)

FULL COMMISSION HEARING

Tuesday, August 16, 2016
10:28 a.m. - 11:53 a.m.

The Full Commission Hearing was heard before Commissioners T. Scott Beck, Susan S. Barden and Gene McCaskill, Chair, at the Workers' Compensation Commission, 1333 Main Street, Suite 500, Columbia, South Carolina, on the 16th day of August, 2016, before M. Sean Cary, Court Reporter and Notary Public in and for the State of South Carolina.

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APPEARANCES

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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.

1 COURT REPORTER: Today is Tuesday. This is South
2 Carolina Workers' Compensation case
3 number 1413546. This is the case of Timothy
4 McDuffie, the claimant, versus Johnson Food
5 Service, the employer, and Great American, the
6 carrier. The Appellant is the defendant
7 represented by E. Ros Huff. The respondent is
8 represented by Andrew Safran. Each side is
9 allowed ten minutes for oral argument and the
10 appellant three minutes in reply. You're
11 requested to argue the grounds of exception and
12 stay within the record.

13 CHAIR: All right, Mr. Huff.

14 MR. HUFF: Thank you, Commissioner. This is I call
15 round two. I enjoyed seeing y'all yesterday
16 and hopefully will have a good result today.
17 I've handed up to the Commission, to the left,
18 some documents that I'm going to be referring
19 to if I could. I would start off by saying as
20 to document number one, the document is a Form
21 51, it says this is a 50/51 Hearing Notice that
22 we're having; a 50/51 Hearing Notice. Of
23 course ---

24 COMMISSIONER BECK: Could I get you to clarify one
25 question for me?

1 MR. HUFF: Yes, sir.

2 COMMISSIONER BECK: Is it the left knee or right
3 knee?

4 MR. HUFF: They're saying -- I think they said it
5 was the left knee. Am I right Andy?

6 COMMISSIONER BECK: Yeah, well, in your ---

7 MR. SAFRAN: Left.

8 COMMISSIONER BECK: --- in your appellate brief, all
9 of your questions in your brief refer to right
10 knee.

11 MR. HUFF: I made a mistake then. I'm sorry. It
12 was typed up wrong.

13 COMMISSIONER BECK: All right.

14 MR. HUFF: Thanks for asking Commissioner, I'm
15 sorry.

16 COMMISSIONER BECK: Just want to make sure I wasn't
17 missing something.

18 MR. HUFF: I'm going to double check that when I sit
19 back down but I think it was --I it was the
20 left knee.

21 COMMISSIONER BECK: I'm almost positive it is.

22 MR. HUFF: Yes, sir. Getting prepared for this,
23 that's ---

24 COMMISSIONER McCASKILL: That's what the pleading
25 says.

1 MR. HUFF: Thank you. But what's important, what
2 are the issues, I'm them out of order because
3 this is a very important issue. The Hearing
4 Notice said this is a 50/51 Hearing. That's
5 what we're told to come defend. Not to defend
6 anything else, defends what's in the 50/51; and
7 we did. And the Commissioner awarded some
8 benefits, temporary total, as an afterthought.
9 Temporary total was never before the
10 Commission. If you look at the Form 50 that I
11 gave you and you look at paragraph eight, due
12 to the injury, Claimant requests temporary
13 total disability benefits because of lost
14 compensable time. It's not checked for the
15 period of, it's left blank. So because
16 temporary total was not asked for we brought no
17 witness, we presented no evidence at all. SO
18 first of all, that's a violation of our due
19 process to be given notice by the pleading and
20 notice on the hearing that we're going to
21 decide this, so I can bring a witness. It's
22 not that I didn't put any documents in or
23 anything, or even cross0-examine the claimant.
24 The question is, we don't bring a witness
25 because you didn't tell us. And then if I

1 start cross-examining the witness, do I open
2 myself up, that I've lost that ground, because
3 I cross-examined. So the first thing we think
4 needs to be done is this matter should be
5 reversed awarding any temporary total. That is
6 crystal clear. On our Form 51 we checked, it
7 is denied the employee's entitled to temporary
8 total disability. It's not an issue. That's
9 in our 51. So we'd like that to be done if we
10 could. I'll say the last thing on it. If you
11 look at the 58 done by the -- by Mr. Safran, he
12 does not list temporary total in his 58. Thank
13 you. I'll go to the next issue. This is an
14 admitted accident to the back. No doubt about
15 it. Dr. Young released the claimant at maximum
16 medical improvement with zero percent
17 impairment. The accident was 9/19/14, released
18 12/31/14. Within roughly three -- four and a
19 half -- three -- three and a half months. I'm
20 going to skip over the evidence. Let me see if
21 I may be able to -- also, Dr. Mazoue -- Mazoue,
22 I think that's how you pronounce it, if I'm,
23 wrong please correct me -- was ordered to be
24 the doctor. We accepted the claim though. The
25 Commissioner designated him as the treating

1 doctor. Temporary total ordered.. An issue
2 I've got with the temporary total, it's on page
3 two of my brief, is that they want us to pay
4 temporary total, and it says effective the day
5 following the last active work date until such
6 time as the obligation is relieved by the --
7 further ordered. Effective following the last
8 active work day? They didn't put any evidence
9 in. When is the last effective work date? You
10 want e to do something outside the Order? I
11 think the Commission, if they're going to order
12 temporary total, has got to tell me when to do
13 it. And they only way you can tell me when to
14 do it is if they present evidence to show when
15 it should start. No evidence. Next page, page
16 three. They're ordering further medical
17 treatment, but if you look at the top up there,
18 the date of accident was 9/20/14. He went to
19 the doctor that day and at that visit they
20 performed as examination. He had normal range
21 of motion, normal gait, normal stance, normal
22 posture. It was totally a normal exam of the
23 back. An x-ray of the spine was performed and
24 the x-ray was normal. The diagnosis was soft
25 tissue issue: soft tissue swelling, that's it.

1 He then goes three days later, he is seen
2 through the Palmetto Health Baptist Emergency
3 Room on September -- and he's diagnosed with
4 left buttocks pain with sciatica with full
5 range of motion of the left hip, knee and
6 ankle. Then he saw Dr. Steve Young two days
7 later, so it's five days from the date of
8 accident, and at that time what do we have
9 here? He's diagnosed with a lower -- a left
10 knee sprain, a left leg injury; all injuries
11 are minor. On 9/29 he goes to Dr. Young. This
12 is how minor this injury is but we're getting
13 all this temporary total ordered and all this
14 other stuff. He is seen, accident 9/20, within
15 ten days, Dr. Young says the following: Normal
16 gait, left knee normal to palpation, normal
17 range of motion, no ligament instability, his
18 patella is freely movable, non-tender, lower
19 back is not tender, normal full range of motion
20 in torso rotation, negative straight leg raise,
21 left thigh musculature is non-tender without
22 spasm, the patient is vastly improved and has
23 no residual findings that would suggest he's
24 not able to work without restrictions. And
25 which he agrees. Next page, page four. He is

1 now seen on October 13th of 2014, so that is
2 within two and a half weeks. Claimant again,
3 normal exams, straight leg test negative.
4 December 31st, 2014, again released to work as
5 he's had no complaints. December 31st, Dr.
6 Peele, lumbar MRI did not reveal any disc
7 pathology, suffered no additional -- offered no
8 additional treatment, discharged him to resume
9 full-duty work activities. MRI that was done
10 on December 19th of 2014, that's within three
11 months, no abnormalities to account for left-
12 sided pain. Our situation is he had an injury,
13 we didn't deny it. So we provided medical
14 treatment, he recovered. I would now go to
15 page five of our brief because this is an
16 important issue. Temporary total was ordered,
17 and as I showed, temporary total was not -- was
18 not pled at all. And I'd be more than happy to
19 answer any questions if y'all may have any. Or
20 Mr. Safran, who is a very, very good attorney
21 can point to me ---

22 COMMISSIONER BECK: Did y'all -- did the defendants
23 admit at the hearing that they had a
24 disinclination to accommodate him?

25 MR. HUFF: No, because it was never raised. The

1 situation is it was not pled. And if it's not
2 pled I have to be very careful what I do or
3 what I don't do as a lawyer. Do I open up a
4 can of worms? It was not pled so we didn't
5 present any evidence, we didn't bring any
6 witness, and we're entitled to do that. That's
7 just Constitutional due process, absolutely.
8 The next thing is they want to choose -- they
9 want to appoint -- and I argues this yesterday
10 before the Commission -- is they want to have
11 Doctor -- the Order says Dr. Mazoue is the
12 authorized treating physician. If a body part
13 that is not accepted is then ordered to be
14 compensable, do we have the -- we have the
15 right, under 42-15-60, to provided that
16 treatment. And on page 7 I actually quoted the
17 code section so I didn't have to look at the
18 book. And it says, employers shall provide
19 medical. That's mandatory. We shall. If it's
20 an amended claim we have do it. If it's denied
21 and then it's ordered to be compensable then we
22 have the right and we shall provide medical
23 treatment. The employer during that period of
24 disability may continue to furnish or cause to
25 be furnished medical treatment. An attending

1 physician and any medical care or treatment
2 that is considered necessary by the attending
3 physician, unless otherwise ordered by the
4 Commission for good cause. There was no good
5 cause here. It was a denied claim. I think
6 the good cause is that it's denied and now it's
7 found compensable. Well, let us provide -- if
8 in an emergency, on account of the employer's
9 failure to provide the medical care as
10 specified in this section, a physician other
11 than provided by the employer can be done in a
12 rare situation. But not -- but not in a denied
13 claim. And again, I cited the McKinney case as
14 the case, which I know y'all are familiar with.
15 Moving to the next thing here.

16 COMMISSIONER McCASKILL: All right, Mr. Huff, you'll
17 have three minutes in reply.

18 MR. HUFF: Thank you.

19 MR. SAFRAN: If Your Honor's please, I don't think
20 there was any question that there was an
21 admitted accident. However, basically what
22 happened is this. Gentleman who had been
23 working for several years out at Johnson Food
24 Service had an injury where he was walking and
25 tripped over something he didn't perceive on

1 the floor. And as a result his leg caught on
2 it, he stumbled forward. He started
3 complaining of pain in his back and his left
4 leg, that was a consistent complaint
5 throughout. He's correct, they sent him to Dr.
6 Stewart Young. Dr. Stewart Young, and I've
7 handed this up to you pages nine and ten from
8 the Order which quote from the medical records,
9 was not only looking at the back, but doing
10 examinations of the knee that said medial left
11 knee pain, pain with standing or weight bearing
12 on the left leg, tenderness over the MCL area.
13 Consistently medial pain, if you look at the
14 bottom, knee pain throughout. If you also look
15 on page 10 that I handed up from the Order
16 where Dr. Young decided that this person needed
17 to have an orthopedic evaluation, it was not
18 only for the back, but it was for the knee
19 also. Unfortunately they sent him to Dr.
20 Peele, who looked solely at the back. There
21 was no indication whatsoever there was any knee
22 examination. Dr. Peele, interestingly enough,
23 the very first visit found a bunch of clinical
24 abnormalities but when he saw on the MRI there
25 was no disc, he tells the guy I think you can

1 go back to work. And my guy said sure, I'll be
2 happy to try; and he did. So, he's working in
3 pain. Basically we ended up getting
4 evaluations from three different doctors for
5 the back pain, which frankly was not disc
6 oriented, it was a facet problem. And so
7 basically you had Dr. Lembo, Dr. John Johnson
8 and Dr. Riber all say this is a post-traumatic
9 facet syndrome. They deposed every one of
10 those doctors. Every one of those doctors did
11 not budge when saying this is the problem, this
12 is related to the accident; it doesn't have
13 anything to do with his disc, it's a facet
14 problem. So basically, Commissioner had three
15 different opinions corroborating a guy who did
16 try to work, having continued symptoms, problem
17 that needed to be specifically treated as
18 result of the accident. They withstood the
19 test- -- or the cross-examination; they all
20 uniformly said that. What happened was, as far
21 as Dr. Mazoue is, we had from their doctor,
22 knee issues that had been documented. They
23 didn't want to send him anywhere so we sent him
24 over to Dr. Mazoue. He not only in his report
25 and in a questionnaire and in an extensive

1 deposition went through the entire litany of,
2 this is consistent with his mechanism of
3 injury, this -- I have got very significant,
4 strong indications on clinical examination of a
5 meniscal tear. I want an MRI to confirm it,
6 but I think very strongly that that's what it
7 is, it is most probably related to this trauma.
8 They were aware of that. They were aware of
9 Dr. Young from the outset. Dr. Mazoue also
10 suggested this is going to end up likely being
11 a surgical case. My guy testified that look,
12 I went and had to get this done, I'm fine with
13 him, I'm ready to have surgery whenever I can
14 get it done. And I think ultimately what
15 happened was she looked at the evidence and
16 said we've got two doctors saying there's a
17 knee problem, we have a specialist saying it is
18 causally related and we have nothing on the
19 other side. So effectively what happened was
20 she had all evidence and no evidence from a
21 condition that was documented from the outset
22 that they just chose to ignore. I think she
23 felt like based upon the fact they had done
24 nothing about it, that he had established a
25 rapport with a very reputable surgeon and was

1 going to likely need surgery, that that was
2 good cause to let that surgeon go ahead and
3 move forward as opposed to starting all over
4 again when they had every opportunity for a
5 mater of months to do something and chose not
6 to. As far as the situation involving the
7 temporary total, it's pretty clear if you look
8 at page 15 of the transcript, which I've handed
9 up, unfortunately when I filed the 50 he was
10 trying to work. Shortly before when we doing
11 the Form 58, he was still trying to work. And
12 basically he came out of work within a matter
13 of a couple three weeks before the hearing. He
14 was -- as he testified, he was told by his
15 employer go get an excuse, you have to give us
16 something to come back to work. So what he
17 ended up doing was he went back to two of the
18 doctors he'd seen for his back and he got
19 restrictions. He presented that. They told
20 him we'll call you. We need to go -- your
21 lawyer and our lawyer have to sort this out,
22 we'll call you. He testified, I have been
23 there, I gave him the slip. Mr. Huff, in the
24 transcript, said I want to sit down and talk to
25 the employer, see if we can put him back to

1 work. Because the guy did work for a period of
2 time, he did, I would like to accommodate him.
3 So effectively what's happened is, they said we
4 know about it, we'll do what we can, and
5 effectively, wait for our call. Still waiting.
6 So basically, we had restrictions, we had a
7 employer that certainly knew that the guy was
8 out because he was bringing them slips back and
9 they just declined to put him back to work.
10 They said, we'll consider it. That's what Mr.
11 Huff said, let me talk to them, see if we can
12 accommodate him.

13 MR. HUFF: May I object? I have to object.

14 Normally I don't do this. What I say is not
15 testimony, it's not evidence.

16 MR. SAFRAN: Excuse me, but it is in the record, it
17 is in the transcript, and it is a statement by
18 counsel that I can certainly refer to. So
19 basically what happens is he's claiming today
20 there's a denial of due process, due process
21 demands notice ---

22 CHAIR: Hold one second. Just for the purposes of
23 the record I'm going to overrule Mr. Huff's
24 objection. Go ahead.

25 MR. SAFRAN: But effectively, again, the whole

1 hallmark of due process is a lack of notice.
2 I'm not going to sit up here and deny that the
3 time we file all this stuff the guy was still
4 trying to work. On the other hand, there's no
5 question by what's in the transcript that there
6 was clearly notice that the gentleman was on
7 restriction. They had actually deposed the
8 doctors who had validated the restriction.
9 There was no question whatsoever that everybody
10 understood there were restrictions because of a
11 condition that was admitted that Commissioner
12 Taylor ultimately found to be compensable. And
13 so where we were was simple, she said okay
14 look, y'all have indicated you knew, he's
15 brought you the slips back, you've had every
16 opportunity to give it back to him, and
17 effectively what she's saying is you've got the
18 keys, all you have to do get out of this is
19 just put him back to work, it's your choice
20 okay? If you don't want to that's fine, but
21 he's out of work because of something I am
22 ruling he is not at maximum medical improvement
23 for, that he needs to have treatment for and
24 that he has restrictions from. You want to put
25 him back to work, fine. There's no doubt

1 everybody was aware of that. And so
2 effectively what happens is, is now, you know,
3 they're saying wait a minute, it should have
4 come up. Well it did come up, and on top of
5 that I think she acknowledged in the Order.
6 Frankly, I was a little dizzy at the time
7 because we came in here -- I had gotten a
8 report from Dr. Lembo that was timely filed,
9 and basically Mr. Huff wanted to go depose her
10 a second time. And rather than got through
11 that process I simply said Commissioner, I will
12 withdraw the report, we don't have to worry
13 about it. We spent an hour in here because Mr.
14 Huff was objecting, saying I couldn't withdraw
15 it unless he agreed to it. He would prefer to
16 take the deposition instead of letting me
17 withdraw the evidence. So frankly we went
18 round and around in the transcript for
19 literally I think somewhere in the neighborhood
20 of an hour about, well wait, I'll just take it
21 out so we can kill the problem No, No, you
22 can't do that. I want to go talk to my client.
23 I want to take her deposition. And if not, I
24 want to make sure thet they tell me I don't
25 have to take the deposition. I'm telling you,

1 when that process was over I was seeing starts.
2 Because frankly, I did not understand why we
3 were going through all that. But the practical
4 matter is afterwards I said my guy's out of
5 work, I think we can get temporary total, it's
6 all known as far as what basically the
7 situation is. If they want to put him to work,
8 he's been going back asking. They don't want
9 to do it. He's not supposed to sit out and
10 basically die on the vine, which is effectively
11 what's been happening. So I think the
12 circumstances are these: there are four issues
13 that are argues in this brief. Number one is
14 the knee. The knee is basically proven without
15 any response whatsoever. The second one is the
16 designation of Dr. Mazoue. I think she had the
17 discretion to find under these circumstances
18 good cause existed. Because again, we didn't
19 create the knee, their doctor recommended a
20 referral to address knee pain. They chose not
21 to do it. We were obliged to go do that
22 ourselves and our doctor's ready to operate.
23 Number three, temporary total. Again, I don't
24 think this is a matter of seeing where we can
25 hide the ball. This is basically what it's all

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1 about. So what are we going to do? We don't
2 do this today, we go back and get the same
3 thing done? Because effectively he's still, in
4 the record, out of work basically, so what's
5 the difference? They knew, they chose not to
6 accommodate. I think under the law we're
7 entitled to temporary total and to make us have
8 to start all over again and go back again to do
9 the same thing is really ridiculous. Number
10 four, they said the Order basically wasn't
11 sufficient. The Order's 38 pages, has more
12 findings of fact than I can count, and I think
13 goes into an exhaustive, exhaustive discussion
14 of the evidence. This is not one of those
15 things where you've got conclusory findings.
16 She analyzed everything. There is no question
17 whatsoever that the basis of the decision on
18 every issue is not only crystal clear, but it
19 is very well defined. And as a result, I don't
20 think there is any basis to reverse anything.
21 Because again, what she's simply trying to do
22 in this case is what anybody would want to do
23 in any of these cases. This guy got hurt and
24 tried to continue work until he couldn't. He
25 then asked to be accommodated. He was declined

1 accommodation. He asked for more treatment of
2 his back, he was denied that treatment. He
3 asked for treatment of his knee, he was denied
4 that treatment. She is essentially just trying
5 to put this thing right and do what basically
6 should have been done from the outset. I'm not
7 here to suggest one way or the other what the
8 motivation was as to why they chose not to do
9 any of this stuff because I think I have an
10 excellent attorney on the other side. I don't
11 question that. I do think though, that for
12 some odd reason they chose to deny a back
13 problem that was determined to be clear by
14 three doctors. They chose to deny a knee
15 problem that their problem identified. They
16 chose to deny the guy any money whatsoever and
17 then basically want to come in here and start
18 all over. And I just think that would be in
19 this circumstance a circus, and I'd ask that it
20 be affirmed on all grounds.

21 CHAIR: Thank you, sir. All right, Mr. Huff.
22 Before I start the clock I'm going to read to
23 you from the transcript beginning at page five,
24 and then I want to ask you a couple of
25 questions and I'll start your time then.

1 MR. HUFF: All right. Let me turn to that, sir.
2 CHAIR: Page five.
3 MR. HUFF: The transcript?
4 CHAIR: That's right.
5 MR. HUFF: You may go forward, sir.
6 CHAIR: All right.
7 MR. HUFF: What line are we starting with?
8 CHAIR: Beginning on line 5: Additionally, Your
9 Honor, as far as Mr. Huff and I -- this is Mr.
10 Safran speaking -- and I had already talked,
11 I'm going to -- still working on trying to look
12 into a little more about this comp rate so in
13 the event of payments, they can pay him at
14 whatever rate they think. If it is a number
15 later that proves to be somewhat higher, we can
16 straighten that out, but that won't stop
17 anything from happening; but other than that
18 we're fine. The Commissioner says all right,
19 thank you. Mr. Huff, you say: Thank you,
20 Commissioner, I'm going to address the issue of
21 the comp rate first. We have no problem
22 working with Andy. If we have the wrong comp
23 rate we will adjust it if that's allowable
24 under the regulations, and it would be improper
25 if we have proper documentation not to do that.

1 I have no problem with that. My first question
2 is, if y'all weren't talking about temporary
3 total, what were you talking about? Because it
4 says payments. And secondly, if you didn't
5 think that temporary total was before the
6 Commissioner, why didn't you object at that
7 point?

8 MR. HUFF: Well, first question is, we're talking
9 about a comp rate and a EWW, we're not talking
10 about temporary total there Commissioner.

11 CHAIR: You're talking about payments.

12 MR. HUFF: Payments, right. Permanency. What if it
13 -- you know, this is the situation, we said the
14 man's at maximum medical improvement. It's
15 time, if there's any Permanency, let's pay it.
16 That says nothing about paying temporary total.
17 That was just discussing how we're going to
18 come up with a comp rate, not whether he's
19 entitled to -- if you can show me where it says
20 temporary total -- it does not say temporary
21 total, it says the comp rate. That's what that
22 whole issue was.

23 CHAIR: All right. Go ahead.

24 MR. HUFF: Thank you.

25 CHAIR: You still have over two minutes.

1 MR. HUFF: All right. Thank you, Commissioner, I do
2 appreciate that. Again, what's important is
3 the due process. We've got to be told what
4 issues we have to litigate. And as y'all all
5 know, Andy and I get along well, we fight hard,
6 but he's very knowledgeable and knows what he's
7 doing and I know what I'm doing. I don't tip
8 my hand. I go to my client and I tell my
9 client they didn't raise the issue of TTD, what
10 do you want me to do? Then don't address it
11 Mr. Huff. So, I don't address it. He didn't
12 ask for it. And we brought no witness to the
13 hearing. We put no witness on the stand to
14 talk about TTD. Did he call in and say he had
15 a child that was sick? Did he have another
16 accident because there's been numerous
17 accidents. It's also interesting here -- and
18 like I said, Andy's a good attorney. He
19 doesn't get one opinion, he doesn't get a
20 second opinion, he gets three and four opinions
21 from the same doctors. And you'll see him in
22 the next case today when we stand up and argue.
23 He talks about the findings of fact and I find
24 this -- I think the Order is defective. I've
25 counted them. If you look at this Order,

1 there's 168 findings of fact, 168. Because if
2 you look at all the different numbered
3 paragraphs there's five, six or seven, or three
4 or four, sub-paragraphs, (A) (B) (C), 2
5 (A) (B) (C), 4 (A) (B). And I think that Order is
6 defective because you've got all these sub-
7 paragraphs but nothing to support it. So
8 that's one thing I'd like to be looked into.
9 And I'm looking -- yep, finding of fact, 168.
10 Let me see something else here real quickly.
11 The Order says, statement of case,
12 stipulations, medical evidence, and then he
13 finds this fact. There's no statement of case
14 setting forth anything to support the findings
15 of fact.

16 CHAIR: All right.

17 MR. HUFF: Thank you.

18 CHAIR: Thank you very much. This concludes this
19 proceeding. Good to see both of you.

20 (There being nothing further, the hearing concluded
21 at 10:53 a.m.)

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CERTIFICATE

This is to certify that the within hearing consisting of twenty five (25) pages, is a true and correct transcript of the testimony given by said witnesses after being duly sworn; said hearing was reported by the method of Stenomask with Backup.

I further certify that I am neither employed by nor related to any of the parties in this matter or their counsel; nor do I have any interest, financial or otherwise, in the outcome of same.

IN WITNESS WHEREOF I have hereunto set my hand and seal on September 30, 2016.



M. Sean Cary
Court Reporter

Notary Public for South Carolina
My Commission Expires: January 29, 2023



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STATE OF SOUTH CAROLINA
BEFORE THE
SOUTH CAROLINA WORKERS' COMPENSATION COMMISSION
WCC No. 1413546

Timothy McDuffie,)
)
 Claimant,)
)
v.)
)
Johnson Food Service)
)
 Employer,)
)
and)
)
Great American Alliance)
)
 Carrier/Defendants.)
-----)

FULL COMMISSION HEARING

Monday, June 18, 2018
1:36 p.m. - 1:53 p.m.

The Full Commission Hearing was heard before Commissioners Melody L. James, Gene McCaskill and Susan S. Barden, at the Workers' Compensation Commission, 1333 Main Street, Suite 500, Columbia, South Carolina, on the 18th day of June, 2018 before Sarah Costilow, 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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CALL TO ORDER:

COURT REPORTER: Today is Monday, June 18th, 2018.

This is South Carolina Workers' Compensation Case Number 1413546. This is the case of Timothy McDuffie, Claimant, versus Johnson Food Service, Employer, and Great American Alliance, Carrier. The Appellant is the Defendant, represented by Benjamin M. Renfrow. The Respondent is represented by Andrew N. Safran. Each side is allowed 10 minutes for oral argument and the Appellant three minutes in reply. You are requested to argue the grounds of exception and stay within the record.

COMMISSIONER BARDEN: Mr. Renfrow?

MR. RENFROW: Thank you, Commissioners.

POSITION STATEMENT BY MR. RENFROW:

MR. RENFROW: I've now been involved in this case for about five weeks, maybe six weeks. And if I had two of those carts right there with all the documents that were sent to my office a few months ago related to this case, we'd fill at least two of them up and maybe three. The other thing I was thinking about as I was driving here today is I've been before a full Commission panel maybe twice in the last two



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1 years, because I'm at a point in my career when
2 I tell my clients we're not going to win or
3 this is not enough of an issue to appeal, we
4 don't appeal it. But the opposite is true in
5 this case. I don't know that I've ever had a
6 case where I felt there was a bigger error of
7 law made than the one before you today.

8 Before I tell you about the case and what we
9 do have, let me tell you what we don't have.
10 This isn't a case where the Defendants have
11 refused to provide any treatment and the
12 Commissioner had to resolve a dispute to
13 determine if more treatment was necessary per
14 the Act. This isn't a case where the claim was
15 denied or was in a denied posture for all or a
16 certain body part and the Defendants have
17 refused to provide a doctor or specialist or
18 treatment at all. In fact, this is not a case
19 where the Defendants have refused to provide
20 specific treatment or anything at all that a
21 doctor has recommended. There is not a single
22 dispute here about treatment or what is to be
23 provided. But what we do have, is we have a
24 Claimant who's gone without seeing a specialist
25 for his back for over a year due to the posture



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1 of this case. We have an Order from a
2 Commissioner that gave specific instructions to
3 the Defendants to name a treating physician and
4 to provide very specific treatment. The
5 Defendants agreed to provide that treatment
6 with Midlands Orthopaedic, named Dr. Lozanne,
7 Karl Lozanne, who was trained at Brown and at
8 Yale, as the authorized treating physician;
9 he's a neurosurgeon. And an e-mail was sent to
10 the Claimant's attorney notifying him of that
11 in earlier this year. The day before that
12 treatment was supposed to be had, Mr. Safran's
13 office filed a motion to quash. And this case
14 came before Commissioner Wilkerson at a motions
15 hearing. There's no record of that hearing.
16 We have an Order that was issued afterwards
17 written by Andy. And at that hearing, the
18 Commissioner found that one, because Dr.
19 Lozanne wasn't -- or was a neurosurgeon, that
20 that was not the type of specific treatment
21 this Claimant needed, and went on to announce
22 that he would designate Dr. Kelby Hutcheson,
23 the authorized treating physician. Dr.
24 Hutcheson's an anesthesiologist and a pain
25 management provider. The worst thing in the



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1 world that can happen in this case that's been
2 going on since 2014, in light of the fact that
3 at least ten different providers have seen this
4 Claimant over the course of this claim, is for
5 this Claimant to get thrown into a practice
6 that does nothing but pain management and
7 assume that's going to make this get any
8 better.

9 Not one reason was given why Dr. Lozanne
10 wasn't sufficient, other than Dr. Lozanne's a
11 neurosurgeon, and at this point, Mr. McDuffie
12 has not been found to be a surgical candidate.
13 It doesn't mean Dr. Lozanne can't direct
14 treatment. Doesn't mean that group at Midlands
15 Orthopaedics can't provide ever- -- any and
16 everything that is needed. In fact, I brought
17 for you today -- I'm sure you've seen it and
18 you may even have it memorized as many times as
19 you've seen these cases -- is the list of
20 services provided and the doctors that exist at
21 Midlands Orthopaedics. As you will see, they
22 have every specialty that Mr. McDuffie could
23 ever need with regards to any type of
24 orthopaedic or spinal surgery issues.

25 One of the fundamental rights that the



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1 Defendants have left in this workers comp
2 system is the right to control medical
3 treatment. Again, we didn't deny treatment.
4 We didn't say, we're not accepting that body
5 part in this particular case. This was a
6 situation where Andy just didn't like the
7 doctor we picked and now he's trying to control
8 it. There's a history of that going on in this
9 case back to 2015. The first hearing in this
10 case was before Commissioner Taylor. Andy
11 decided he wanted Dr. Mazoue -- I think is how
12 you pronounce it -- to be the treating knee
13 physician. We had denied the Claimant needed
14 additional treatment for the knee. We lost.
15 Andy was awarded not only a compensable knee
16 but that additional treatment was needed and he
17 got to pick the doctor in that case. At least
18 in that case, while I completely disagreed with
19 that decision that there was a dispute about
20 whether more treatment was needed, this case
21 has none of that. We're not disputing that we
22 have to provide this treatment. We're not
23 disputing that we will get it set up as soon as
24 possible. Andy just said, you know what, I won
25 the first time so why not try it again and take



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1 complete control of medical treatment in this
2 case. There's no good cause that was shown by
3 Andy as to why Dr. Lozanne and his practice
4 shouldn't be controlling medical treatment in
5 this case other than Andy just doesn't like
6 him, and that's not good enough. Thank you.

7 COMMISSIONER BARDEN: All right, thank you. All
8 right, Mr. Safran?

9 POSITION STATEMENT BY MR. SAFRAN:

10 MR. SAFRAN: With all due respect -- let me just
11 hand this up first. Thank you. Listening to
12 what I just heard, frankly, and again, I'm
13 trying to say this as nicely as I can, it's
14 indicative -- he hadn't had this case five
15 minutes, because everything he just said was,
16 for the most part, factually inaccurate. Now,
17 what happened in this case was we had an
18 initial hearing that was because there was
19 denied treatment for the back. There was a
20 completely denied knee component. We went in
21 front of Commissioner Taylor and she determined
22 that the back was requiring a specific mode of
23 treatment, and it's in the Full Commission
24 Order that two of you sat on here within the
25 last year and a half or so. And what happened



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1 was, is that there were -- a surgeon who didn't
2 find anything wrong, Dr. Peele. And then she
3 was -- this gentleman was sent to three people
4 who do non-surgical treatment, i.e., of the set
5 type of focused treatment, Dr. Riber, Dr.
6 Lembo, Dr. John Johnson. And ultimately what
7 happened was, is that Commissioner Taylor found
8 that, yes, he has more than proven his
9 entitlement to this non-surgical treatment.
10 The surgeon basically said there's nothing here
11 for you. He didn't even diagnose the facet
12 syndrome. So then, I had to go to the trouble
13 -- this was not a matter of not liking anybody.
14 This was a matter of going and getting a
15 diagnosis and a treatment plan from specialists
16 who actually do what this gentleman needed.
17 And so we came over to the panel because,
18 unlike what I just heard, they appealed it.
19 They not only appealed the entitlement to
20 treatment for the back, they appealed the
21 entitlement to anything for the leg. And then
22 once you ruled, they appealed that to the Court
23 of Appeals and then ultimately withdrew it
24 'cause it was bogus, frankly. And so what --
25 where we're here is, if you look at your Order,



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1 it basically affirmed what Commissioner Taylor
2 said, was, I'm going to let you pick a doctor
3 but you're going to provide -- and she put in
4 bold -- treatment, underlined. Not playing
5 around, treatment. And so it also said, this
6 treatment shall include but not be limited to,
7 because I think there's medications and other
8 things out there available, these facet blocks.
9 And so first, they tried to send him back to
10 Dr. Peele as the Order says. Well, what the
11 heck are you going back there for? He's a
12 surgeon in a non-surgical case who couldn't
13 even pick it up in the first place. So then,
14 a period of time lapses; I get this thing to go
15 to Dr. Lozanne, another surgeon. And I think
16 what is being hidden here is, if you look at
17 what I just handed you, when I filed the motion
18 and actually finally kind of ferreted out what
19 their whole motive behind this whole referral
20 was. It wasn't to provide treatment. If you
21 look basically on, I think it's the last page
22 that I gave you, what it says here in the
23 response was we're not just sending him there
24 for an evaluation; it's to determine if any
25 treatment should be provided. Well we've got



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1 an Order of the panel that says you will
2 provide this treatment. You will provide this
3 particular type of treatment by someone who
4 does it. They send him over there not just for
5 the purpose of getting an evaluation by a
6 surgeon in a case where clearly the panel's
7 already laid out exactly what this guy needs,
8 but if you read their response, it says, to
9 determine whether there is any treatment even
10 required. Well, sure it's required. You've
11 got an Order that's now on appealed that says
12 you shall provide it; it's the law of this
13 case. And so, yes, I responded and said, whoa,
14 whoa, whoa, this is the second time that you've
15 effectively tried to dodge this Order by
16 sending this person to a specialist that you
17 know doesn't provide this treatment. And what
18 I'm hearing today is, oh, well, you know, well,
19 Dr. Lozanne can be the one that he starts with
20 and then he can go somewhere else 'cause all
21 these other doctors are there that can provide
22 it. That's not what this Order said. This
23 Order said, you shall provide through an
24 appropriate specialist these medial branch
25 blocks. Well, we all know we do it every day.



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1 Plus we have three of them in there who
2 basically do it every day who said, this is
3 what he needs. Dr. Karl Lozanne doesn't medial
4 branch blocks. Dr. Karl Lozanne is a surgeon.
5 And so, what I'm hearing now is, well, you
6 know, you can send him over there and then he
7 can pass him down to somebody else. This is a
8 game. This has always been a game. This is
9 what it is today. It's a game. I'm sorry, but
10 to hear what I just heard when I was listening
11 is nowhere remotely close to what the facts are
12 of this case. And it's offensive to me that
13 we're even hearing that because, again, we had
14 a very specific determination that said you are
15 entitled to X; this is what X is in terms of
16 your treatment regiment. You shall provide it
17 in this fashion. They got two swings at it and
18 basically the Commissioner decided, okay, not
19 only have you basically failed to do what the
20 Order says, now you're coming to me with the
21 law of the case saying that he shall get it
22 where we have highlighted and bolded treatment
23 and you're saying we're going to send him over
24 here to see if we're required to give him
25 anything. Now, I'm sorry; I mean, that's



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1 sanctionable. And frankly, the fact we're here
2 listening to this is problematic for me. Now,
3 again, he wasn't here from the beginning, and
4 this is a long ongoing case. But the point is,
5 they were given the opportunity to drive the
6 car here and they haven't done it. And so the
7 Commissioner finally said, I'm going to take
8 the reins; we're going to send him here and
9 this is where we're going to go. And so,
10 frankly, I would ask that this thing get
11 affirmed because I think, again, it is
12 effectively getting a new lawyer to come in
13 here and try to give a rationale that makes
14 sense for something that was absurd in the
15 first place. And I think this ought to be
16 affirmed and I think frankly there ought to be
17 sanctions imposed.

18 COMMISSIONER BARDEN: All right. Mr. Renfrow?

19 REPLY BY MR. RENFROW:

20 MR. RENFROW: Once again, we have Andy doing what
21 Andy does. He's trying to bully his way into
22 getting what Andy wants. And the fact of the
23 matter is this, if -- and I told Andy this
24 before and I have great respect for Andy -- but
25 if we had sent this individual -- my clients



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1 had sent this individual to Dr. Lozanne and he
2 had done something that was in contradiction to
3 the Order or gave any impression that my
4 clients had tried to circumvent the Order, we
5 wouldn't be here today. But we haven't.
6 Andy's basing this off an assumption that the
7 treatment that's been ordered wasn't going to
8 be provided; that's not enough. And that's not
9 fair that we can stand here today and he can
10 threaten sanctions and threaten all this stuff
11 when we don't know if the doctors would have
12 done what they said they were going to do or
13 were told to do or not. He's just taking the
14 assumption that his clients weren't going to
15 get what was ord- -- that they were ordered to
16 get.

17 The other thing I would say is that this is
18 all -- Andy talks about games and it bothers me
19 a little bit that he talks about games,
20 especially assuming he's suggesting that Ben
21 Renfrow's playing games. But in the very first
22 hearing we had in this case -- and I'll be glad
23 to show it to you because it's part of the
24 Commission's file and it's in the record in
25 this case -- on page 11 of the hearing.



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1 transcript from the first hearing, Andy
2 recommended Dr. Hutcheson take over treatment
3 in the case, or be one of the providers that
4 Commissioner Taylor ordered that we send him
5 to. Andy's wanted that from the beginning and
6 this is nothing more than his plot to get the
7 treatment that he wanted. He was successful
8 with the knee. Whether my clients played a
9 role in that success I don't know, but I know
10 this, my folks were ready to provide the
11 treatment that was ordered as I understand the
12 Order, and we are here today arguing over his
13 assumption that his clients weren't going to
14 get that treatment. And I would ask that this
15 Order be overturned and that there was not good
16 grounds or good faith for the Commissioner to
17 designate the treatment in this case. Thank
18 you.

19 **COMMISSIONER MCCASKILL:** May I -- just before you
20 finish. What concerns me about this is that
21 your client wants to send the Claimant to a
22 surgeon. When you read the Orders, the
23 underlying Order from Commissioner Taylor and
24 then this Order from Commissioner Wilkerson, it
25 is clear, especially from Commissioner



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1 Wilkerson, because, I mean, it's treatment
2 highlighted, underlined repeatedly, that that
3 is the intent of the Order of the Commission.
4 And Lozanne is an A-plus doctor, nobody's going
5 to argue that point, but that isn't his first
6 specialty.

7 MR. RENFROW: And I don't know what Lozanne's --
8 what he does and doesn't do as a neuro ---

9 COMMISSIONER MCCASKILL: He's a surgeon.

10 MR. RENFROW: He's a neurosurgeon. Okay. He's got
11 tons of training. His expertise ---

12 COMMISSIONER MCCASKILL: Yeah.

13 MR. RENFROW: --- is in here. But I would say,
14 Commissioner ---

15 COMMISSIONER MCCASKILL: He's operated on one of my
16 colleagues for goodness sake.

17 MR. RENFROW: Right. And I know he's got a great
18 reputation. But to say that he can't provide
19 the treatment.

20 COMMISSIONER MCCASKILL: And I'm not suggesting that
21 at all ---

22 MR. RENFROW: Right.

23 COMMISSIONER MCCASKILL: --- but it concerns me that
24 Commissioner Wilkerson especially is very clear
25 about what he is ordering.



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1 MR. RENFROW: Here's ---

2 THE COURT: That's not Dr. Lozanne's first thing.

3 MR. RENFROW: But let's say we send him to an
4 anesthesiologist and a pain management provider
5 and that pain management provider sticks that
6 one needle in and does that facet block. Are
7 we assuming he doesn't need any additional
8 treatment beyond that? The way I read the
9 Order is we're to designate a treating
10 physician and provide very specific treatment.
11 So that can be read that there are two separate
12 things that have to happen, the specific
13 treatment and then somebody to control it all.
14 If we send Mr. McDuffie -- and I don't know why
15 this is such a big deal. If we send Mr.
16 McDuffie to a doctor who does nothing but stick
17 needles in people and provide them with
18 medicines, then as soon as that's fixed or
19 determined it's not going to work, we're going
20 to have to start back over somewhere else.

21 COMMISSIONER BARDEN: Well, you might have to
22 revisit the issue as to whether then you go to
23 a neurosurgeon after the fact, but ---

24 COMMISSIONER JAMES: Well, we have ---

25 THE COURT: The Order is ---



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1 COMMISSIONER BARDEN: I'm sorry.

2 THE COURT: No, I was just going to say the Order is
3 pretty specific.

4 COMMISSIONER JAMES: But there are -- I think both
5 counsel agree. There are a number of practices
6 across the state where one person controls the
7 treatment and then they use different parts of
8 the practice. I know Southeastern Spine down
9 in Charleston is the same way.

10 MR. RENFROW: And Andy's had an IME done from that
11 practice along with three or four, maybe five,
12 others.

13 COMMISSIONER JAMES: But at this point, I guess -- I
14 mean, do we -- we don't know what Dr. Lozanne's
15 going to do or not do.

16 MR. SAFRAN: That -- and that's part of my point.

17 COMMISSIONER BARDEN: Okay. Any other questions?

18 COMMISSIONER MCCASKILL: That's it.

19 COMMISSIONER BARDEN: That concludes this proceeding.
20 Y'all have a good rest of the day.

21 COMMISSIONER MCCASKILL: Thank y'all very much.
22 Good to see both of you.

23 (There being nothing further, the full commission
24 hearing concluded at 1:53 p.m.)
25



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CERTIFICATE

This is to certify that the within hearing consisting of eighteen (18) pages, is a true and correct transcript of the testimony given by said witnesses after being duly sworn; said hearing was reported by the method of Stenomask with Backup.

I further certify that I am neither employed by nor related to any of the parties in this matter or their counsel; nor do I have any interest, financial or otherwise, in the outcome of same.

IN WITNESS WHEREOF I have hereunto set my hand and seal on January 23, 2019.

Sarah Costilow

Sarah Costilow
Court Reporter

Notary Public for South Carolina
My Commission Expires: May 29, 2028



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WCC File #: 1413546
Carrier File #: 564615078
Carrier Code #:
Employer FEIN #:

Claimant's Name: Timothy McDuffie SSN: REDACTED Employer's Name: Johnson Food Services, LLC
Address: REDACTED Address: PO Box 10422
City: REDACTED State: REDACTED Zip: REDACTED City: Fort Jackson State: SC Zip: 29207
Home Phone: () Work Phone: () Insurance Carrier: Great American Alliance Insurance Co.
Preparer's Name: E. Ros Huff, Jr. Law Firm: Huff & Hapeshis, LLC Preparer's Phone #: (803) 252-2232

REQUEST FOR COMMISSION REVIEW

Request for Commission Review by ☐ Claimant ☒ Employer (check one) Date of Injury or Illness: 09/20/14

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 Addendum

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

☐ Mediation

☐ Mediation is requested by consent of the Parties pursuant to Reg. 67-1803.

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

I certify I have served this document pursuant to Reg. 67-211 by delivering a copy to: Andrew N. Safran, Esquire address: PO Box 12089, Columbia, SC 29211 on the 1 day of June 2016 by: ☒ first class postage ☐ certified mail ☐ personal service.

Preparer's Signature: Attorney Title: roshuff@huffandhapeshis.com Email: 06/01/16 Date:
Check this box if you are not represented by an attorney ☐

Questions about the use of this form should be directed to the Judicial Department at 803.737.5675 or appeals@wcc.sc.gov.

If the claimant appeals and is not represented by counsel, the Judicial Department will properly serve this form pursuant to Reg. 67-607 C. Pursuant to Reg. 67-605 and Reg. 701, the appeal must be postmarked no later than 14 days from the date of service of the Decision and Order of the Hearing Commissioner along with the filing fee. Attach a Form 32, if you are unable to pay the filing fee. Refer to Reg. 67-211 and Reg. 67-701 through 711.

Timothy McDuffie v. Johnson Food Services, LLC
WCC File No: 1402961
Form 30 Addendum

The Employer/Carrier appeal the May 16, 2016 Order of the Honorable Aisha Taylor, Commissioner upon the following grounds. Did the hearing Commissioner err in finding as a fact, concluding as a matter of law and ordering the following:

- 1) That the claimant sustained an injury to his right lower extremity?
- 2) That the claimant is entitled to medical treatment to the right lower extremity?
- 3) That the claimant is not at maximum medical improvement and thus entitled to continuing/ongoing medical treatment?
- 4) That the issue of temporary disability was proper before the Commission?
- 5) That the Defendants be financially responsible for ALL medicals provided and to also include further treatment to be provided by Dr. Mazoue?
- 6) That Dr. Mazoue as the authorized medical provider?
- 7) That Conclusion of Law No. 3 is not a conclusion of law as stated, but only a statement of some sort and should be stricken.
- 8) That Conclusion of Law No. 5 is not a conclusion of law as stated, but only a statement of some sort and should be stricken.
- 9) That Conclusion of Law No. 6 is not a conclusion of law as stated, but only a statement of some sort and should be stricken.
- 10) That ruling/ordering that medical treatment shall continue until this Commission determines he has achieved maximum medical improvement in that treatment is required only to lessen the claimant's disability?
- 11) That alleged/stated conclusions of law Nos. 7, 8, 9 are not properly stated/supported conclusions of law.
- 12) That because the issue of entitlement of temporary total disability benefits was not pled, raised or properly brought before the hearing Commissioner, the defendants/employer did not address the issue by presentation of evidence, thus denying them due process.

Timothy McDuffie v. Johnson Food Services, LLC
WCC No. 1413546

CERTIFICATE OF SERVICE

This is to certify that copies of the foregoing Form 30 has been served upon the following named individuals as indicated below by mailing a copy of the same in the United States mail, with sufficient postage affixed thereto and return address clearly marked on

06/01, 2016.

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Attorneys for Employer/Carrier

STATE OF SOUTH CAROLINA)

COUNTY OF RICHLAND)

Timothy A. McDuffie,)

Employee/Claimant,)

vs.)

Johnson Food Services, LLC,)

Employer,)

and)

Great American Alliance Ins. Co.
and Strategic Comp.,)

Carrier/Defendants.)

BEFORE THE
SOUTH CAROLINA
WORKERS' COMPENSATION COMMISSION
WCC FILE NUMBER: 1413546

NOTICE OF MOTION AND
MOTION TO QUASH DEFENDANTS'
NOTICE OF MEDICAL APPOINTMENT
AND DESIGNATE TREATING PHYSICIAN

RECEIVED

JAN 11 2018

SC WORKERS' COMPENSATION

TO: SHELBY G. HAPESHIS, ESQUIRE, ATTORNEY FOR DEFENDANTS:

YOU WILL PLEASE TAKE NOTICE that Claimant, Timothy A. McDuffie, by and through his undersigned counsel, hereby moves the South Carolina Workers' Compensation Commission for an Order: (a) quashing Defendants', Johnson Food Services, LLC's and Great American Alliance Insurance Company's, January 2, 2018 notice of appointment with Dr. Karl A. Lozanne; (b) determining Defendants' attempt to direct him for assessment by this or any other surgeon is violative of this Commission's October 12, 2016 ruling obliging them to provide "treatment" for Mr. McDuffie's causally related lumbar facet syndrome "in accordance with the treatment recommendations outlined by" Drs. John F. Johnson, Ezra B. Riber and Nancy R. Lembo; (c) requiring Defendants to expeditiously provide this "treatment . . . include[ing], but not limited to, performance of lumbar facet/medial branch blocks"; (d) designating an appropriate treating physician; and (e) awarding reasonable attorney fees, as

well as cost reimbursement, incidental to the preparation and filing of this motion, which is obviously necessary to ensure compliance with this Commission's October 12, 2016 Order.

This Motion is also based upon the provisions of S.C. Code Ann. Sections 42-3-175 (2015), 42-3-180 (2015), 42-15-60 (2015) and 42-17-60 (2015), as well as following facts:

1) On September 19, 2014, Mr. McDuffie sustained compensable injuries to his back and left leg when he tripped over an exposed pipe at the Johnson Food Services, LLC facility located at Ft. Jackson military base. Following this injury, he initially received treatment through Dr. Stewart Young of First Care, who prescribed physical therapy in conjunction with medication before recommending orthopaedic evaluation for "[p]ersistent low back, left thigh and left knee" (See, October 12, 2016 Order, Finding of Fact No. 7).

2) Defendants then directed Mr. McDuffie for evaluation by Dr. Michael W. Peelle of Moore Orthopaedics, who: (a) observed several clinical abnormalities that led him to obtain a lumbar MRI scan; (b) indicated this scan did not reveal any disc pathology; (c) offered no additional treatment; and (d) discharged him effective January 5, 2015. (See, October 12, 2016 Order, Finding of Fact No. 8 and 9).

3) As he remained symptomatic, Mr. McDuffie subsequently underwent evaluations by Drs. Johnson, Riber and Lembo, who each: (a) determined the consequences of his compensable injury had produced a facetogenic pain syndrome; (b) recommended treatment in the form of facet injections/medial branch blocks; and (c) confirmed the nature/degree of his causally related symptoms/pathology prohibited him from engaging in unrestricted work activities. (See, October 12, 2016 Order, Finding of Fact Nos. 10-11 and 17-28).

4) After considering Mr. McDuffie's testimony, as well as the opinions expressed by Drs. Johnson, Riber and Lembo, this Commission specifically found:

(a) his testimony, including description of the injury mechanism and the nature/location of all symptoms associated with this accident, are wholly consistent with the medical evidence; (b) this medical evidence certainly confirms the onset of low back and left leg pain shortly after sustaining the admittedly compensable September 19, 2014 trauma; (c) while the apparent absence "of structural abnormalities on his MRI" led Dr. Peelle to discharge him from active care, Drs. Johnson, Riber and Lembo unanimously confirmed a scan of this nature is not diagnostic of facetogenic pain; (d) these medical specialists also convincingly verified/explained the positive correlation between their diagnosis of posttraumatic facet syndrome with not only his relevant clinical findings (including diminished lumbar extension), but also the September 19, 2014 mechanism of injury; (e) these specialists, who each regularly encounter facetogenic pain in their respective practices, likewise reliably established his need for previously unprovided facet-directed treatment; and (f) this treatment, aimed toward a posttraumatic facet syndrome diagnosed by Drs. Johnson, Riber and Lembo, proximately results from the consequences of his September 19, 2014 compensable accident. (See, October 12, 2016 Order, Finding of Fact No. 30)(Emphasis added).

5) This Commission further found:

(a) the evidence, including consistent opinions expressed by Drs. Johnson, Riber and Lembo, convincingly indicates Mr. McDuffie's compensable accident has created a lumbar posttraumatic facet syndrome; (b) this causally related condition has produced not only persistent back pain, but also associated left leg symptoms (See, testimony of Drs. Riber and Johnson); (c) Mr. McDuffie has not reached the point of maximum medical improvement relative to this causally related back injury component; (d) the treatment he requires for this compensable back injury component includes, but is not limited to, the lumbar facet/medial branch blocks identified by these physicians; and (e) Mr. McDuffie's receipt of these additional treatment modalities for his back injury component is reasonable, medically necessary and geared toward lessening the ultimate period of disability produced by the consequences of his September 19, 2014 compensable accident. (See, October 12, 2016 Order, Finding of Fact No. 31)(Emphasis added).

6) Based on this evidence, the Commission concluded:

(a) Mr. McDuffie's receipt of treatment for the posttraumatic lumbar facet syndrome diagnosed by Drs. Johnson, Riber and Lembo is reasonable, medically necessary and geared toward lessening his ultimate period of

disability per Section 42-15-60; (b) *this treatment shall include, but not be limited to, performance of lumbar facet/medial branch blocks, in accordance with the treatment recommendations outlined by these physicians*; (c) Defendants will be afforded the right to provide treatment for Mr. McDuffie's back injury component per Section 42-15-60, but *strictly based upon the undersigned's ruling that Mr. McDuffie's diagnosed posttraumatic facet syndrome is causally related to the consequences of his compensable accident, so as to ensure receipt of this treatment*; and (d) this obligation to provide ongoing medical treatment shall continue until this Commission determines he has achieved maximum medical improvement. (See, October 12, 2016 Order, Conclusion of Law No. 6.) (Italics added).

7) The Commission consequently ordered that Defendants shall "accept financial responsibility for treatment of Mr. McDuffie's lumbar posttraumatic facet syndrome through an appropriate specialist of its choosing, who shall provide treatment for this condition as a causally related result of Mr. McDuffie's compensable accident"

8) Per email correspondence dated January 2, 2018, Defendants case nurse advised that Defendants had scheduled a January 12, 2018 appointment for Mr. McDuffie with Dr. Lozanne. (See, Exhibit A). Unfortunately, Dr. Lozanne, a neurosurgeon, does not personally treat posttraumatic facet syndromes, but rather specializes in surgical care of spinal disorders (See, Exhibit B).

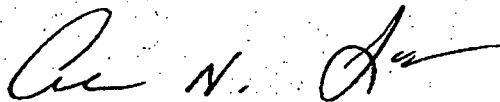
9) In this connection, posttraumatic facet syndromes, which are not addressed through traditional surgical measures, are routinely treated by conservative spine care physicians through the types of interventional procedures identified by this Commission's October 12, 2016 Order (facet injections and medial branch blocks). (See, Exhibits C and D). Significantly, the Commission recognized this fact ("these specialists, who each regularly encounter facetogenic pain in their respective practices") in rendering its rulings as to causal relationship, as well as Mr. McDuffie's specific treatment needs (See, October 12, 2016 Order, Finding of Fact Nos. 30 – 31 and Conclusions of Law No. 6.).

10) While the Commission afforded Defendants the opportunity to designate a physician, it likewise: (a) emphasized Defendants' obligation "to provide treatment"; (b) required that "this treatment shall include, but not be limited to, performance of lumbar facet/medial branch blocks, in accordance with the treatment recommendations outlined by . . . Drs. Johnson, Riber and Lembo"; and (c) similarly instructed the "treatment" of Mr. McDuffie's lumbar posttraumatic facet syndrome . . . [be provided] through an appropriate specialist . . ." (See, October 12, 2016 Order, Conclusion of Law No. 6 and "AWARD").

11) Given the nature of this Commission's prior ruling, it is apparent: (a) there is no justification for directing Mr. McDuffie for a neurosurgical assessment; (b) the current effort to direct Mr. McDuffie to a spine surgeon is not only inconsistent with the treatment course mandated by the October 12, 2016 Order, but also reflective of an attempt to circumvent the obligations imposed by this ruling; (c) despite being afforded ample opportunity to direct Mr. McDuffie to an appropriate specialist, they have declined to do so; and (d) the current circumstances warrant the Commission's designation of a treating physician.

ACCORDINGLY, Mr. McDuffie respectfully requests that: (a) the January 2, 2018 Notice of Appointment be quashed; (b) this Commission designate an appropriate specialist to provide treatment in accordance with the October 12, 2016 Order; and (c) he be awarded appropriate attorney fees and costs incidental to seeking this enforcement of the October 12, 2016 Order..

Respectfully submitted,



Andrew N. Safran, Esquire
Post Office Box 12089
Columbia, South Carolina 29211
Attorney for Employee/Claimant

January 11, 2018

T. McDuffie 564615078

Page 1 of 1

From: Michelle Estep <michelle@wrightrehab.com>
To: Patricia Walker <pwalker@safranlawfirm.com>
Cc: Andrew N. Safran <msa6631@aol.com>
Subject: T. McDuffie 564615078
Date: Tue, Jan 2, 2018 3:00 pm

Mr. McDuffie has an appt with Dr. Lozanne with Midlands Ortho and Neurosurgery on 1/12/18 at 11:30 am.
The appt is at the Gregg Street entrance of the 1910 Blanding Street. Columbia, SC office.

Please notify Mr. McDuffie with the appt info, confirm his planned attendance and remind him to bring his
MRI disc, current medications and a picture ID or the MD will not see him.

I will plan to attend, to receive an update following a private examination, and will update all parties.

Thank you!

Michelle Estep, RN, BSN, CCM
Certified Case Manager
Wright Rehabilitation Services
803 260 6457 p
803 753 0860 f
michelle@wrightrehab.com

Exhibit A

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& NEUROSURGERY
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Meet Our Physicians

Karl A. Lozanne, M.D.



Undergraduate Study: Brown University

Medical School: Yale University School of Medicine

Residency: University of Pittsburgh Medical Center

Areas of Specialty

General Neurosurgery

Endoscopic endonasal approaches

Minimally invasive spine

Spinal deformity, spinal instrumentation

Peripheral nerves

Brain tumors, cerebrovascular

Exhibit B

http://www.midlandortho.com/doc_lozanne.htm

1/10/2018

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SPECIALISTS OF THE SOUTHEASTERN SPINE INSTITUTE

The Southeastern Spine Institute (SSI) employs some of the best spine care professionals in the Southeast, if not in the whole country. Our doctors fall into one of two categories: Spine Surgeons and Conservative Spine Care Physicians.

Spine Surgeons

Our spine surgeons are all board certified or board eligible in Orthopedic Surgery. In addition, each one has had formal, specialized training in the evaluation and surgical management of spine problems. Their training over the years has provided them with the expertise to surgically intervene when your condition requires this form of treatment.

In general, though, fewer than 10 percent of our patients require surgery, and it can often be done in our own in-house surgery center (ASC). Most of the care we provide leans toward a conservative approach, which brings us to our...

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Conservative Spine Care Physicians

Our conservative spine care physicians have training in physical medicine and rehabilitation. In addition, each has special training in the non-operative management of spine problems. Their special training includes performing EMG and Nerve Conduction Studies. They also specialize in safe spine and joint injections done under fluoroscopy.

More Information

Read our doctor's bios and backgrounds below. Better still, come in to meet us!



AFFILIATED PHYSICIANS

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Exhibit C

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OUR DOCTORS:

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Steven C. Poletti, M.D.
Richard Blake Dennis, M.D.
Richard F. Frisch, M.D.
Leonard E. Forrest, M.D.
John F. Johnson, M.D.
G. Robert Richardson III, M.D.
Mark D. Netherton, M.D.
W. Blane Richardson, M.D.

Richard C. Holgate, M.D.
Thomas S. Anderson, M.D.
German Levin, M.D.
Ryan Harrison Nobles, M.D.
Timothy P. Bryan, M.D.

AFFILIATED PHYSICIANS:

George "Trey" Lee, M.D.
Thomas C. Appleby, M.D.

OUR PA'S

G. Ryan April, PA-C
Kirsten Loeffler, PA-C
Justin P. Swain, PA-C
Carolyn Hyatt, PA-C
Caldin Lane Tuggle, PA-C
Anne Buck, PA-C
Sloane Convey, PA-C
Melissa Kynoski, PA-C

Courtney Bock, PA-C
Daniel R. Butler, PA-C
Christina Chandler, PA-C
Meghan Nix, PA-C
Amanda Thurber Harridge, PA-C
Kimsey Cooper, PA-C
Katie Kemmeling, PA-C
Gabby Hayden, PA-C

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JOHN F. JOHNSON, M.D.

Dr. Johnson came to the Southeastern Spine Institute (SSI) to join the growing staff; the SSI staff works together in a spine-only practice, to help you overcome your neck and back pain. Dr. Johnson is proud to be a part of the SSI team.



Education and Background

After graduating with numerous honors from the College of Charleston, Dr. Johnson attended the Medical University of South Carolina (MUSC). Although he spent one year studying in the London University Hospital Systems (under auspices of AUC) in England, he graduated from MUSC in 1990.

Dr. Johnson then traveled to Hong Kong for post-graduate surgical studies with SSI founder Donald R. Johnson, M.D. He completed his internship in the Greenville (SC) hospital system. For his residency in Physical Medicine and Rehabilitation, he returned to MUSC. He completed a subspecialty fellowship at SSI following his residency.

Tip of the Week

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Board Certification and Associations

Dr. Johnson has been board certified by the American Board of Physical Medicine and Rehabilitation since 2000. He is an active member of many professional organizations:

- American Academy of Pain Management
- American Academy of Physical Medicine and Rehabilitation
- American Association of Neuromuscular & Electrodiagnostic Medicine
- American Back Society
- Association of Academic Physiatrists
- Association of American Physiatrists
- Charleston County Medical Society
- International Spinal Injection Society
- North American Spine Society
- South Carolina Medical Association
- South Carolina Spine Society, for which he served as president
- South Carolina Workers' Compensation Education Association
- Southern Medical Association

Dr. Johnson has current hospital affiliations with the Department of Internal Medicine at East Cooper Regional Medical Center in Mt. Pleasant, the Department of Neurology (as Assistant Professor at MUSC, and as Chief of the Department of Physical Medicine and Rehabilitation in the St. Francis-Roper Hospital System.

Reaching Out to Peers and Colleagues

Dr. Johnson has published numerous articles in the peer-reviewed industrial journal Rehab in Review. His work has also appeared in the Archives of Physical Medicine and Rehabilitation, the most highly cited journal in Rehabilitation.

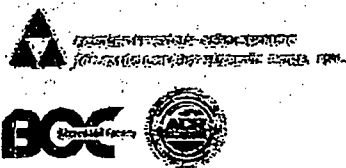
In addition, Dr. Johnson has given a dozen presentations to South Carolina audiences. [Submitting with Note](#)
the "Management of Chronic Back Pain" at the Joyner Sports Medicine National Conference and a presentation at the [Start Chat](#)

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radio discussions about low back pain, and ongoing lectures to the students at MUSC, where he acts as an Assistant Professor and Training Instructor. Dr. Johnson is also conducting a research project on Lubar Epidural Steroid Injections.

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BLOCK SUITE

An *epidural steroid injection* is one non-surgical approach to relieving your back and neck pain. In the past, your back doctor had to perform this injection in a hospital or outpatient hospital suite. The Southeastern Spine Institute (SSI) has its own complete block suite in-house, which means we can help you right in our own office here in Mt. Pleasant.

Our block suite is equipped with a state-of-the-art fluoroscope that enables our board certified doctors to deliver pain medicine directly where it's most needed. These treatments include the Celiac Plexus Block and the Stellate Ganglion Block. You can find the complete list of pain block injections at the bottom of this page.



What Is an Epidural?

Most commonly associated as a pain treatment for mothers giving birth, an epidural is an injection of steroidal medication directly into the epidural space of the spine. The epidural space is between the dura mater membrane and the bony vertebral wall, located just outside the dural sac. The dural sac surrounds the nerve roots and cerebrospinal fluid.

An epidural is a safe, effective, non-surgical pain relief treatment. But there are other reasons our back doctors may recommend an epidural injection for you, such as for inflammation and rehabilitation. The different types of epidural steroids injection are described next.

EPIDURAL STEROID INJECTIONS FOR INFLAMMATION

When you've suffered a herniated disc in your lumbar or lower spine, the inflammation can cause significant nerve root irritation and swelling. It's the inflammation that actually causes the pain you feel.

Steroid-based medications (corticosteroids) have been shown to reduce inflammation by inhibiting the production of substances that cause the inflammation. An epidural steroid injection is very effective because it delivers the medication directly to the site of inflammation.

EPIDURAL STEROID INJECTIONS FOR REHABILITATION

In general, your back doctor gives you an epidural steroid injection to provide pain relief so you can make progress with your rehabilitation. With less back pain, you feel more comfortable and are better able to perform physical therapy (PT).

Active therapies such as stretching, strengthening, pain relief exercises and low-impact aerobic conditioning help you rehabilitate your lower back. PT also helps prevent or reduce the risk of low back pain in the future. Being able to do your rehabilitation pain-free encourages you to do the exercises.

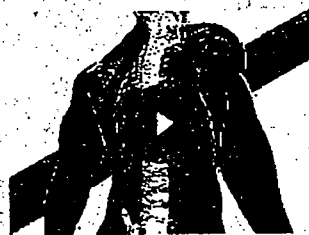
EPIDURAL STEROID INJECTIONS FOR PAIN

There are many reasons and diagnoses for which your back doctor will give you an epidural steroid injection. It's a safe and effective non-surgical treatment option for pain relief, and our doctors always follow a conservative approach first.

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A lumbar herniated disc, degenerative disc disease and lumbar spinal stenosis are common causes of acute or chronic low back pain and/or leg pain. For these and other conditions that cause chronic pain, your SSI physician may recommend an epidural steroid injection instead of





The Epidural Steroid Injection Procedure

An epidural steroid injection usually takes between 15 and 30 minutes. You lie flat on your stomach on an X-ray table. Before the procedure, your doctor numbs your skin where he will make the injection. He uses lidocaine, which is similar to the novocaine that dentists use. Lidocaine, like novocaine, is a local anesthetic, numbing only the area where it's applied.

Your SSI doctor uses a fluoroscope during the procedure. By providing live X-ray images, fluoroscopy helps your doctor guide the needle accurately into the epidural space. Controlled studies found that steroid medication was injected incorrectly up to 34 percent of the time without fluoroscopy.

Once your doctor has placed the needle in the exact position it needs to be, he injects the epidural steroid solution. Following the injection, you will usually be monitored for 15 to 20 minutes before being discharged to go home.

Sedatives are rarely necessary because the injection procedure isn't usually uncomfortable. If you experience any anxiety or discomfort, your doctor can give you a sedative, but then you will have to be monitored for a longer period after the injection, and you may have to arrange for a ride home.

On the day of your epidural steroid injection, you must rest. You can typically resume your normal activities — those that you've done the week prior to the epidural injection — the day following your injection.

Types of Injections

Listed below are the types of pain block and steroid epidural injections offered by the doctors at SSI. If you have specific questions, click on a link or contact us.

- Caudal Steroid Injection
- Celiac Plexus Block
- Cervical Epidural Steroid Injection
- Epidural Steroid Injections
- Facet Joint Injections
- Fascia Iliaca Block
- Lumbar Epidural Steroid Injection
- Lumbar Sympathetic Block
- Lumbar Transforaminal Epidural Steroid Injection
- Medial Branch Block
- Occipital Nerve Injections
- Sacroiliac Joint Steroid Injection
- Selective Nerve Root Blocks
- Stellate Ganglion Block
- Trigeminal Nerve Block
- Trigger Point Injection

More Information

For information about the safety of the treatments at SSI, refer to the Spinal Injections Safety report.

Tip of the Week

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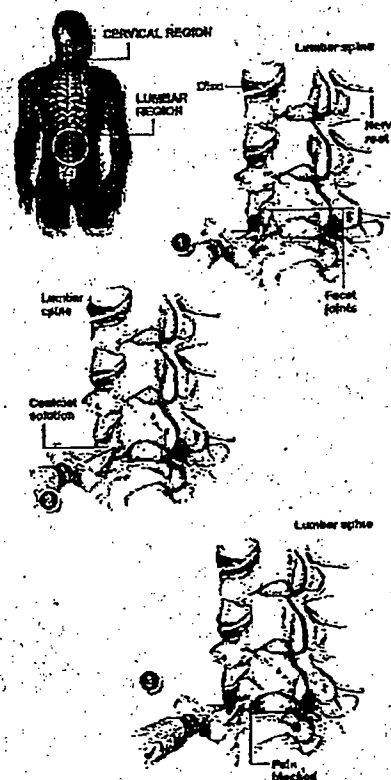
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FACET JOINT INJECTIONS



Facet joints are the small joints along your spine that provide stability while guiding motion. Your facet joints are subject to age, arthritis and injury.

A Facet joint Injection delivers a small amount of local anesthetic and a steroid medication to the facet joints causing you pain in either your neck or your back. The mix of drugs can anesthetize your facet joints and block the pain.

Facet Joint Injections have two purposes: to help your doctor diagnose the cause and location of your pain and to provide immediate pain relief. The elimination of pain can help you tolerate physical therapy while rehabilitating from an injury or back condition.

Overview

Each vertebra in your spine is connected to the vertebra above and below it by facet joints, located on both sides at the rear of the spine. A Facet Joint Injection can confirm whether the facet joints are the source of your pain while helping to relieve the pain and inflammation. The procedure is described below. Talk to your surgeon about the risks and what to expect after the procedure.

1. Numbing the Skin

Using a local anesthetic, your back doctor numbs a small area of skin over the area of the suspected facet joints. See Illustration 1.

2. Confirming the Needle Placement

Guided by fluoroscopic X-ray, your physician inserts a needle into your facet joint. As shown in Illustration 2, the doctor confirms the correct placement of the needle by injecting contrast dye into the joint, which the fluoroscope easily can detect.

3. Injecting the Medication

Your back doctor then injects a combination of a numbing anesthetic and an anti-inflammatory steroid medication to the facet joint through a thin needle. Refer to Illustration 3.

Depending on the location of pain, you may need one or more injections. If the pain subsides after the injection, that facet joint was likely the cause of your pain.





4. Recovering from the Procedure

Your back or neck pain should disappear immediately after a successful Facet Joint Injection; however, once the numbing effect of the anesthetic wears off, the pain may return. It usually takes five to 10 days for the steroid medication to reduce inflammation enough to reduce your pain.

Your pain relief may last anywhere from several days to several months. You may have up to three Facet Joint Injections per year.

More Information

For more information about nerve blocks and epidurals, refer to the Southeastern Spine Institute (SSI) Block Suite.

Find out more about SSI's Pain Management procedures.

For information about the safety of the treatments at SSI, refer to the Spinal Injections Safety report.

Tip of the Week

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MEDIAL BRANCH BLOCK

Each vertebra in your spine is connected by two facet joints: one on each side. Each facet joint connects to two medial nerves that carry signals, including pain signals, away from the spine to the rest of your body.

If your doctor believes that your back or neck pain originates in your facet joints, he can administer a facet joint injection. This nerve block injection can be both diagnostic and therapeutic, since it can confirm whether the facet joints are indeed the source of your pain. If they are, this injection helps relieve the pain and inflammation by temporarily interrupting the nerve signal.

Preparation for a Medial Branch Block

A Medial Branch Block injection usually takes between 15 and 30 minutes. You have to lie flat on your stomach on an X-ray table.

Before the procedure, your doctor numbs your skin where he will make the injection. He uses lidocaine, which is similar to the novocaine that dentists use. Lidocaine is a local anesthetic, numbing only the area where it's applied. Sedatives are rarely necessary, but if you experience any anxiety about the procedure, your doctor can give you a sedative.

Your doctor uses a fluoroscope, which provides live X-ray images, to guide the needle accurately. Once he has the needle where it needs to be, he injects the steroid solution.

Following the injection, you usually will be monitored for 15 to 20 minutes before being discharged to go home. If you had a sedative, you will have to be monitored for a longer period and you may have to arrange for a ride home.

On the day of your epidural steroid injection, you must rest. You typically can resume your normal activities — those that you've done the week prior to the epidural injection — the day following your injection.

More Information

For more information about nerve blocks and epidurals, refer to Southeastern Spine Institute's Block Suite.

For information about the safety of the treatments at SSL, refer to the Spinal Injections Safety report.

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Tip of the Week

Poor posture can damage the spine and its associated muscles and ligaments. A hunched stance places abnormal stress on muscles and ligaments, causes backache and fatigue, and can even cause the spine to become fixed in an abnormal position.

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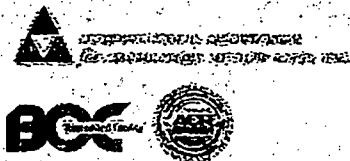
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Palmetto Pain Management LLC

PAIN MANAGEMENT + SPINAL DIAGNOSTICS

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Services Offered

Palmetto Pain Management offers comprehensive evaluation and treatment of challenging pain issues as follows:

Consultation: A comprehensive evaluation is the key to determining the cause of pain and best course of treatment

Medical Management: For patients who are not candidates for intervention or surgery



Interventional Treatment & Procedures: The majority of treatments can be performed safely and comfortably in the office with mild sedation if preferred. These procedures are performed under fluoroscopy or ultrasound guidance for exact delivery of medication to the appropriate area.

- Radiofrequency for potentially prolonging the duration of pain relief.
- Spinal cord stimulation for treating the most challenging chronic pain conditions.
- Discography for determining which discs are causing pain.

<https://www.palmettopainmanagement.com>

Exhibit D

1/10/2018

- Electrodiagnostic Testing to confirm neuropathy.
- Greater Occipital Nerve Blocks.
- Trigeminal Nerve Blocks.
- Sphenopalatine Ganglion Blocks for headaches and facial pain.
- Epidural Steroid Injections (Cervical, Thoracic and Lumbar regions).
- Selective Transformaminal Epidural Injections.
- Peripheral Nerve Blocks (Face, Arms, Legs, Chest Wall).
- Facet Joint Injections.
- Medial Branch Facet Nerve Injections.
- Sympathetic Nerve Block for different body regions.
- Major Joint Injections (Shoulders, Hips, Wrist, Knees and Ankles).
- Small Joint Injections (Hands, Feet)

Referrals within our network of expert colleagues include the following specialties:

- Spine surgeons
- Orthopaedic surgeons
- Neurologists
- Psychologists
- Physical therapists
- Acupuncturists
- Chiropractic physicians

Patient Praises

Pain Free for Months

I suffered a severe back injury and was in pain for months until I was able to see Dr. Riber. I immediately felt better after my procedure and have remained pain free for months. The staff is extremely professional and compassionate. I would highly recommend Dr. Riber to anyone in pain.
-Matt McLain

Palmetto Pain Management
1655 Bernardin Avenue
Suite 240 Columbia, SC 29204
803-779-3263 Phone / 803-779-3207 Fax



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Dr. Ezra Riber on Good Day Columbia talks pain management



Interview with Dr. Ezra Riber.

About Dr. Riber

Dr. Ezra B. Riber is the founder and Medical Director of Palmetto Pain Management, LLC, a comprehensive interventional Pain Management program located in Columbia, South Carolina. He has been evaluating and treating patients with pain in South Carolina for more than 25 years. Previously, Dr. Riber was the founder and Director of the Pain Management Center at McLeod Regional Medical Center in Florence, SC, where he was also the director of the post-operative pain

service. He was the first anesthesiologist to serve as Chair of the Department of Surgery at McLeod before relocating his family to Columbia in 1999.



Dr. Riber completed his internship in Internal Medicine at Marshall University Affiliated Hospitals, and both his residency and fellowship in Anesthesiology and Pain at the University of Cincinnati Medical Center. He is Board Certified in both Anesthesiology and Pain Medicine with the American Board of Anesthesiology. He is currently president of the SC state society for ASIPP (American Society of Interventional Pain Physicians).

A founding member and President Elect of the Pain Society of the Carolinas, Dr. Riber is one of two board members representing South Carolina and also serves as chair of the Advocacy Committee. He is a long-time member of the Spine Intervention Society and has developed a widely used technique to improve trials with spinal cord stimulation (Lilly's Loop). Dr. Riber is an assistant clinical professor in the department of medicine at the University of South Carolina School of Medicine.

Dr. Riber's family has a strong military background. His father was a World War II veteran stationed in the Pacific, and his older brother, also an MD, was a full colonel in the Army reserve. Dr. Riber is honored to have many patients who have served in the military, many of whom are stationed locally at Fort Jackson, Shaw and McInire.

Certifications and Membership:

- Board Certified in Anesthesiology with added qualifications in Pain Medicine
- Fellowship trained with 25 years of post-training experience
- Founding and current board member, Pain Society of the Carolinas
- South Carolina Medical Association
- International Spinal Intervention Society
- South Carolina Society of Anesthesiologists

Dr. Riber at Palmetto Pain Management offers an "elegantly simple" way to handle chronic head pain. "The State."
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Treatment Goals:

- Provide a comprehensive evaluation
- Decrease pain
- Improve sleep
- Address depression and anxiety
- Improve daily activities and quality of life

Patient Praises

Chronic Back Pain has Ended

Dr. Riber and his staff have been wonderful to me and my family. They took time to understand how my chronic back pain was impacting me and then created a multi-part plan to fix it. Dr. Riber and his

staff were patient, kind, and very responsive. 6 years later I am still pain free. I count Dr. Riber as one of the blessings in my life. -Walker McKay

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STATE OF SOUTH CAROLINA)

COUNTY OF CHESTERFIELD)

Timothy A. McDuffie,)

Employee,)

vs.)

Johnson Food Service, LLC,)

Employer,)

and)

Great American Insurance Company,)

Carrier.)

BEFORE THE
SOUTH CAROLINA
WORKERS' COMPENSATION COMMISSION

CERTIFICATE OF SERVICE
WCC FILE NUMBER: 1413546

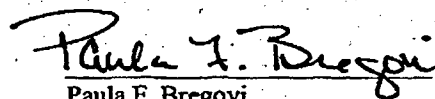
Paula F. Bregovi, paralegal for Andrew N. Safran, certify that on the 11th day of January, 2018, she served the documents identified below in the following fashion:

Documents: Claimant's Notice of Motion and Motion to Quash Defendants' Medical Appointment and Designate Treating Physician

To: **VIA HAND DELIVERY**
The Honorable Amy Bracy
Judicial Director
South Carolina Workers' Compensation Commission
1333 Main Street, Suite 500
Columbia, South Carolina 29201

VIA U.S. MAIL
Shelby G. Hapeshis, Esquire
Hapeshis Law, LLC
Post Office Box 4247
Irmo, South Carolina 29063

This 11th day of January, 2018.


Paula F. Bregovi
Post Office Box 12089
Columbia, South Carolina 29211
(803) 256-6689

STATE OF SOUTH CAROLINA

COUNTY OF RICHALAND

Timothy McDuffie,

Employee,

vs.

Johnson Food Services, LLC,

Employer,

and

Great American Alliance Insurance Co.,

Carrier.

BEFORE THE SOUTH CAROLINA
WORKERS' COMPENSATION
COMMISSION

WCC FILE NO: 1413546

**DEFENDANT'S RESPONSE TO
CLAIMANT'S MOTION TO QUASH
NOTICE OF MEDICAL
APPOINTMENT AND DESIGNATE
TREATING PHYSICIAN**

TO: SOUTH CAROLINA WORKERS COMPENSATION COMMISSION AND ANDREW
N. SAFRAN, ATTORNEY FOR CLAIMANT:

PLEASE TAKE NOTICE THAT pursuant to Regulation 67-215, the Defendants, by and through their undersigned attorney, respond to Claimant's Motion to Quash Notice of Medical Appointment and Designate Treating Physician. The grounds for this response are as follows:

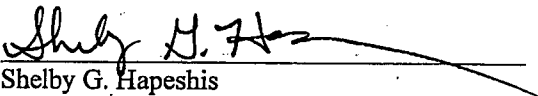
1. This claimant contends that he sustained compensable injuries to his back and left leg when he tripped over an exposed pipe at Johnson Food Service, LLC on September 19, 2014. Defendants denied the claim and a hearing was held by the single commissioner wherein the commissioner found the claim compensable and Defendants appealed. The appellate panel in an order dated October 12, 2016 found in part the following:
 - a. The claimant suffered from lumbar post-traumatic facet syndrome producing back pain and leg symptoms;
 - b. Defendants will be afforded the right to provide treatment for claimant's back injury component per Section 42-15-60.

2. Because the claimant has not been evaluated by a doctor to determine the need or necessity for treatment since 2016, the Defendants scheduled an IME with Dr. Lozanne for evaluation and potentially a prescription for injections and or other treatment if necessary.
3. Claimant's attorney would not allow claimant to attend this appointment and filed a Motion to Quash the appointment and Motion to Designate a treating physician in addition to a request for fees and sanctions.
4. Claimant's attorney, in his motion, contends that he objects to the appointment on the basis that Dr. Lozanne does not personally treat post-traumatic facet syndrome, but rather specializes in surgical care of spinal disorders. Regardless of whether Dr. Lozanne performs the injections, the purpose of the appointment is for an evaluation and current recommendations for treatment if any. Therefore, claimant's argument in that respect is erroneous.
5. Claimant should be compelled to attend the IME in order to assess his current medical condition to determine what medical care is needed if any in this situation.
6. Defendants contend that the motion should be denied as there is a justification for the assessment as to determine the claimant's current medical status years after the order was written.
7. Dr. Lozanne's visit is not inconsistent with the courts order, nor an attempt to circumvent obligations but rather to fulfill the same. It should be noted that claimant's attorney has never filed a Motion requesting Defendants fulfill treatment pursuant to the order.
8. Further, the current circumstances do not warrant the Commission's designation of a treating physician because Defendants scheduled the IME in furtherance of the claimant's own treatment.

9. Defendants contend that no conditions exist to warrant attorney's fees and costs incidental to seeking enforcement of the Order as Defendants are trying to comply with the commission's order.

For the reasons set forth above, the defendants respectfully request that the Claimant's Motion to Quash Notice of Medical Appointment and Designate Treating Physician be denied.

Respectfully Submitted,


Shelby G. Hapeshis
HAPESHIS LAW, LLC
Post Office Box 4247
7588 Woodrow Street, Ste. 4
Irmo, South Carolina 29063

Irmo, South Carolina
January 22, 2018

Attorneys for Defendants

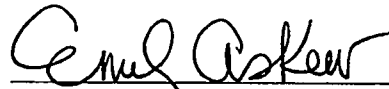
CERTIFICATE OF SERVICE

This is to certify that copies of the foregoing Defendants Response to Claimant's Motion to Quash Notice of Medical Appointment and Designate Treating Physician have been served upon the following named individuals, indicated below, by mailing a copy of the same in the United States mail, with sufficient postage affixed thereto and return address clearly marked on January 22, 2018.

Andrew N. Safran
Post Office Box 12089
Columbia, SC 29211

Amy Bracy, Judicial Director
SC Workers Compensation Commission
PO Box 1715
Columbia, South Carolina 29202

Commissioner Avery B. Wilkerson, Jr.
South Carolina Workers' Compensation Commission
1333 Main Street, Suite 500
Columbia, SC 29201



Emily Askew
Paralegal to Shelby G. Hapeshis
HAPESHIS LAW, LLC
Post Office Box 4247
7588 Woodrow Street, Ste. 4
Irmo, South Carolina 29063

Attorneys for Defendants

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



WCC File #: 1413546
Carrier File #: 564615078
Carrier Code #:
Employer FEIN #:

Claimant's Name: Timothy McDuffie SSN: REDACTED Employer's Name: Johnson Food Services, LLC
Address: REDACTED Address: PO Box 10422
City: REDACTED State: REDACTED Zip: REDACTED City: Fort Jackson State: SC Zip: 29207
Home Phone: Work Phone: Insurance Carrier: Great American Alliance Insurance Co.
Preparer's Name: Shelby G. Hapeshis Law Firm: Hapeshis Law, LLC Preparer's Phone #: 803-233-2102

REQUEST FOR COMMISSION REVIEW

Request for Commission Review by ☐ Claimant ☒ Employer (check one) Date of Injury or Illness: 09/20/14

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 Addendum

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

☐ Mediation

☐ Mediation is requested by consent of the Parties pursuant to Reg. 67-1803.

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

I certify I have served this document pursuant to Reg. 67-211 by delivering a copy to: Andrew N. Safran, Esquire address: PO Box 12089, Columbia, SC 29211 on the 27 day of March 2018 by: ☒ first class postage ☐ certified mail ☐ personal service.

Shelby G. H
Preparer's Signature

Attorney
Title

shelby@hapeshislaw.com
Email

3/27/18
Date

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

Questions about the use of this form should be directed to the Judicial Department at 803.737.5675 or appeals@wcc.sc.gov.

If the claimant appeals and is not represented by counsel, the Judicial Department will properly serve this form pursuant to Reg. 67-607 C. Pursuant to Reg. 67-205 and Reg. 701, the appeal must be postmarked no later than 14 days from the date of service of the Decision and Order of the Hearing Commissioner along with the filing fee. Attach a Form 32, if you are unable to pay the filing fee. Refer to Reg. 67-211 and Reg. 67-701 through 711.

Timothy McDuffie v. Johnson Food Services, LLC

WCC File No: 1402961

Form 30 Addendum

The Employer/Carrier appeal the March 13, 2018 Order of the Honorable Avery Wilkerson, Commissioner upon the following grounds. Did the hearing Commissioner err in finding as a fact, concluding as a matter of law and ordering the following:

Did the Commissioner erred in determining that Dr. Hutcheson should be the treating physician in this matter, the error being that this determination is an error of law and not supported by a preponderance of the evidence?

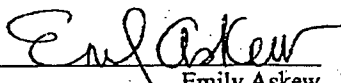
Timothy McDuffie v. Johnson Food Services, LLC
WCC No. 1413546

CERTIFICATE OF SERVICE

This is to certify that copies of the foregoing Form 30 has been served upon the following
named individuals as indicated below by mailing a copy of the same in the United States mail,
with sufficient postage affixed thereto and return address clearly marked on
03/27, 2018.

Andrew N. Safran
Post Office Box 12089
Columbia, SC 29211

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


Emily Askew
Paralegal to Shelby G. Hapeshis
HAPESHIS LAW, LLC
Post Office Box 4247
7588 Woodrow Street, Suite 4
Irmo, South Carolina 29063
803.233.2102

Attorneys for Employer/Carrier

BEFORE THE SOUTH CAROLINA
WORKERS' COMPENSATION COMMISSION

WCC FILE NO. 1413546

Timothy A. McDuffie,)
Employee,)
Claimant/Appellant,)
vs.)
Johnson Food Services, LLC,)
Employer,)
and)
Great American Alliance Ins. Co.)
and Strategic Comp,)
Carrier,)
Defendants/Appellants.)

**BRIEF OF
DEFENDANTS/APPELLANTS**

STATEMENT OF THE CASE

This matter has an extensive litigation history, and as such, Defendants offer only the pertinent portions of the posture of this claim. Claimant sustained a compensable injury to his back, on or about September 19, 2014, while performing his job duties for Defendants, Johnson Food Services, LLC. More specifically, Claimant alleged he sustained injury when he tripped over an exposed pipe at the Employer's facility located at Fort Jackson military base in Richland County, South Carolina. Prior to his injury, the Claimant worked for Employer for approximately 16 months. On June 12, 2015, Claimant filed a Form 50 alleging an additional injury to his left leg and entitlement to further medical treatment for his left leg and back conditions. Defendants filed a Form 51, denying Claimant's need for additional medical care on July 10, 2015.

A hearing was held before Commissioner Aisha Taylor (hereinafter, "Single Commissioner") on October 29, 2015, to determine the issues outlined in the parties' Forms 50

and 51, as well as address other relief sought. The Single Commissioner considered testimony from the Claimant and several medical providers and reviewed the medical evidence submitted by the respective parties.

Following the hearing, the Single Commissioner issued a Decision and Order, dated May 16, 2016, whereby she found, in relevant part: (1) Defendants “accept financial responsibility for treatment of Mr. McDuffie’s lumbar facet syndrome through *an appropriate specialist of its choosing*, who shall provide treatment for this condition as a causally related result of Mr. McDuffie’s compensable accident” [emphasis added]; (2) treatment of the left knee injury component would be provided by Dr. Christopher Mazoue.

Pursuant to the Single Commissioner’s Order, the Employer and its Carrier, Great American Alliance Insurance Company (hereinafter collectively “Defendants”), acknowledged the compensability of Claimant’s back injury and subsequently authorized Claimant’s receipt of certain medical treatment through several providers, including Drs. Michael W. Peelle of Moore Orthopaedics and Stewart Young of First Care. However, on June 1, 2016, Defendants filed a Form 30, Request for Commission Review appealing the May 16, 2016 Order of the Single Commissioner upon several grounds, including, in pertinent part, the Single Commissioner’s error in appointing Dr. Mazoue as the authorized treating physician given the Defendants’ right to direct medical care and treatment pursuant to Section 42-15-60(a) of the South Carolina Code of Laws.

A hearing was held before the Full Commission Appellate Panel on August 16, 2016. By Order, dated October 12, 2016, the Appellate Panel affirmed the Single Commissioner’s factual findings and legal rulings and ordered the Defendants, in relevant part, to:

- (a) accept financial responsibility for all medical modalities previously provided/prescribed by any authorized healthcare specialists, as well as for the charges stemming from Dr. Mazoue’s June 10, 2015 evaluation; (b) authorize the additional causally related medical treatment, medications, evaluations, diagnostic

testing, evaluative procedures, physical therapy, surgical procedures, etc. provided/prescribed by Dr. Mazoue who is hereby designated as Mr. McDuffie's treating physician relative to the left knee injury component for the purposes of this claim; *(c) accept financial responsibility for treatment of Mr. McDuffie's lumbar posttraumatic facet syndrome through an appropriate specialist of its choosing, who shall provide treatment for this condition as a causally related result of Mr. McDuffie's compensable accident; ...*"

[emphasis added].

Pursuant to the Appellate Panel's October 12, 2016 Order, Defendants arranged for Nurse Case Manager, Michelle Estep, to schedule an appointment for Claimant with Dr. Karl Lozanne, neurosurgeon, of Midlands Orthopaedic and Neurosurgery. Claimant's counsel was notified via e-mail correspondence on January 2, 2018 of the Claimant's January 12, 2018 evaluation with Dr. Lozanne. Thereafter, Claimant's counsel refused to allow the Claimant to attend the appointment with Dr. Lozanne, and by Motion dated January 11, 2018, sought to quash Defendants' directive of medical care for Claimant's back injury with Dr. Lozanne. Claimant's counsel further requested designation of Dr. J. Kelby Hutcheson, a pain management physician, as the authorized treating physician.

On January 22, 2018, Defendants responded to Claimant's Motion to Quash and maintained that the appointment with Dr. Lozanne was scheduled for evaluation and current recommendations for treatment in furtherance of the directives of the Appellate Panel and given Claimant's gap in treatment since 2016. Moreover, Defendants asked for this Commission to compel Claimant's attendance to the evaluation with Dr. Lozanne, so that the Claimant's current medical condition could be assessed and a determination could be made for what additional medical care and treatment is needed. Furthermore, Defendants contended that the evaluation with Dr. Lozanne was not inconsistent with the Appellate Panel's Order nor was it an attempt to

circumvent obligations, as Claimant's counsel insinuated, but rather was an effort to fulfill certain responsibilities under the rulings prescribed by the October 12, 2016 Order.

A hearing on the motions was held on February 6, 2018 in Columbia, South Carolina before Commissioner Avery Wilkerson, Jr. (hereinafter "Hearing Commissioner"). Although the hearing was not placed on the record, upon information and belief, the Hearing Commissioner received oral argument from both parties and reviewed the relevant portions of the Commission's claim file. By Order, dated March 13, 2018, the Hearing Commissioner granted Claimant's Motion to Quash and, furthermore, designated Dr. J. Kelby Hutcheson of Carolinas Center for the Advanced Management of Pain as the Claimant's treating physician. On March 27, 2018, Defendants filed a Form 30, Request for Commission Review, and this appeal follows.

STATEMENT OF FACTS

On September 19, 2014, Claimant sustained compensable injuries to his back and left leg when he tripped over an exposed pipe while working at Johnson Food Services, LLC. (March 13, 2018 Order, Finding of Fact No. 1). On September 20, 2014, Defendants directed the Claimant to MedCare Urgent Care Center where he was assessed for back and left leg pain. (October 12, 2016 Order, Finding of Fact No. 3). Defendants then directed Claimant for an evaluation with Dr. Stewart Young of First Care who assessed the Claimant for "pain in the left thigh musculature with weightbearing/walking" and "tenderness over the MCL area." Dr. Young further placed the Claimant on sedentary duty work status. (October 12, 2016 Order, Finding of Fact No. 5; see March 13, 2018 Order, Finding of Fact No. 1.).

Thereafter, Defendants directed Claimant for additional evaluation and treatment by Dr. Michael W. Peelle of Moore Orthopaedics on December 17, 2014. Dr. Peelle assessed the Claimant for his September 19, 2014 tripping injury, including resulting pain in the back, left

buttock, left thigh, and left leg and offered a diagnosis of left lower extremity radiculopathy. (October 12, 2016 Order, Finding of Fact No. 8; see March 13, 2018 Order, Finding of Fact No. 2). During a visit on December 31, 2014, Dr. Peelle released the Claimant to return to full duty work effective January 5, 2015. Id.

After that time, Claimant sought independent, further evaluation from Dr. Ezra B. Riber of Palmetto Pain Management, LLC, Dr. Nancy R. Lembo of Carolina Spine and Sport Rehabilitation Specialists, P.A., and Dr. John F. Johnson of Southeastern Spine Institute. (March 13, 2018 Order, Finding of Fact No. 3). Upon review of the Claimant's testimony and the opinions expressed by these physicians, including deposition testimony, this Commission concluded that "these medical specialists also convincingly verified/explained the positive correlation between their diagnosis of posttraumatic facet syndrome with not only his relevant clinical findings (including diminished lumbar extension), but also he September 19, 2014 mechanism of injury" and established the need for treatment aimed toward a diagnosis proximately resulting from the September 19, 2014 accident at work as the Claimant had not yet reached maximum medical improvement. (March 13, 2018 Order, Finding of Fact No. 4). This Commission further opined that "(d) the treatment he requires for this compensable back injury component includes, *but is not limited to*, the lumbar facet/medial branch blocks identified by these physicians; and (e) Mr. McDuffie's receipt of these additional treatment modalities for his back injury component is reasonable [and] medically necessary" [emphasis added]. (March 13, 2018 Order, Finding of Fact No. 5).

In addition, the Commission ordered that Defendants shall "accept financial responsibility for treatment of Mr. McDuffie's lumbar posttraumatic facet syndrome *through an appropriate specialist of its choosing*, who shall provide treatment for this condition as a causally related result

of Mr. McDuffie's compensable accident" [emphasis added]. (March 13, 2018 Order, Finding of Fact No. 7).

Defendants arranged for Nurse Case Manager, Michelle Estep, to schedule an appointment for Claimant with Dr. Karl Lozanne, neurosurgeon, of Midlands Orthopaedic and Neurosurgery, and on January 2, 2018, Claimant's counsel was notified via e-mail correspondence of the Claimant's January 12, 2018 evaluation with Dr. Lozanne. (March 13, 2018 Order, Finding of Fact No. 9). Thereafter, Claimant's counsel refused to allow the Claimant to attend the appointment with Dr. Lozanne, and by Motion dated January 11, 2018, sought to quash Defendants' directive of medical care for Claimant's back injury with Dr. Lozanne. Claimant's counsel further requested designation of Dr. J. Kelby Hutcheson, a pain management physician, as the authorized treating physician.

ISSUE PRESENTED

- I. Did the Hearing Commissioner err as a matter of law in appointing Dr. Hutcheson as the authorized treating physician?**

ARGUMENTS/DISCUSSION

- I. The Hearing Commissioner erred in appointing Dr. Hutcheson as the authorized treating physician as neither "good cause" nor sufficient evidence was established to warrant a designation of a treating physician.**

The Hearing Commissioner committed an error of law when he appointed Dr. Hutcheson as the authorized treating physician. There was no basis or "good cause" shown for this appointment, and this assignment was committed in error as this case does not represent a situation contemplated under § 42-15-60(A). Section 42-15-60(A) provides:

The employer shall provide medical, surgical, hospital, and other treatment, including medical and surgical supplies as reasonably may be required, for a period not exceeding ten weeks from the date of an injury, to effect a cure or give relief and for an additional time as in the judgment of the commission

will tend to lessen the period of disability as evidenced by expert medical evidence stated to a reasonable degree of medical certainty. In addition to it, the original artificial members as reasonably may be necessary must be provided by the employer. During any period of disability resulting from the injury, the employer, at his own option, may continue to furnish or cause to be furnished, free of charge to the employee, and the employee shall accept, an attending physician and any medical care or treatment that is considered necessary by the attending physician, unless otherwise ordered by the commission for good cause shown. The refusal of an employee to accept any medical, hospital, surgical, or other treatment or evaluation when provided by the employer or ordered by the commission bars the employee from further compensation until the refusal ceases and compensation is not paid for the period of refusal unless in the opinion of the commission the circumstances justified the refusal, in which case the commission may order a chance in medical or hospital service. If in an emergency, on account of the employer's failure to provide the 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.

In the instant case, the Employer did not fail to direct medical treatment in an adequate manner and, as such, the exception articulated in the statutory language of § 42-15-60 is inapplicable. Rather, in good faith, Defendants authorized and scheduled an evaluation of Claimant and arranged for a comprehensive opinion by Dr. Lozanne to determine the Claimant's current medical condition and further necessary medical care and treatment needed in compliance with the directives of the October 12, 2016 Appellate Panel Order. Due to the fact that Claimant's counsel prohibited Claimant from attending the evaluation with Dr. Lozanne and the Hearing Commissioner granted Claimant's Motion to Quash, it is mere speculation to suggest that the potential treatment plan suggested by Dr. Lozanne fails to constitute treatment of the Claimant's lumbar posttraumatic facet syndrome. Furthermore, there is no tangible evidence available to suggest that Dr. Lozanne's evaluation and possible treatment of Claimant would not tend to lessen the Claimant's period of disability. Rather, this notion that Dr. Lozanne, an experienced neurosurgeon, would be unable to personally treat the Claimant's posttraumatic facet syndrome is

not fact, but conjecture on the part of Claimant's counsel. Moreover, Claimant's counsel assumes that a pain management physician, and not a neurosurgeon who specializes in the diagnosis and treatment of the spine, is better suited to treat the Claimant's lumbar injury. There is no evidence available and none represented by the Claimant that establishes that Dr. Hutcheson is in some way more qualified to evaluate the Claimant than Dr. Lozanne.

Furthermore, it is true that the jurisprudence of this State provides that where it deems necessary, the Commission may "override the employer's choice of providers and order a change in the medical or hospital service provided" in the event a controversy arises between the parties and "good cause" for this designation is established by the employee. Clark v. Aiken County of Gov't, 366 S.C. 102, 107, 620 S.E. 2d 99, 104 (Ct. App. 2005); see Gattis v. Murrell's Inlet VFW #10420, 353 S.C. 100, 576 S.E.2d 191, 197-98 (Ct. App. 2003); see Martin v. Rapid Plumbing, 369 S.C. 278, 631 S.E.2d 547, 555 (Ct. App. 2006); see Hall v. United Rentals, 371 S.C. 69, 636 S.E.2d 876, 885 (Ct. App. 2006). However, while South Carolina law obviously provides the Commission with the authority to recognize a Claimant's selected physician as the authorized treating physician, implicit in our Courts' characterization of the Defendants' ability to direct medical treatment as a right, is the requirement that Claimant must make some showing that there is a justification for extinguishing that right. Without such a requirement, Defendants' right to direct medical treatment would be completely eviscerated and essentially meaningless. Defendants believe that the record in this matter is devoid of any such justification. Defendants contend that its treatment of Claimant was adequate and always directed toward providing Claimant relief and aimed at tending to lessen the period of disability resulting from the initial injury. Claimant certainly cannot and did not carry his burden in establishing that treatment by Dr. Hutcheson will somehow lessen the Claimant's period of disability. Given this consideration,

the only justification that remains for Claimant's selection of Dr. Hutcheson is based upon Claimant's mere preference of physician. If Claimant is permitted to undergo evaluation and subsequent treatment with Dr. Hutcheson pursuant to his preference and absent evidence somehow establishing that care under Dr. Hutcheson will yield a better result than with Dr. Lozanne, the case and statutory law relevant in conferring a right in Defendants to direct medical treatment is thwarted in its entirety. Accordingly, Defendants right to direct medical treatment cannot be disturbed on these grounds.

Moreover, the cases represented above and relied upon by Claimant's counsel and the Hearing Commissioner illustrate factual situations where an employer failed to provide treatment. Such a scenario is not representative of the facts in this case. Rather, here, Defendants have provided treatment for Claimant's back injury with a specialist who is simply not preferred by Claimant's attorney. Certainly, this is not the type of controversy contemplated by the statute. Nor is this situation one of emergency thereby requiring intervention of this Commission to order and designate medical care by a particular provider – especially not a provider hand selected by Claimant's attorney. Unlike an emergency, sudden change, or complication to one's condition, which might necessitate care before authorization could have reasonably been sought and obtained, Claimant's treatment for his back injury has been ongoing for years. Here, where the Claimant seeks to select a different treating physician for an ongoing, non-emergent course of treatment, a statutory exception does not apply.

II. The Hearing Commissioner erred in appointing Dr. Hutcheson as the authorized treating physician as Defendants have the right to direct medical care pursuant to South Carolina law.

The Workers' Compensation Act provides that the employer retains the right to name the authorized treating physician once a case has been accepted. Clark at 113. More specifically, S.C.

Code Ann. Reg. 67-509 states, "[t]he employer's representative chooses an authorized health care provider and pays for authorized treatment." Any refusal by the Claimant to accept treatment generally bars further compensation. Clark at 113. McKinney v. Kimberly Clark Corp., 658 S.E.2d 112 (Ct. App. 2008) further provides for the Defendants' right to choose physicians. The South Carolina Supreme Court in Risinger v. Knight Textiles, 353 S.C. 69, 73, 577 S.E.2d 222, 224-25 (2002), held that although Defendants have the right to direct medical care, a Claimant is not required to sacrifice much-needed treatment merely to comply with an employer's choice of physicians. The Risinger court further held that the South Carolina workers' compensation statute does not allow for an employer to "doctor shop" for a favorable opinion. Id. at 224. Here, the Claimant is not sacrificing treatment by attending an evaluation with Dr. Lozanne. First, there is no evidence of such, and second, the opinions and recommendations of Dr. Lozanne are unknown. So while the Defendants are prohibited from engaging in "doctor shopping," the statute furthermore does not afford a unilateral right to the Claimant to select his treating physician. McKinney at 114.

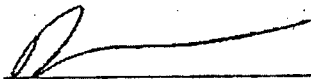
In consideration of the aforementioned, Claimant has not satisfied its burden in proving that the appointment of Dr. Hutcheson as a treating physician is reasonably necessary to effectuate a cure, provide relief, or lessen the period of disability. Defendants further note that a mere preference for a different physician should not be enough to satisfy this burden or constitute "good cause." As such, a sufficient basis for taking away Defendants' right to direct medical treatment has not been established.

CONCLUSION

For the reasons stated above, Defendants respectfully request that the Hearing Commissioner's Decision and Order of March 13, 2018, granting Claimant's Motion to Quash and designating Dr. Hutcheson as the authorized treating physician, be reversed.

Respectfully submitted,

WILLSON JONES CARTER & BAXLEY, P.A.



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Attorneys for Defendants/Appellants

Date: May 11, 2018

BEFORE THE SOUTH CAROLINA
WORKERS' COMPENSATION COMMISSION

WCC FILE NO. 1413546

Timothy McDuffie,
Employee,
Claimant,

vs.

Johnson Food Services,

Employer,

and

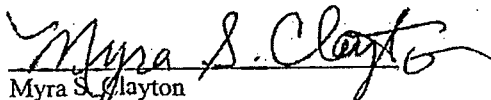
Strategic Comp Claims,

Carrier,
Defendants.

CERTIFICATE OF SERVICE

I, Myra S. Clayton, do hereby certify that I am the Legal Assistant for Benjamin M. Renfrow, Esquire, attorney for the defendants with **WILLSON JONES CARTER & BAXLEY, P.A.** in Greenville, South Carolina, and that on the 11th day of May, 2018, I mailed the foregoing **BRIEF OF DEFENDANTS/APPELLANTS** to the following by placing a copy thereof in the United States mail, first class, proper postage affixed thereto:

Andrew N. Safran, Esquire
P.O. Box 12089
Columbia, SC 29211



Myra S. Clayton
Legal Assistant to Benjamin M. Renfrow, Esquire
WILLSON JONES CARTER & BAXLEY, P.A.
872 S. Pleasantburg Drive
Greenville, SC 29607

STATE OF SOUTH CAROLINA)

COUNTY OF RICHLAND)

Timothy A. McDuffie,)

Employee/Claimant,)

vs.)

Johnson Food Services, LLC,)

Employer,)

and)

Great American Alliance Insurance)
Co. / Strategic Comp.,)

Carrier/Defendants.)

BEFORE THE
SOUTH CAROLINA
WORKERS' COMPENSATION COMMISSION
WCC FILE NUMBER: 1413546

CLAIMANT'S MEMORANDUM
IN OPPOSITION TO DEFENDANTS'
APPLICATION FOR REVIEW

STATEMENT OF THE CASE

This is an appeal from the March 13, 2018 Order of The Honorable Avery B. Wilkerson, Jr., which concluded: (a) Defendants', Great American Alliance Insurance Company's/Strategic Comp's, reported attempts to direct Claimant, Timothy A. McDuffie, to a spinal surgeon were "inconsistent with this Commission's prior identification of his treatment needs"; (b) their current effort to "obtain an evaluation to determine whether treatment is warranted ("if any") certainly constitutes an attempt to relitigate" the Appellate Panel's emphatic ruling requiring them to "provide treatment for Mr. McDuffie's back injury component . . . [including] lumbar facet/medial branch blocks identified by" no less than three non-surgical spine specialists; (c) after considering "the essentially undisputed facts involved in this case, . . . Mr. McDuffie has established 'good cause' per . . . [S.C. Code Ann.] Section 42-15-60 [(2015)] . . . for Commission designation of a treating physician"; and (d) selection of Dr. J. Kelby Hutcheson was appropriate under the present circumstances.

Essentially, Great Alliance American/Strategic Comp contend: (a) their directing Mr. McDuffie to Dr. Karl A. Lozanne, a neurosurgeon, "for an evaluation and current recommendations for treatment if

any" was not inconsistent with this Commission's explicit admonition to "provide treatment"; (b) this second attempt to force surgical evaluation for post-traumatic facet syndrome (which the Panel previously found to be a non-surgical condition), rather than provide the mandated "treatment", did not justify Commissioner Wilkerson's designation of a treating physician per Section 42-15-60; (c) they purportedly possess an unfettered right to direct medical care, regardless of this Commission's prior ruling; and (d) Commissioner Wilkerson's unilateral designation of Dr. Hutcherson was inappropriate.

However, despite these assertions, a review of the record, in light of governing legal authorities, clearly verifies: (a) the October 12, 2016 Order not only required Great American Alliance/Strategic Comp to provide Mr. McDuffie "treatment", but also specifically identified certain **non-surgical** modalities he was entitled to receive; (b) notwithstanding the Commission's unequivocal directive "to provide treatment . . . [including, at minimum,] lumbar facet/medial branch blocks", Great American Alliance/Strategic Comp have defiantly sought two surgical evaluations for the stated purpose of determining "if any . . . medical care is needed"; (c) their conduct is not only incompatible with the law of his case, but also constitutes a thinly veiled attempt to avoid an unquestionable obligation to "treat" Mr. McDuffie's back injury component; (d) Great American Alliance's/Strategic Comp's obvious unwillingness to comply with the October 12, 2016 Order undoubtedly warrants Commission designation of a treating physician; (e) any notion Dr. Hutcherson was "hand selected by Claimant's Attorney" is unfounded; and (f) Commissioner Wilkerson's rulings should be affirmed.

UNDISPUTED FACTS

On September 19, 2014, Mr. McDuffie sustained compensable injuries to his back and left leg when he tripped over an exposed pipe at the Johnson Food Services, LLC facility located at Ft. Jackson military base. Following this injury, he initially received treatment through Dr. Stewart Young of First Care, who prescribed physical therapy in conjunction with medication before recommending orthopaedic

evaluation for "[p]ersistent low back, left thigh and left knee" (See, October 12, 2016 Order, Finding of Fact No. 7).

Great American Alliance/Strategic Comp then directed Mr. McDuffie for evaluation by Dr. Michael W. Peelle of Moore Orthopaedics, who: (a) observed several clinical abnormalities that led him to obtain a lumbar MRI scan; (b) indicated this scan did not reveal any disc pathology; (c) offered no additional treatment; and (d) discharged him effective January 5, 2015. (See, October 12, 2016 Order, Finding of Fact No. 8 and 9).

As he remained symptomatic, Mr. McDuffie subsequently underwent evaluations by Drs. John F. Johnson, Ezra B. Riber and Nancy R. Lembo, who each: (a) determined the consequences of his compensable injury had produced a facetogenic pain syndrome; (b) recommended treatment in the form of facet injections/medial branch blocks; and (c) confirmed the nature/degree of his causally related symptoms/pathology prohibited him from engaging in unrestricted work activities. (See, October 12, 2016 Order, Finding of Fact Nos. 10-11 and 17-28).

After considering Mr. McDuffie's testimony, as well as the opinions expressed by Drs. Johnson, Riber and Lembo, this Commission specifically found:

(a) his testimony, including description of the injury mechanism and the nature/location of all symptoms associated with this accident, are wholly consistent with the medical evidence; (b) this medical evidence certainly confirms the onset of low back and left leg pain shortly after sustaining the admittedly compensable September 19, 2014 trauma; (c) while the apparent absence "of structural abnormalities on his MRI" led Dr. Peelle to discharge him from active care, Drs. Johnson, Riber and Lembo unanimously confirmed a scan of this nature is not diagnostic of facetogenic pain; (d) **these medical specialists also convincingly verified/explained the positive correlation between their diagnosis of posttraumatic facet syndrome with not only his relevant clinical findings (including diminished lumbar extension), but also the September 19, 2014 mechanism of injury;** (e) these specialists, who each regularly encounter facetogenic pain in their respective practices, likewise reliably established his need for previously unprovided facet-directed treatment; and (f) this treatment, aimed toward a posttraumatic facet syndrome diagnosed by Drs. Johnson, Riber and Lembo, proximately results from the consequences of his September 19, 2014 compensable

accident. (See, October 12, 2016 Order, Finding of Fact No. 30)(Emphasis added).

This Commission further found:

(a) the evidence, including consistent opinions expressed by Drs. Johnson, Ribier and Lembo, convincingly indicates Mr. McDuffie's compensable accident has created a lumbar posttraumatic facet syndrome; (b) this causally related condition has produced not only persistent back pain, but also associated left leg symptoms (See, testimony of Drs. Ribier and Johnson); (c) Mr. McDuffie has not reached the point of maximum medical improvement relative to this causally related back injury component; (d) the treatment he requires for this compensable back injury component includes, but is not limited to, the lumbar facet/medial branch blocks identified by these physicians; and (e) Mr. McDuffie's receipt of these additional treatment modalities for his back injury component is reasonable, medically necessary and geared toward lessening the ultimate period of disability produced by the consequences of his September 19, 2014 compensable accident. (See, October 12, 2016 Order, Finding of Fact No. 31) (Emphasis added).

Based on this evidence, the Commission concluded:

(a) Mr. McDuffie's receipt of treatment for the posttraumatic lumbar facet syndrome diagnosed by Drs. Johnson, Ribier and Lembo is reasonable, medically necessary and geared toward lessening his ultimate period of disability per Section 42-15-60; (b) *this treatment shall include, but not be limited to, performance of lumbar facet/medial branch blocks, in accordance with the treatment recommendations outlined by these physicians*; (c) Defendants will be afforded the right to provide treatment for Mr. McDuffie's back injury component per Section 42-15-60, but *strictly based upon the undersigned's ruling that Mr. McDuffie's diagnosed posttraumatic facet syndrome is causally related to the consequences of his compensable accident, so as to ensure receipt of this treatment*; and (d) this obligation to provide ongoing medical treatment shall continue until this Commission determines he has achieved maximum medical improvement. (See, October 12, 2016 Order, Conclusion of Law No. 6.)(Italics added).

This Commission consequently ordered that Defendants shall "accept financial responsibility for treatment of Mr. McDuffie's lumbar posttraumatic facet syndrome through an appropriate specialist of its choosing, who shall provide treatment for this condition as a causally related result of Mr. McDuffie's compensable accident"

As confirmed by counsel, following Mr. McDuffie's counsel's March, 2017 request for treatment of the spinal injury component, Great American Alliance/Strategic Comp attempted to redirect him to Dr. Peelle. In view of this surgeon's previous inability to identify the subsequently diagnosed posttraumatic facet syndrome and indication Mr. McDuffie required no further care, his counsel: (a) informed defense counsel this course of action was inconsistent with the Commission's October 12, 2016 Order; and (b) objected to either reevaluation by Dr. Peelle or his designation as Mr. McDuffie's treater.

Per email correspondence dated January 2, 2018, Great American Alliance's/Strategic Comp's case nurse advised counsel that they had scheduled a January 12, 2018 appointment for Mr. McDuffie with Dr. Lozanne. (See, Exhibit A). As confirmed by inspection of his curriculum vitae information, Dr. Lozanne, a neurosurgeon, does not personally treat posttraumatic facet syndrome, but rather specializes in surgical care of spinal disorders. (See, Exhibit B).

In this connection, the extensive factual findings contained in the October 12, 2016 Order verify: (a) lumbar facet syndrome is initially treated with facet joint injections and/or medial branch blocks; (b) radiofrequency rhizotomy, depending upon the response to these injections/blocks, is also a consideration; (c) this treatment is routinely provided by conservative spine care physicians; and (d) the treatment Great American Alliance/Strategic Comp are obliged to provide does not involve surgical intervention. (See, October 12 2016 Order, Finding of Fact Nos. 11, 17, 19, 23, 25-27 and 30-31; Conclusion of Law No. 6).

While the Commission afforded Great American Alliance/Strategic Comp the opportunity to designate a physician, it likewise: (a) emphasized this obligation "to provide treatment"; (b) required that "this treatment shall include, but not be limited to, performance of lumbar facet/medial branch blocks, in accordance with the treatment recommendations outlined by . . . Drs. Johnson, Riber and Lembo"; and (c) similarly instructed the "treatment" of Mr. McDuffie's lumbar posttraumatic facet syndrome . . . [be provided] through an appropriate specialist" (See, October 12, 2016 Order, Conclusion of Law No. 6 and "AWARD").

To date, Great American Alliance/Strategic Comp have attempted to refer Mr. McDuffie to two surgeons for assessment of a condition (posttraumatic facet syndrome) this Commission has previously found does **not** require surgery, but instead warrants procedures (injections and possible radiofrequency rhizotomy) performed by nonsurgical spine physicians. Additionally, Great American Alliance/Strategic Comp have indicated a primary purpose for these evaluations is to determine **if treatment is necessary**, despite this Commission's ruling Mr. McDuffie **shall receive** this facet **"treatment"**.

COMMISSIONER WILKERSON'S RULING

Recognizing the current neurosurgical referral constituted nothing less than another attempt to avoid an unconditional responsibility to provide specified treatment, Commissioner Wilkerson appropriately: (a) determined the current circumstances constituted "good cause" for Commission designation of a treating physician; (b) chose Dr. Hutcheson, who all would acknowledge routinely provides the precise forms of treatment referenced in the October 12, 2016 Order; and (c) designated this medical specialist as Mr. McDuffie's treating physician in accordance with the authority vested by Section 42-15-60.

LEGAL ANALYSIS

Although Great American Alliance/Strategic Comp initially appealed several aspects of the October 12, 2016 Order, they did not contest the determinations relative to Mr. McDuffie's back injury component, particularly: (a) "his need for non-surgical treatment . . . [that] includes, but is not limited to, the lumbar facet/medial branch blocks identified by" Drs. Johnson, Lembo and Riber; (b) "these specialists, who each regularly encounter facetogenic pain in their respective practices, likewise reliably *established his need* for previously unprovided facet-directed treatment"; (c) they were simply "afforded the right to *provide treatment* for Mr. McDuffie's back injury component per Section 42-15-60, *but strictly based upon the . . . [Commission's] ruling that Mr. McDuffie's diagnosed posttraumatic facet syndrome is causally related to the consequences of his compensable accident so as to ensure receipt of*

treatment"; and (d) this treatment of Mr. McDuffie's lumbar posttraumatic facet syndrome . . . [would be provided] through an appropriate specialist". (Italics added). These findings/conclusions/rulings consequently constitute the law of this case. See, Hudson v. Lancaster Convalescent Center, 407 S.C. 112, 754 S.E. 2d 486, 490 (2012).

Given the law of this case, Defendants' attempts to: (a) direct Mr. McDuffie to a surgeon are inconsistent with this Commission's prior identification of his treatment needs; and (b) obtain an evaluation to determine **whether** treatment is warranted ("if any") certainly constitutes an attempt to relitigate a previously resolved issue.

Section 42-15-60 (A) grants the employer/carrier an opportunity to direct medical care "unless otherwise ordered by the commission for good cause shown." In this regard, it is axiomatic that the Commission is empowered to "override the employer's choice of providers and order a change in the medical or hospital service provided" in the event a controversy arises between the parties and "good cause" for this designation is established by the employer. See, Carter v. Aiken County Government, 366 S.C. 102, 620 S.E. 2d 99, 104 (Ct. App. 2005); Hall v. United Rentals, 371 S.C. 69, 636 S.E. 2d 876, 885 (Ct. App. 2006).

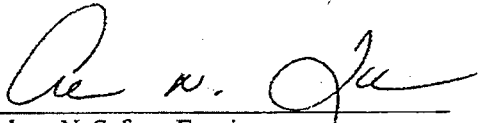
Our Appellate Courts have likewise recognized this Commission is vested with the authority to designate a treating physician in accordance with its assessment of an individual's particular medical needs. Gattis v. Murrell's Inlet, VFW, 353 S.C. 100, 576 S.E. 2d 191, 198 (Ct. App. 2003). ("Where it deems it necessary, the . . . [C]ommission may override an employer's choice of medical provider. . . ."; See also, Martin v. Rapid Plumbing, 369 S.C. 278, 631 S.E. 2d 547, 555 (Ct. App. 2006).

In this instance, Great American Alliance/Strategic Comp: (a) unquestionably understood the nature of medical care they were obliged to provide Mr. McDuffie; (b) could have easily directed him to a non-surgical spine specialist for receipt of the facet injections, as well as the incidental medical modalities envisioned by the October 12, 2016 Order; (c) purposely sought to avoid the legal implications of this

Commission's rulings by their attempted surgical referrals, including an effort to return him to a physician who had already demonstrated an inability to recognize or treat the posttraumatic facet syndrome; and (d) have admitted a legally inappropriate motive for the current referral, i.e. questioning **the need for "treatment"** they have been instructed to provide. In view of these facts, there is no legitimate rationale for challenging Commissioner Wilkerson's rulings.

Accordingly, Mr. McDuffie respectfully requests that Panel to affirm Commissioner Wilkerson's March 13, 2018 Order in its entirety.

Respectfully submitted,



Andrew N. Safran, Esquire
Post Office Box 12089
Columbia, South Carolina 29211
Attorney for Employee/Claimant

_____, 2018

STATE OF SOUTH CAROLINA)
)
COUNTY OF RICHLAND)
)
Timothy A. McDuffie,)
)
Employee,)
)
vs.)
)
Johnson Food Service, LLC,)
)
Employer,)
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and)
)
Great American Insurance Company,)
)
Carrier.)
)

BEFORE THE
SOUTH CAROLINA
WORKERS' COMPENSATION COMMISSION

CERTIFICATE OF SERVICE
WCC FILE NUMBER: 1413546

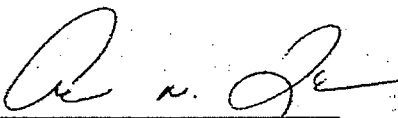
Andrew N. Safran certifies that on the 30th day of May, 2018, he served the document identified below in the following fashion:

Documents: Claimant's Memorandum in Opposition to Defendants' Application for Review

To: VIA E-Case
The Honorable Amy Bracy
Judicial Director
South Carolina Workers' Compensation Commission
1333 Main Street, Suite 500
Columbia, South Carolina 29201

VIA U.S. MAIL AND E-MAIL
Benjamin M. Renfrow, Esquire
Willson, Jones, Carter & Baxley, P.A.
872 S. Pleasantburg Drive
Greenville, South Carolina 29607
[bmrenfrow@wjlaw.net]

This 30th day of May, 2018.


Andrew N. Safran
Post Office Box 12089
Columbia, South Carolina 29211
(803) 256-6689

T. McDuffie 564615078

Page 1 of 1

From: Michelle Estep <michelle@wrightrehab.com>
To: Patricia Walker <pwalker@safranlawfirm.com>
Cc: Andrew N. Safran <msa6631@aol.com>
Subject: T. McDuffie 564615078
Date: Tue, Jan 2, 2018 3:00 pm

Mr. McDuffie has an appt with Dr. Lozanne with Midlands Ortho and Neurosurgery on 1/12/18 at 11:30 am.
The appt is at the Gregg Street entrance of the 1910 Blanding Street, Columbia, SC office.

Please notify Mr. McDuffie with the appt info, confirm his planned attendance and remind him to bring his MRI disc, current medications and a picture ID or the MD will not see him.

I will plan to attend, to receive an update following a private examination, and will update all parties.

Thank you!

Michelle Estep, RN, BSN, CCM
Certified Case Manager
Wright Rehabilitation Services
803 260 6457 p
803 753 0860 f
michelle@wrightrehab.com

Exhibit A

1/10/2018

Certificate of Counsel

The undersigned hereby certifies that the Record on Appeal contains all material proposed to be included by any of the parties and not any other material.

September 10, 2019



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