

# Appeal Before the Workers Comp Board Part 1

APPEAL BEFORE THE WORKERS COMP BOARD part 1

BEFORE THE WORKERS' COMPENSATION BOARD

OF THE STATE OF OREGON

In the Matter of the Compensation )

Case No.: 05-08315

Of

) Claim No. C6404749910

Edward M. Johnston II, Claimant )

Brief for Claimant

This brief is submitted by Edward M. Johnston for himself as the claimant.

I am appealing to you based on the Order on Reconsideration issued by ALJ Jenny Ogawa in my case above, dated July 7, 2006.

## I. The Scope of the Injuries and the Hearing

1. The case referred to above is the case formally here on appeal before the WCB. It regards the extent of and compensation for my C4-5 injury from 2001 at Hallmark Inns & Resorts. This was the second injury to my neck; there was an earlier one, deemed not a part of the process that led to this appeal. However, I have only one neck. The basic background is this:

On Nov. 4, 1989, while working as a bouncer at the PipTide Restaurant in Newport, insured by Liberty NW, I was beaten over the back of the neck with a pipe. This FIRST INJURY, though initially and absurdly described by Liberty as "neck strain" was eventually the source of an accepted condition for C5-6. This led to my FIRST SURGERY, an anterior cervical discectomy and fusion at C5-6, done at McKenzie-Willamette Hospital by Physician Robert Hacker 03/03/98 - nearly nine years after the damage was done.

I suffered a SECOND INJURY on July 28, 2001, when I slipped and fell in a puddle of water, working as a cook, at Georgie's Grill, a.k.a. (and organizationally a part of) Hallmark Inn, also insured by Liberty. This injury affected chiefly my neck C4-5. This led to my SECOND SURGERY, another anterior cervical discectomy and fusion with canal decompression with instrumented interbody fusion with allograft at C4-5 on 3/4/2002.

At least, this time, Liberty did not succeed in delaying the operation by nine years. The underlying case now at issue, which is the basis of this appeal, addressed the C4-5 injury and conditions.

However, it is bizarre to not also address handling of and compensation for the First, C5-6, Injury. That initial injury damaged both vertebrae and more; the later injury worsened both and more. The two vertebrae are next to each other. They are medically, physically and experientially linked. The 2001 event that caused

the Second Injury (which is formally on appeal here) might not have caused as bad an injury if the First Injury (in 1989) had not occurred. The First injury might not now be as bad as it is if the second injury had not happened. The two vertebrae are right next to each other in my neck; other vertebrae adjacent to them also show clear and substantial medical evidence of harm and have for a long time. My compensation for the first injury was minimal, and that condition has grown worse since then, in part due to the second injury. Therefore, I ask that case:

WCB Case No. 03-04430,

Claim No. C604255450,

DOI: 11/04/1989,

WCD File No. G537856,

which addressed my C5-6 injury, also be reviewed here along with the case formally on appeal. And I ask that I received full and fair compensation for the medical harms, medical expenses, and financial losses (calculated as a bouncer, when I was making twice or more than that as much as I was making as a cook) caused by the injuries - or, to be really fair and accurate, the income lost from not being able to return to the private security business, which would have earned me millions each year. Plus, if you please, punitive damages against Liberty for the misbehavior and reasons outlined below.

Additionally, as any review of the medical record (and especially the more recent medical reviews) would show, I in fact have other medical issues in other vertebrae in my neck and back, and they are getting worse, too. These, too, cause me hurt and grief and expenses and, in a fair system of compensation, would be included in the review and compensated for.

2. Further, the medical record from that First Injury clearly includes discussion of a closed head injury from that first incident. I ask the board to include that, in this, appeal, too, along with the rest of the 1989 incident injuries I sustained.

3. In the Transcript of the hearing on which this appeal is based, page 6, ALJ Ogawa states "Any issues regarding the C5-6 condition is what is called under the Board's own motion. I do not have the authority to decide any issues regarding the C5-6. Your C4-5 disc condition was accepted by Liberty under the 2001 injury claim with Hallmark Inns & Resorts. I have the legal authority to decide issues regarding the C4-5 disc condition under the 2001 injury." Clearly, unless Ogawa was wrong, the WC Board has the authority to review both of my cases and all of my medical conditions, under the Board's "own motion" authority. While C4-5 was "accepted," the benefits that have come to me from this have been minimal. I request that the Board review and address it now, in the interests of justice, fairness, and expediting the WC Department process (that is, the hope that all the outstanding issues between me and Liberty can be addressed at one time, instead of

further strung out over yet more years, at more cost to taxpayers and harm to me) - and in the hope this can be completed before I die. My reasonable remaining lifespan is not long, by any reasonable standard. I need only to slip and fall again and I can slice my spinal cord, either killing me or paralyzing me. To the extent I prevail, I request that the board act to ensure that whatever decisions against Liberty are reached by the Board be implemented - that the Board instruct Liberty to provide me with a certified check in the amount of the settlement, such that I can cash it and deposit it in my own bank account, and thereby avoid games such as having Liberty put a stop payment on a check, or otherwise force me into a whole second process of collecting on the Board's rulings. Please make failure to immediately implement a decision in my favor a basis for further, much larger and more severe punishment, in whatever, and all ways, that you can. I simply cannot forever play Liberty's game; Liberty as a corporation can go on forever, and play games forever; but I will die, and not too long from now.

4. There is basis in the case history for combining review of both injuries/claims. On July 22, my then attorney Welch wrote Liberty attorney Sally Anne Curey seeking consolidation of hearings on the two different Injuries. (EXHIBIT 1) On July 24, 2003, Liberty NW Insurance lawyer Sally Anne Curey wrote to my then attorney Brian Welch, "First of all, Liberty has no objection, of course, to your moving to combine the two hearings." (EXHIBIT 2) On 8/12/2003 the Board consolidated the hearings on the different claims. (EXHIBIT 3) If we can do so once, we can do so again.

## II. Errors by ALJ in Appealed Case (i.e., Re: C4-5, the Second Injury)

While this section must address the flaws in Ogawa's logic and fact finding, I must here note that I am not merely seeking a reversal of Ogawa's Order Denying Reconsideration dated April 7, 2006. That would merely get me back in the soup of another dubious ALJ review and another stacked Liberty review. I do not a remand back to an ALJ. I am asking the WC Board to not only overrule Ogawa, but to rule on the underlying issues which I sought (unsuccessfully) to get Ogawa to reconsider, too, not just the dismissal of my case, which I want un-dismissed, but a review of the "post-aggravation rights" (the under-girding issue in the case) as dismissed in the Own Motion Order on Reconsideration (Dismissing) dated Jan. 10, 2006, by WC Board members Lowell and Kasubhai. Further, I am asking the Board to reverse the Order of Dismissal dated Jan. 10, 2006 signed by Board members Lowell and Biehl. I am requesting also that I be granted (a) total disability, returning back to the First Injury, (b) full and total compensation of all medical expenses incurred, (c) full and fair compensation for lost income (as noted above calculated on the basis of the income a bouncer, not a cook makes - or on the income I might have made had I gone back into the private security business, which would have earned me millions of dollars. And I am requesting (d) punitive damages against Liberty, for the reasons stated and detailed below. My apologies for the repetition, but I must make it clear that the issues in Ogawa's flawed

decision, though I next go into them, are nowhere near the sum and substance of this matter. Finally, I seek a mechanism to assure that, if and when justice is done and I prevail, Liberty will have to act in proper response to my victory and actually do as the Board decides.

Returning to my response to ALJ Ogawa's errors:

1. ALJ Ogawa mistakenly asserts no physician stated I was "not medically stationary or was worse."

Ogawa asserts, though she does so in a footnote (number 1) that "Neither Dr. Theuson, who last saw claimant in July 2005, nor Dr. Throop, who saw claimant in November 2005, indicated that claimant's C4-5 disc condition was not medically stationary or was worse. Rather, Dr. Theuson noted in May 2005 that claimant would probably have gradual deterioration due to aging. Dr. Theuson also reported that, although claimant stated he had worsened, Dr. Theuson found little change, objectively, since the March 2002 surgery."

This statement by the ALJ is not correct.

On Nov. 5, 2003, Dr. Hacker, the surgeon on both my operations, wrote to Ada Wainmayer at WCD that "I expect that Mr. Johnston will likely have a lifelong problem with cervical myelopathy." (EXHIBIT 4) This is something of an understatement, but certainly true. I have, as he expected, since gotten worse.

The Samaritan Pacific Communities Hospital Diagnostic Imaging Report (DIR) for exam date 03/30/2005 relating to an MRI of the cervical spine by Dr. Bear, performed for Dr. Theuson. (EXHIBIT 5) It reported that at C4-5 "There is a mild to moderate broad-based posterior disk bulge/osteophyte, with minor AP narrowing of the spinal canal. There is mild to moderate narrowing of the right neural foramen, and moderate narrowing on the left." The active changes - "narrowing" (twice noted) - are compared, evidently, to the "Plain films dated August 16, 2002" that also "were reviewed" by Dr. Bear. This comparison clearly indicates changed and worsened conditions since that time (i.e., August 2002, after the March 2002 surgery). This DIR also states that "The AP diameter of the spinal canal is narrowed from C3-4 through C6-7." That, obviously, must include C4-5. (Note also that this MRI found further worsening conditions at C3-4, C5-6 AND C6-7, also.)

In an undated letter Dr. Theuson stated "I saw Mr. Johnston for his closing exam on March 18 (and 31st), 2005." (This letter is associated with a range of motion report dated 3/18/05) (EXHIBIT 6) At that time he again reiterated that he has felt a gradual deterioration since his surgery on 3/5/2002. He was evaluated in May 2003 for persisting parasthesias in both upper and lower limbs but nothing definitive was found." But, he goes on to state, in direct conflict with the ALJ's assertion, "1. Yes, I would consider his acute lumbar/cervical strain with C4-5 cervical disc herniation to be medically stationary." The legal

effect of this error (regarding the stability of my medical condition) by ALJ Ogawa is not clear to me, but as the error is part of the logic by which she dismissed my claim for additional compensation, I feel obliged to point it out.

Further, in this vein, on May 5, 2005, in a letter to Liberty Northwest, (EXHIBIT 7) Dr. Theuson starts right off by reiterating "Yes I would consider his acute lumbar/cervical strain with C4-5 cervical disc herniation to be medically stationary as does your IME." He also wrote there that "The patient has complained of intermittent sensory changes of both his arms and legs, generally worsened by activity and improved by rest. These seemed to be a result of the last surgery and thus would be tied to the same cause. (The need for surgery being due to the injury.)" This, too, indicates worsening conditions related to my 2001 C4-5 injury (the one formally at issue in the Ogawa hearing), contrary to the ALJ's conclusion that no doctor had, before that hearing date, found my condition getting worse.

The Independent Medical Examiner, Paul Williams, of STAR Medical, on 4/22/05 (EXHIBIT 8) noted "a global decrease in sensation in C4, C5, C6, C7, C8 and T1" (page 3). It is not clear if that decrease is in comparison to prior physician tests or some general standard, but this doctor does state (page 4) that he has reviewed a long list of my MRI and X-ray films. The observation is repeated again by Dr. Williams on page 6. So, this strongly appears to be evidence Ogawa was wrong in saying no doctor found I was getting worse - and it is certainly evidence I was much worse than having, as Liberty for years insisted I had, "cervical strain."

Even Dr. Throop - the "Independent" Medical Examiner, upon whom ALJ Ogawa so heavily depends - stated in his Nov. 15, 2005 letter (EXHIBIT 9) to Tamara L. Schnack at WCD (page 1) "The last MRI scan was done on 03/30/05, which showed a number of disk bulges at the cervical level and osteophytes at all levels, with multiple areas of foraminal encroachment, especially at C6-7 on the left and at C-4 on the left. There was multiple spinal stenosis at multiple levels." (We note that "C-4" has to have been intended as C4-5.) I note that the foraminal encroachment was new at that point, and had not been in the record at the time of the March 2002 surgery. So much for my not worsening as of the time of Ogawa's review.

2. There has been deterioration at C4-5 since the first operation.

On Oct. 29, 2002, Dr. Paul Meunier wrote to attorney Conway McAllister (EXHIBIT 10) about my case. "I have for comparison two MRI examinations dated 12/12/1997 and 10/23/2001. Additionally, I have a number of x-ray examinations dated 04/09/1998, 07/22/1998, 02/03/1999 and 11/26/2001. ... There is some disc space narrowing at C4-5 and early posterior osteophytic ridging at this same level. There is a small linear calcification anterior to the C4-5 disc level which appears to be ligamentous in origin. Accounting for differences in position and technique, the examinations likewise reveal stable findings at the C4-5 disc level. The

findings on MRI correspond with the findings on plain film examination. There is vertebral body endplate spondylosis or hypertrophic degenerative change. The intervertebral disc has a corresponding protrusion which is central to left paracentral. There is some compromise of the central canal and apparent displacement of the traversing cervical cord at this level. ...”

The Samaritan Pacific Communities Hospital Diagnostic Imaging Report (EXHIBIT 11) for exam date 03/30/2005 related to a MRI of the cervical spine by Dr. Bear, performed for Dr. Theuson. He reported that at C4-5 “There is a mild to moderate broad-based posterior disk bulge/osteophyte” - contrast with the “small” and “early” in the previously cited document) “and, with minor AP narrowing of the spinal canal. There is mild to moderate narrowing of the right neural foramen, and moderate narrowing on the left.” The comparison evidently is to the “Plain films dated August 16, 2002” that “were reviewed” by Dr. Bear. This clearly indicates changed and worsened conditions since that time, (i.e., right after the March 2002 surgery). It also states that “The AP diameter of the spinal canal is narrowed from C3-4 through C6-7.” This clearly includes C4-5. (Note also that this MRI found further worsening conditions at C3-4, C5-6 and C6-7.)

Thus, from the Oct. 29, 2002 exam to the 03/03/2005 exam, it appears there have been worsened conditions., contrary to Ogawa’s conclusion.

3. Do we accept ALJ’s view that there is no Stenosis at C4-5 or the ALJ’s view that the Stenosis at C4-5 did not come from the injury?

Spinal stenosis is defined as “narrowing of the spinal canal.”

ALJ Ogawa wrote that (page 3 of 4) “Here, the medical evidence does not clearly establish that the March 2005 MRI findings of spinal stenosis stem from the accepted C4-5 disc condition.” She then goes on to, contradictorily, state (same paragraph) that “...Spinal stenosis was not reported at the C4-5 disc level.”

I do not see how there can be no stenosis reported at C4-5 when there is also a failure to “establish that the March 2005 MRI findings of spinal stenosis stem from the accepted C4-5 disc condition.” Obviously, there was and is a finding of stenosis at C4-5.

And, The Samaritan Pacific Communities Hospital Diagnostic Imaging Report for exam date 03/30/2005 relating to an MRI of the cervical spine by Dr. Bear (EXHIBIT 12), performed for Dr. Theuson confirmed this. It reported that at C4-5 “There is a mild to moderate broad-based posterior disk bulge/osteophyte, with minor AP narrowing of the spinal canal. There is mild to moderate narrowing of the right neural foramen, and moderate narrowing on the left.” (Emphasis added.)

4. What did the stenosis come from?

The question becomes what other source beside the “accepted condition” the stenosis could come from. I

am not a doctor and do not know the universe of possible answers, but it seems to me that if it did not come from the injury that underlay the “accepted condition,” it must have come from degenerative changes. I quote from the Nov. 15, 2005 letter from Dr. Throop (Previous Exhibit 9). (page 4): “The degenerative disease is unrelated to the C4-5 disk herniation condition.” If degenerative disease is unrelated, it must have come from the underlying injury-based, accepted condition.

The evidence shows the ALJ was wrong on four critical points (points she expressly relied on in denying me compensation for my claims):

1. My medical condition was not identified as stationary or getting worse. It was, at some points, viewed as “medically stationary” and, more often and more severely as having grown worse, in varying ways, at various times. Indeed, the trajectory has been all in one direction, and it is this very fact that most frightens me. I live in fear of a slip and fall - or simply aging - that could, and almost surely someday will, either make me paralyzed or kill me. Ogawa is dead wrong, if you’ll pardon the phrase, where she stated I have neither gotten worse nor been medically stationary (which claim obviously means I am getting better!!!). If this is not basis for over-ruling the ALJ, then the sun really does revolve around the Earth.

2. There has been deterioration at C4-5 since the first operation.

3. There is spinal stenosis at C4-5.

4. The stenosis did not come from degenerative disease, so it must have come from my actual specific accepted medical condition at C4-5.

What follows next is from the August 13 letter that I sent to the WCB. As I stated in my letter then, the below include issues of (a) closed head injury; (b) bad faith rejection of medical evidence of the C4-5, (c) rejection of my C6-7 injury, (d) harassment of my physicians by Liberty, and (e) manipulation of evidence. All these should be sufficient to (i) award me compensation back to the appropriate dates when the need for medical insurance became apparent and it was not provided by the insurer despite repeated requests it do so, (ii) medical, travel and other injury related expenses and (iii) punitive damages for misbehavior, lost or missing evidence and harassment of my doctors.

### III. Closed Head Injury

The C4-5 disc injury came from the original 1989 injury, for which Liberty NW totally disabled me on 5/31/90 for C4-5 and C5-6 and “closed head injury.” (EXHIBIT 13) Liberty NW in fact, gave me a total disability finding in 1990 for C4-5 and C5-6 and closed head injury. Somehow, thereafter, the recognition of the closed head injury by Liberty dropped off their computer. Note that the closed head injury is mentioned in the July 9, 1990 letter to Liberty from Drs. Stanford and Barth at BBV medical

service (EXHIBIT 14) - even before the cervical disc injuries had been properly identified as significantly more than "strains." On Jan. 17, 1991, Western Medical Consultants, Dr. Grizka and Dr. Snodgrass (EXHIBIT 15) also found closed head injury, as well as other injuries, including at C5-6. I have never received compensation for this, nor even a review of it.

#### IV. THE C5-6 ISSUE.

While attorney Curey strenuously tried to limit this case to just the C4-5 injury from the Second Incident (at Georgies), and will surely seek to limit this review by the WC Board to just that injured vertebrae, C4-5, I also ask the WC Board to review the 1989 injury to C5-6 at the Piptide and such compensation as I may have gotten for it - and what I should receive for it. In fact, C5-6 was the initially most damaged vertebrae, and the object of my first surgery. Though the damage and the lost income caused has been great, the compensation I have gotten for it has been tiny.

I have all along insisted on retaining my rights to raise claims about and seek full and just compensation for BOTH incidents, both injuries and the medical consequences of both. Liberty NW, in fact, gave me a total disability finding in 1990 for C4-5 and C5-6 and closed head injury. (See previous Exhibit 13) Somehow, now, the recognition of the C5-6 injury dropped off their computer.

On Nov. 28, 1990, Portland Magnetic Imaging Labs, Dr. John English, (EXHIBIT 16) recommended surgery on C4-5 and C5-6 because of the First Injury. I waited, however, for updated, improved surgical procedures because the existing science was not encouraging back then. This was, in fact, at the suggestion of one of my physicians, Dr. William Bernstein; so I waited before having surgery. Maybe that was a mistake, because it gave Liberty time to develop various arguments to oppose the surgery (and maybe not, as Liberty probably would have opposed it anyway, at any time and however bad my need for it). Further, if it made the surgery that I did eventually receive more helpful and less likely to have killed me, I think it was worth it. (Emphasis added.)

On Jan. 17, 1991, Western Medical Consultants, Dr. Grizka and Dr. Snodgrass, (see previous Exhibit 15) found (besides a closed head injury), "very small central disc herniation at the C4-5 level, left paracentral disc herniation considered to be present at the C5-6 level, but not well visualized." (Emphasis added.) They found I was "not medically stationary" and that I probably would not be for four months. Thus, the C5-6 injury is shown, again, to have began as a result of the First Injury. My compensation for C5-6 should go all the way back to the First Injury.

On May 23-24, 1991, the Oregon Pain Center (OPC) (EXHIBIT 17) found "Mild herniated disc C5-6 left by MRI, questionable significance without objective neurological correlate. (p.1) On May 29, OPC limited me to "work in the medium category." (EXHIBIT 18)

A year later, on May 7, 1992, the Workers Compensation ORDER ON RECONSIDERATION (EXHIBIT 19) reduced what had



by then become my partial (no longer total as was originally found by Liberty) disability "to NONE." The logic of this escaped me at the time and still escapes me. That decision did not, however, make the pain go away. I had pain, and even some black-outs, subsequently.

On 9/22/97 a Diagnostic Imaging Report taken at Samaritan Pacific Communities Hospital Emergency Room (EXHIBIT 20) found "There is some degenerative change at C4-5 and C5-6 consisting primarily of intervertebral disc narrowing and anterior bulging. There is some suggestion of spasm."

But it was not just degenerative matters or merely spasm, as subsequent medical reviews, and surgery, proved. Two months later, Robert Hacker, Neurosurgeon, wrote (EXHIBIT 21) in a letter to Dr. Cephus Allin (dated 11/12/97): "In my opinion Mr. Johnson may well have a painful cervical spondylosis disorder. ... repeat MRI scan is probably reasonable to determine whether there have been late changes with significant root or spinal cord entrapment."

That was done. There is a letter dated Dec 12, 1997, in which MR Imaging Associates (EXHIBIT 22) wrote to Dr Hacker finding "Abnormality at C5-6 on the left is larger than expected from plain film findings and probably a combination of cervical spondylosis, foraminal narrowing and disc herniation." In December 1997, when the pain had grown excruciating to me, Dr. Hacker recommended surgery on C4-5 and C5-6 discs; Liberty refused to accept 4-5 and accepted only 5-6. In the interim, I had only gotten worse, and who knows what further damage has been done me - first from the initial delay due to Liberty after the surgery became (in my physicians' opinion) worth the risk it entailed, then due to Liberty's refusal to deem the condition one that needed an operation, and also from Liberty's refusal to support an operation on the 4-5 disc until 2002. With Liberty still denying I had anything worse than cervical strain, it took me till 1997 to get authorization from OMAP for the surgery at C5-6, and OMAP did pay for the surgery, which occurred March 3, 1998 (my first surgery).

On July 30, 1998, a letter from my then attorney Strooband (EXHIBIT 23), notes on page 2 that IME Western Medical on 1/16/91 (Gritzka and Snodgrass) had "concluded Mr. Johnston had a herniated disc at C5-6 caused from the work incident of 11/4/89." The attorney's letter then asked Dr Hacker if he had reviewed the Western Med 1/17/91 report and if he agreed or disagreed with Gritzka and Snodgrass regarding existence of a herniated disc at C5-6 and their view that it was due to the 11/4/89 injury. Dr. Hacker circled the "I agree" words.

I continued my efforts to get surgery, once it had become less risky, and indeed got it (on March 3, 1998) - but only after both C4-5 AND C5-6 had more than once been identified as actually entering the spinal cord. More timely surgery - on C5-6 [the First Surgery] and on C4-5, too - might have avoided or significantly delayed that unhappy development.

In (EXHIBIT 24) a July 7, 1998 OWN MOTION ORDER

REFERRING FOR CONSOLIDATED HEARING (still, despite all the above, referring to my problem as “acute neck strain”), the Board noted that Liberty had denied compensation for “current cervical disc herniation C5-6 left condition. . . . (and) opposes reopening on the following grounds: (1) the insurer is not responsible for claimant’s current condition, (2) surgery of hospitalization is not reasonable and necessary for the compensable injury; and (3) claimant was not in the work force at the time of disability.” This was wrong because (1) the insurer insured both employers of mine and is only “no responsible” for my condition in the sense it is not responsible for anybody’s injury except the injury of persons hurt by an employer or vehicle or other equipment employed or owned by the insurer; (2) the medical record established that surgery was reasonable and necessary for both injuries by the date of that assertion by Liberty, and (3) because I was working at the time, and h claim to the contrary was a bald lie.

In effect, Liberty passed me off to the taxpayer, as a burden to the system. Now, because of what Liberty has done, because of its delays and dishonesty, I am indeed a burden to that system and to the taxpayer, when I should not be. Thus, the issue of compensation of C5-6 should be reopened, because that matter was mishandled by the Liberty, and at points the agency, over an extended period of years.

The Board, by its OWN MOTION ORDER of Feb 10, 1999, (EXHIBIT 25) authorized reopening of my 1989 injury claim re: C5-6 to “provide temporary disability compensation beginning March 8, 1998...” (I do not believe I ever got compensation for a decades worth of suffering relating to C5-6 and incapacity - and have not gotten same for continued suffering related to C5-6 and incapacity thereafter to the extent it arose from C5-6. And the compensation I have gotten relating to C4-5 has been fairly minimal.) However, this Order got some of it right. This order states that “on December 21, 1998, ALJ Spangler issued an Opinion and Order which set aside the insurer’s denial. In doing so, ALJ Spangler found the claimant’s cervical disk herniation at C5-6 was causally related to the November 1989 compensable injury. The ALJ’s order has not been appealed” by Liberty, this noted. (They knew they were lying. But they still haven’t paid compensation.) “On March 8, 1998, claimant underwent anterior cervical fusion. Thus we conclude that claimant’s compensable injury has worsened requiring surgery. Furthermore, as previously noted, we find that claimant was in the work force at the time of his disability. Accordingly, we authorize the reopening of claimant’s 1989 injury claim to provide temporary disability compensation beginning March 8, 1998, the date claimant was hospitalized. When claimant is medically stationary, the insurer shall close the claim pursuant to OAR 438-012-0055.”

Thus, C5-6 is an issue in my life and in this case and the Board has already found that “C5-6 was causally related to the November 1989 compensable injury” (see previous exhibit 25). There is no sane reason why the C5-6 injury and compensation for it should not be addressed by the Board now, when it clearly is related to the second injury, and the harms

from that second injury are, to some extent, “medical sequela” of the first injury. Indeed, Liberty’s evident bad faith, as detailed below, in denying the need for the first surgery should give anybody with an ounce of decency pause before asserting that they don’t owe me insurance compensation for the expenses of and the losses due to the C5-6, as well as the C4-5 harms (i.e., for losses, harms and expenses related to both the First Injury, which harmed both C4-5 and C5-6, and costs of the First Surgery (on C5-6) and the losses, harms and expenses related to the Second Injury (on C4-5) and the costs of the Second Surgery. For justice to be rendered to me, the Board must address not just C4-5 (and its injury and surgery) but also C5-6 (and its injury and surgery).

#### V. MANIPULATION OR LOSS OF EVIDENCE.

1. When I was injured at Georgie’s Beachside Grill (the second injury), Liberty’s investigator picked up the video tape of the event. It has not been seen since, though I have asked for a copy of the tape of the investigative interview between me and him. Also, the restaurant had a videotape of my fall (Georgies) and that was given to the Liberty investigator. Where did it go?

2. Plus, there should be a letter from Samaritan Pacific Communities Hospital already in evidence discussing a number of missing MRIs. I am in the process now of receiving another letter discussing the MRIs, from the individual at Liberty who wrote that letter, in case it is not in evidence. I made the mistake of innocently turning over to Liberty the MRIs in the hope and expectation the insurer would use them to arrive at a fair and just conclusion as to the degree of disability involved, and amount of compensation warranted, in my case. Evidently, the transfer of possession of such MRIs to the insurer is normal - which makes sense, otherwise how could it make its own assessment of how disabled the claimant is and how much to pay out in compensation? But it only makes sense if the insurer is not going to lose, damage or destroy the MRIs. Liberty lost and never found those MRIs. But the MRI technician at the MRI imaging trailer at Samaritan Pacific Communities Hospital had retained copies in his system and was able to regenerate them for me. They are in evidence. Why did Liberty lose them? And isn’t it a rule of law that when a party loses or destroys evidence it is taken that the evidence supported the arguments of the other side?

As further evidence of the loss of the MRIs, I note a letter regarding my Neurosurgical History and Physical, by Dr. Hacker, dated Nov. 12, 1997. (EXHIBIT 26) “A review of outside films confirms degenerative changes, most pronounced at the C4-5 and C5-6 level. There is nothing to suggest an obvious deformity or subluxation. The patient has an MRI report that is several years old, documenting spondylotic change at C4-5 and C5-6. These studies apparently have been lost.” Gentlemen, it wasn’t me that lost them. And, as noted above, isn’t there a rule in law that if evidence is lost or destroyed, one can infer that it hurt the party that lost or destroyed it?

3. Then there is the January 17, 2003 letter from my then-attorney Brian Welch (EXHIBIT 27) to attorney McAllister for LiBerty, "I would appreciate your kindness in locating those x-rays and forwarding them to Dr. Hacker..." To the best of my knowledge, Dr. Hacker never got the requested x-rays.