THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM THE
CLARENDON COUNTY COURT OF COMMON PLEAS

The Honorable R. Ferrell Cothran, Jr., Circuit Court Judge

Case No.: 2012-CP-14-00024

Andreal Holland,.....Appellant,

v.

J.C. Witherspoon, Jr., Inc., A&K Mulch, LLC, Employers, and Capital City Insurance Company, Carrier,.....Respondents.

FINAL BRIEF OF RESPONDENTS

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STATEMENT OF THE CASE

The facts of this case revolving around the affirmative defense of election of remedies, per S.C. Code Ann. § 42-1-560, are largely undisputed. *See* S.C. Code Ann. § 42-1-560 (Supp. 2011). The Claimant/Appellant Andreal Holland suffered severe compensable injuries to multiple body parts on or about June 1, 2006, including a brain injury. He has been represented by counsel throughout the majority of this case and continuously since at least 2007. The circumstances of the workers' compensation claim gave rise to a third party action (products liability) against other parties including the manufacturer of the equipment the Claimant was using at the time the accident occurred. On October 10, 2008, Andreal Holland, through counsel, filed a third party civil action for damages which arose from this same accident. (R.O.A. 78). An amended complaint was filed on March 3, 2009. (R.O.A. 90).

It is undisputed that the Claimant/Appellant did not file the requisite "S-2" notification with the Workers' Compensation Commission, and serve the S-2 on the Defendant Employer/Carrier in this case until May 14, 2009 at the earliest. (R.O.A. 134). The notice of the third party claim, and service of the S-2 was therefore made well in excess of the thirty day limitation for filing this notification as prescribed by S.C. Code Ann. § 42-1-560. *See* S.C. Code Ann. § 42-1-560 (Supp. 2011).

Subsequently, the Defendants/Respondents in this workers' compensation action raised the affirmative defense of election of remedies pursuant to S.C. Code Ann. § 42-1-

560 and as interpreted by the South Carolina Supreme Court in *Callahan v. Beaufort Cnty. Sch. Dist.*, 375 S.C. 92, 651 S.E.2d 311 (2007). *See* S.C. Code Ann. § 42-1-560 (Supp. 2011); *see also Wise v. Wise*, 394 S.C. 591, 716 S.E.2d 117 (Ct. App. 2011). This issue was originally scheduled to be determined - in addition to issues raised by the Claimant - in a Form 50 hearing scheduled in May, 2009. (R.O.A. 127). That hearing was postponed, the Form 50 requesting the hearing was later withdrawn, and the hearing was neither held at that time, nor on the hearing request of the Claimant.

The current issues associated with the election of remedies then came before the Commission on the Defendants'/Respondents' Form 21 hearing request. (R.O.A. 135). The Form 21 hearing was postponed multiple times, and was ultimately scheduled to be heard before Commissioner T. Scott Beck on Friday, December 17, 2010. During a teleconference on December 16, 2010, Commissioner Beck and the attorneys for the respective parties agreed to have the issue of election of remedies determined based on the APA's submitted into the record before the Commission and legal memorandums to be filed by the parties. (R.O.A. pp. 140-182).

Upon submission of the legal memoranda filed by the parties, in addition to the APA's and exhibits, the Hearing Commissioner subsequently ruled that the Claimant Holland had elected his remedy due to failure to comply with the mandated statutory dictates of § 42-1-560. *See* S.C. Code Ann. § 42-1-560 (Supp. 2011). (R.O.A. pp. 12-32). The Claimant appealed the hearing Commissioner's order to the Appellate Panel of the

Commission via a timely filed Form 30 appeal. In the Claimant's/Appellant's Form 30 and addendum, he cited twelve (12) separate points of error for appellate review by the Appellate Panel. (R.O.A. pp. 183-184).

Pursuant to S.C. Code Ann. § 42-17-50, the Appellant Panel reviewed the decision of the Single Commissioner, weighed the evidence as presented in the initial hearing, and considered all issues raised by Claimant's Form 30 and in the briefs of the parties. *See* S.C. Code Ann. § 42-17-50 (Supp. 2011). After careful review of the instant case, the Appellant Panel determined that all of the Hearing Commissioner's Findings of Fact and Conclusions of Law were correct as stated. On December 14, 2011, the Appellate Panel issued an order unanimously affirming the Single Commissioner's Decision and Order and adopting the same as the Decision and Order of the Appellate Panel. (R.O.A. pp. 33-57). On January 12, 2012 the Claimant/Appellant timely appealed the Appellate Panel Order of the full Commission to the Court of Common Pleas in Clarendon County citing fifteen (15) separate grounds of error for judicial review. (R.O.A. p. 239). By Order dated November 14, 2012, the Honorable K. Ferrell Cothran, Jr., Clarendon County, fully affirmed the Order of the Workers' Compensation Commission. (R.O.A. 58-77).

This appeal by the Claimant/Appellant to the Court of Appeals follows. Claimant now appeals on six (6) separate grounds of error for legal review by the Circuit Court.

STANDARD OF REVIEW

The date of injury for this accident is prior to July 1, 2007. Therefore, pursuant to S.C. Code Ann. § 42-17-50, the Claimant/Appellant properly appealed the full Commission Order to the Circuit Court of Clarendon County prior to the appeal to the Circuit Court. *See* S.C. Code Ann. § 42-17-50 (Supp. 2011) (*See Generally Pee Dee Reg'l Transp. v. S.C. Second Injury Fund*, 375 S.C. 60, 62, 650 S.E.2d 464, 465 (2007)). The South Carolina Administrative Procedures Act governs judicial review of decisions by the Workers' Compensation Commission. *Bass v. Isochem*, 365 S.C. 454, 467, 617 S.E.2d 369, 376 (Ct. App. 2005). An appellate court's review is limited the determination of whether or not the decision of the Appellate Panel of the Workers' Compensation Commission was supported by substantial evidence or is controlled by some error of law. *Grant v. Grant Textiles*, 372 S.C. 196, 200, 641 S.E.2d 869, 871 (2007); S.C. Code Ann. § 1-23-380(A)(5) (Supp. 2006).

The judicial review of the appellate panel's factual findings is governed by the substantial evidence standard. *Gadson v. Mikasa Corp.*, 368 S.C. 214, 221, 628 S.E.2d 262, 266 (Ct. App. 2006). The appellate panel's decision must be affirmed if supported by substantial evidence in the record. *Shuler v. Gregory Elec.*, 366 S.C. 435, 440, 622 S.E.2d 569, 571 (Ct. App. 2005) (internal citations omitted). A reviewing court may not substitute its judgment for the judgment of the Commission as to the weight of the evidence on questions of fact. S.C. Code Ann. § 1-23-380(A)(5) (Supp. 2006). However,

a reviewing court may reverse or modify a decision of the appellate panel if the findings of the panel are, "clearly erroneous in view of the reliable, probative and substantial evidence on the whole record." S.C. Code Ann. § 1-23-380(A)(5)(e) (Supp. 2006); (*Houston v. Deloach & Deloach*, 378 S.C. 543, 550; 663 S.E.2d 85, 88) (S.C. Ct. App. 2008)).

ELECTION OF REMEDIES IN GENERAL

This accident which gives rise to this claim for benefits took place on or about June 1, 2006. The claim also took place under circumstances that gave rise to third party civil action. The Claimant/Appellant filed a third party civil action in October of 2008, and subsequently amended it in March of 2009. (R.O.A. pp. 78, 90). The Form S-2, notice of third party action - employee, was never filed along with this third party law suit, nor within thirty days afterwards. It was not filed with the SCWCC or served upon the Employer/Carrier until approximately May of 2009. (R.O.A. p. 134).

S.C. Code Ann. §42-1-560(b) requires that, when an injured employee chooses to assert a third party claim for benefits, in addition to a workers' compensation claim, a notification of the, "commencement of the [third party] action **shall be given** within thirty days thereafter to the Industrial Commission, the employer and carrier upon a form prescribed by the Industrial Commission." (emphasis added). The 'prescribed form' of the Commission is the 'S-2.' (See S.C. Code of Regs. § 67-203(2)). However, a Form S-2 notifying the Respondent Employer/Carrier and the S.C. Workers' Compensation

Commission of this third party action was not filed until May of 2009, several months after the commencement of the third party civil action.

Therefore, pursuant to S.C. §42-1-560, and corresponding S.C. case law, including but not limited to Supreme Court's decision in *Callahan v. Beaufort County School District*, 375 S.C. 92, 651 S.E.2d 311 (2007), the Respondent/Defendants have asserted that the Claimant, by failing to comply with the mandated statutory notice requirements for his third party action, has elected his remedy and is barred from further workers' compensation benefits from his employer.

ARGUMENT

Is §42-1-560 unconstitutional as being vague, ambiguous? Is §41-1-560 unconstitutional as failing to provide equal protection under the law? (Claimant's/Appellant's Appeal Issue No. I).

Neither of the above two issues should have been considered by the full Commission Panel on appeal, nor should they be considered now by the Court of Appeals, as the constitutionality of S.C. Code Ann. §42-1-560 was not challenged or raised to the hearing Commissioner. Therefore, the Claimant/Appellant should be precluded from now raising these arguments for the first time on appeal. Issues not raised to the trial court are deemed abandoned on appeal, and cannot be raised for the first time to an appellate body reviewing the decision of the trial officer who originally heard the case, as the trial Judge or Commissioner would never have had the opportunity to consider and determine the issue in the first instance. This principle holds true for both

factual and legal issues, including a challenge to the constitutionality of a statute. (See *State v. Nichols*, 325 S.C. 111, 120-21, 481 S.E.2d 118, 123 (1997) ("An issue may not be raised for the first time on appeal, but must have been raised to the trial judge to be preserved for appellate review."). **Constitutional arguments are no exception to the rule**, and if not raised to the trial court are deemed waived on appeal. *State v. Powers*, 331 S.C. 37, 501 S.E.2d 116 (1998) (emphasis added). (*See also Palm v. Gen. Painting Co.*, 296 S.C. 41, 370 S.E.2d 463 (1988). The Palm Court held that:

> We need not address Julia's argument regarding the constitutionality of Section 42-9-120 of the Code as interpreted by the Supreme Court's decision in *Day*. So far as the record shows, this contention is made for the first time on appeal. We need not address Julia's argument regarding the constitutionality of Section 42-9-120 [a worker's compensation statute] of the Code as interpreted by the Supreme Court's decision in *Day*. So far as the record shows, this contention is made for the first time on appeal. *Powers v. City of Aiken*, 255 S.C. 115, 177 S.E. 2d 370 (1970).
>
> *Palm* at 50, ___

The issues of the constitutionality of S.C. Code §42-1-560 would further be precluded from determination on appeal in that Judge Cothran's Order upheld the Appellate Panel findings, that the issue of constitutionality had been abandoned by the Claimant's/Appellant's failure to raise such issues to the trial Commissioner. (See Cothran Order at p. 9)(R.O.A. p. 66). Despite not receiving a determination on this issue, the Claimant/Appellant failed to file a Rule 59(e) motion to the Circuit Court for reconsideration of this issue. (*See Generally Nettles v. Spartanburg Sch. Dist.* #7, 341 S.C. 580, 535 S.E.2d 146 (2000) at footnote 4).

Assuming the constitutional arguments were preserved for appellate review, as to the merits of the arguments, Respondents further contend that §42-1-560 is not unconstitutionally vague, nor does it create an equal protection violation. First, there is no vagueness or ambiguity between §42-1-560(b) and (c) as to notice. If a party files a third party civil action, in association with the workers' compensation claim, statutory notice must be given by that party within thirty days. The time period in association with the date of the accident aside, there is no question that notice of the third party filing must be given by the party which actually files the third party claim.

The equal protection argument raised by the Claimant/Appellant is meritless as well. The Appellant Holland indicates that usually person who suffered a personal injury by negligence of another would have three years in which to file a claim against the tortfeasor, but that §42-1-560 only permits him or her one year to do so. However, a person injured on the job by a third party tortfeasor actually has their rights expanded. If the injured worker chooses not to pursue a workers' compensation claim, his or her rights are exactly the same as any other injured party with three years to file. If the injured worker chooses, however, to file *both* a third party action (against the tortfeasor) *and* the workers' compensation claim, he or she is bound to follow the dictates of §42-1-560, or otherwise risk electing his or her remedy. Notably, Mr. Holland, irrespective of the hearing Commissioner's ruling in this case, still has a valid third party civil action which

he has filed against the third party tortfeasor. Therefore, no equal protection violation is implicated by this statute.

Did the Circuit Court err in the application of *Callahan v. Beaufort County School District* and/or §42-1-560? (Claimant's/Appellant's Appeal Issue No. II).

The *Callahan* opinion is worth citing at length, as it succinctly summarizes much of the case law in this area. In *Callahan*, the Claimant filed a third party action, but did not properly notify the Workers' Compensation Commission and the defendant employer and carrier of the third party action via an S-2 until approximately six months after the commencement of the third party action. The court therefore reasoned that:

> South Carolina Code Ann. § 42-1-560 sets forth the requirements for simultaneously pursuing a third-party action and a workers' compensation claim. The statute provides:
>
> > Notice of the commencement of the [third-party] action shall be given within thirty days thereafter to the [Commission], the employer and carrier upon a form prescribed by the [Commission].
> >
> > S.C.Code Ann. § 42-1-560(b).
>
> An injured party may proceed against both the employer-carrier and against a third-party tortfeasor by complying with the requirements of § 42-1-560. *Fisher v. S.C. Dept. of Mental Retardation-Coastal Ctr.*, 277 S.C. 573, 575, 291 S.E.2d 200, 201 (1982); *Hudson v. Townsend Saw Chain Co.*, 296 S.C. 17, 20, 370 S.E.2d 104, 106 (Ct.App.1988) ("[subsection (b)] plainly requires an employee, when he or she brings a third-party action, to give notice to the Commission, the employer, and the employer's carrier of the commencement of the third-party action within 30 days of its commencement.").

> In this case, Claimant did not provide the Form S-2 to the Commission, Employer, and Carrier until July 2003, nearly six months after she initially filed her third-party suit and three months after the action had been removed to federal court.
>
> Because workers' compensation statutes provide an exclusive compensatory system in derogation of common law rights, **we strictly construe the requirements of § 42-1-560** and leave it to the legislature to amend and define its ambiguities. *Cf. Wigfall v. Tideland Utils., Inc.*, 354 S.C. 100, 110, 580 S.E.2d 100, 105 (2003). **Here, the statute clearly requires timely notice to be given to all three entities employer, carrier, and Commission on the Form S-2.**
>
> *Callahan* at 95-6, 313 (emphasis added).

The court went on to hold that this failure alone would be enough to bar further benefits under the Act because the claimant would have made an election of remedies:

> We find the circuit court erred by excusing compliance with the statute based on the "equitable adjustment of the rights of all the parties." Even though the employer had not lost its right of subrogation against the potentially responsible third-party, the statutory provision mandates notice to the employer, carrier, and Commission within thirty days of filing the third-party suit. It was improper for the circuit court to conduct an equity analysis to carve an exception to the workers' compensation notice requirement. See *Wigfall, supra*; *Santee Cooper Resort, Inc. v. S.C. Pub. Serv. Comm'n.*, 298 S.C. 179, 185, 379 S.E.2d 119, 123 (1989) (holding that a court's equitable powers must yield in the face of an unambiguously worded statute).
>
> *Callahan* at 96-7, 314

The *Callahan* court ultimately ruled that claimant Callahan was entitled to continue receiving benefits in workers' compensation while proceeding against the third party tortfeasor. However, the *only* reason this was permitted is because the Claimant

essentially cured the defective S-2 notification issue by voluntarily dismissing her claim under Rule 41 FRCP. The court's reasoning being that:

> A voluntary dismissal leaves the situation as though no suit had ever been filed. 9 *Charles Alan Wright & Arthur R. Miller, Federal Practice & Procedure* 2d § 2367, at 321 (1995); Allen v. S. Ry. Co., 218 S.C. 291, 297-298, 62 S.E.2d 507, 511 (1950). Following this rule, the third-party suit originally filed in January 2003 became a nullity, and § 42-1-560 is not applicable. As a result, there is no violation of § 42-1-560 when the third-party suit is treated as never being filed.
>
> *Callahan* at 97, 314

However, it is abundantly clear from the *Callahan* opinion that the failure to properly file an S-2 notification of the commencement of a third party action would serve as a bar to further benefits. In addition, the *Callahan* court takes the opportunity to explain that strict compliance with the requirements of §42-1-560 is required despite several of the arguments raised by the Claimant Holland's appeal brief and prior legal memoranda:

> This holding does not conflict with our past cases. This Court previously held that a claimant had elected a remedy, thus forgoing workers' compensation benefits, by settling a third-party claim without complying with the notice requirements of § 42-1-560, even though the carrier had actual knowledge of the third-party suit. *Fisher*, *supra*; see also *Hardee v. Bruce Johnson Trucking Co.*, 293 S.C. 349, 354-355, 360 S.E.2d 522, 525 (Ct.App.1987)(discussing the facts of *Fisher*).
>
> Additionally, prior cases interpreting this statute have found that prejudice should not be considered. See *Hudson*, *supra* (finding claimant's prejudice argument "unpersuasive, if in fact the question of prejudice is relevant at all") (citing *Stroy v. Millwood Drug Store Inc.*, 235 S.C. 52, 109 S.E.2d 706 (1959)); *Kimmer v. Murata*, 372 S.C. 39, 640 S.E.2d 507

(Ct.App.2006)(holding that "prejudice is 'NOT' an element to be considered in regard to the failure to give mandated statutory notice.")

Callahan at Footnote No. 2 (emphasis in the original)

Furthermore, the South Carolina Court of Appeals has recently considered the election of remedies issue in *Wise v. Wise*, 394 S.C. 591, 716 S.E.2d 117, (Ct. App. 2011). In *Wise,* the court cites to the *Callahan* decision in order to reach its conclusion stating "because Claimant did not strictly comply with the notice provisions in filing suit against a third party, he is barred from recovering under the Act."

In addition to the rulings in *Callahan* and *Wise*, the leading treatise on South Carolina workers' compensation law similarly provides that:

> By requiring an employee to give notice of a third party action within thirty days of filing to the Commission, employer, and the carrier is allowed to participate and take necessary steps to insure that the ensuing litigation is pursued diligently and effectively. Failure to comply with the notice requirement of the Act can act as a bar to workers' compensation benefits. In *Hudson v. Townsend Saw Chain Company* the Court of Appeals rejected the lower Court's finding that notice of third party action is required only in situations in which an employee pursues a workers' compensation claim simultaneously with a third part action, and held that:
>
> > [I]rrespective of whether an employee pursues a third-party action either before or simultaneously with filing a workers' compensation claim, the employee, to preserve his or her claim to workers' compensation, must provide the notice required by Section 42-1-560(b). If the employee fails to give the notice required by Section 42-1-560(b) and prosecutes the third-party action to a final determination, either before or simultaneously with filing a workers' compensation claim, the employee will be regarded as having elected his or her remedy and will be barred from receiving workers' compensation benefits.

> Notice is required even where the carrier is not prejudiced by the lack of notice. [*Kimmer v. Murata of Am., Inc.*, 372 S.C. 39, 640 S.E.2d 507 (Ct. App. 2006)]
>
> *The Law of Workers' Compensation in South Carolina*, 5th ed., 2008, at p. 477.

Therefore, the Defendants/Respondents assert that it is manifestly clear under S.C. case law and statutory authorities that Mr. Holland, by failing to timely file a Form S-2 has elected his remedy.

In support of his appeal, the Claimant/Appellant contends, in part, that an S-2 notification of a third party claim, by the injured employee to the employer, carrier and the Commission, is not required after a year of compensation has been paid (or presumably when an S-3 has not been filed by the Employer/Carrier). This position is unfounded.

First, a review of §42-1-560 indicates no excusal of the Claimant's burden of notification, per subsection (b), under any generally or particularly defined circumstance. If anything, this statute portrays *exactly* the opposite instruction. The requirements of the employee for proceeding with a third party claim (simultaneously or prior to his or her workers' compensation claim) are outlined in subsection §42-1-560 subsection (b). This section includes the mandate of statutory notice by the Claimant to the other parties and the Commission within thirty days of the commencement of a civil action. On the other

hand, the requirements of the employer/carrier for *proceeding with a third party action* are similarly outlined in subsection (c). Notably, subsection (c) states in part that:

> Failure [of the employer/carrier] to give this notice, or to commence the action at least thirty days prior to the expiration of the time within which such action may be brought, shall operate as a reassignment of the right of action to the injured employee,..., **and the rights and obligations of the parties shall be as provided by subsection (b) of this section.**
>
> S.C. Code Ann. §42-1-560 (Supp. 1986)(emphasis added)

Because the Defendants/Respondents did not institute a third party action on behalf of the injured Claimant Holland within the statutory time period, this non-action by the employer/carrier effectuates a re-assignment of the right of action back to the Claimant. The Claimant then maintains the same burden of "...obligations...as provided by subsection (b) of this section [42-1-560]," which of course includes the thirty day notification requirement by the Claimant to the Employer, Carrier and the Commission. The Claimant *did* proceed in this case with a third party action, and therefore, was bound to comply with notification requirements as outlined by §42-1-560(b).

§42-1-560 subsection (c) obviously contemplates the situation where a year of benefits (or more) has been paid by the defendant carrier, because the time period for the Employer/Carrier to bring the third party suit under §42-1-560(c) does not even start until, "one year after the carrier accepts liability for the payment of compensation or makes payment pursuant to an award under this Title[.]" (Definition of the "one year period" from §42-1-560(b) as referenced in subsection (c)). Therefore, the Claimant's

arguments on this point are not persuasive in light of a clear and definitive mandated statutory burdens to notify the Commission and opposing parties in the workers' compensation claim of his third party action – as required by §42-1-560. This obligation is in effect regardless of the amount of time for which workers' compensation benefits have been paid, and regardless of when in the course of his workers' compensation claim the Claimant chooses to file the third party action.

Did the Circuit Court err in failing to rule that the Claimant was under disability until a GAL was appointed? (Claimant's/Appellant's Appeal Issue No. III).

The Respondents concede that the Claimant/Appellant has suffered significant physical injuries in association with this case. This includes sustaining a physical brain injury. Presumably, the Claimant raises mental incapacity as a bar to the election of remedies defense, through his own failure to properly file an S-2, for the purpose of arguing that such incapacity excused or tolled the 30 day time period for filing and serving his S-2 notification.

Mental incapacity/incompetency can, under certain circumstances, toll the applicable time period for asserting ones rights in legal proceedings or associated statute of limitations. However, this is a meritless argument in the instant case. First, the Defendants/Respondents do not concede that the Claimant is *per se* mentally incompetent or incapacitated due to his injuries arising from this accident, nor from another unrelated

cause. Moreover, no evidence of the Claimant's/Appellant's alleged mental incapacity was ever submitted by Appellant.

However, assuming *arguendo* that the Claimant is incapacitated in a way as to preclude him from legally participating, such a claim for tolling or excusing compliance with the statute (§42-1-560) would still be unfounded and unsupportable under the facts of this claim. The Claimant/Appellant was, and has been, represented by competent legal counsel during all relevant time periods in question for his workers' compensation claim as well as his third party lawsuit. To that end, the third party civil action, filed by the Claimant in October of 2008, was filed on his behalf by an attorney representing the Claimant in a fiduciary capacity. It is factually antithetical, and logically inconsistent to argue that the Claimant was, on one hand, unable to properly proceed with his workers' compensation proceedings, or rather incapable of complying with the Worker's Compensation Act, due to incapacity/incompetency while, on the other hand, simultaneously pursuing through legal counsel his third party civil action – and actively litigating his workers' compensation claim.

Furthermore, incapacity of the Claimant cannot, and should not be imputed to Claimant's counsel for the purpose of tolling or excusing proper compliance with the Worker's Compensation Act. During his purported time of legal disability, the Claimant, through counsel, had filed a Form 50 hearing request and submitted pre-hearing briefs/APA evidentiary submissions. The Claimant/Appellant cannot use the sword and

the shield, and should be judicially estopped from making inconsistent arguments as to his capacity to comply with the Workers' Compensation Act. Generally speaking, the doctrine of judicial estoppel precludes a party from adopting a position in conflict with one earlier taken in the same or related litigation. (Adopted by South Carolina in *Hayne Fed. Credit Union v. Bailey*, 327 S.C. 242, 251, 489 S.E.2d 472, 477 (1997)).

It would appear quite logically inconsistent that the Claimant/Appellant could both actively litigate his workers' compensation claim (through the assistance of counsel), as well as his third party civil action, (also by and through counsel), yet was *contemporaneously* legally incapacitated and therefore unable to serve and file the required S-2 notification letters in a timely manner. Arguably, filing and serving the S-2 timely did not require the level of legal acumen of several other legal tasks taken on the Claimant's behalf by his counsel during the same time period in which he alleges to have been legally disabled, and hence unable to otherwise comply with the Workers' Compensation Act.

Did the Circuit Court err in failing to find the Carrier/Employer(s) waived the election of remedies defense? (Claimant's/Appellant's Appeal Issue No. IV).

Laches is an equitable doctrine which arises upon the failure to assert a known right. *Emery v. Smith*, 361 S.C. 207, 215, 603 S.E.2d 598, 602 (Ct.App.2004). The equitable doctrine of *laches* is equivalent to the legal doctrine of waiver, which is the "voluntary and intentional relinquishment or abandonment of a known right," *Parker v.*

Parker, 313 S.C. 482, 487, 443 S.E.2d 388, 391 (1994). Both *laches* and waiver require a party to have known of a right, and that the party knowingly fails to assert (*laches*) or knowingly abandons that right (waiver).

The Defendants/Respondents assert that the argument of waiver of the election of remedies defense is also without merit. The Defendants have raised this defense, election of remedies, at every contested hearing in this case since the defense became viable, and was known by the Defendants. There is no legal or factual evidence in the record indicating the Defendants have waived or abandoned their right to assert election of remedies as a defense in this claim.

The Claimant previously withdrew his Form 50 hearing request in 2009, and the case had been delayed multiple times for the purpose of giving the parties additional time for settlement discussions, discovery and other reasons. Nevertheless, none of this is evidence of a waiver or abandonment of the defense of elections of remedies by the Employer/Carrier.

The Claimant/Appellant argues that the Defendants/Respondents failed to raise the election of remedies defense in their Form 51 response filed on February 18, 2009. (R.O.A. p. 126). First and foremost, the arguments pertaining to this issue are superfluous as the current election of remedies issue has been raised via the Defendants' own Form 21 hearing request. (R.O.A. 135). Secondly, the arguments made by the Claimant seem to indicate the only proper way to raise election of remedies is by a Form

51. If this were the case, it would mean that a Claimant could thwart the dictates of §42-1-560 by simply never filing a Form 50 (on an already accepted claim) thereby never giving a defendant the opportunity to raise the election of remedies on a Form 51.

The Defendants/Respondents could not have raised the election of remedies issue in their February 18, 2009 Form 51 without some knowledge of the filing and non-service of the S-2. The Carrier was never served with an S-2 notice of the original Complaint in the third party action, filed on October 10, 2008. As indicated in the Appellants own brief, the amended third party complaint (March 3, 2009) was not even received by the Carrier until March 10, 2009. (R.O.A. p. 90). Furthermore, at that time, and as noted by the Claimant in his own legal memorandum, he could have still, ostensibly, "cured" his S-2 service/filing defect by voluntarily dismissing the third party action and re-filing it; then timely serving the S-2. It should also be noted that a claimant must comply with the, "notice requirements of §42-1-560, even though the carrier had actual knowledge of the third-party suit," in order to maintain both the workers' compensation action the third party suit simultaneously. *Callahan v. Beaufort Cnty. Sch. Dist.*, 375 S.C. 92, 96, 651 S.E.2d 311, 313 (2007)(at Footnote 2)(internal citations omitted).

As the hearing drew closer, no such action to cure this defect was ever taken by the Claimant. Accordingly, the Defendants/Respondents did raise the election of remedies defense on their Form 58, filed May 11, 2009, for the corresponding Form 50

hearing on May 20, 2009. (R.O.A. p. 127) (Note: The three year Statute of Limitations for the third party civil action expired on June 1, 2009). However, since no curative action was ever taken by the Claimant/Appellant, election of remedies would have been a viable defense for the Employer/Carrier on the date of the May 20, 2009 Form 50 hearing. The Appellant also indicates that the Form 58 Pre-Hearing Brief filed by Defendants on May 11, 2009 was untimely for the May 20, 2009 Form 50 hearing. (R.O.A. p. 127). This is not accurate. Judicial notice should be taken that May 10, 2009 (the actual due date of the Defendants Form 58, PHB) was a Sunday. Meaning, a filing on the following Monday would be timely. Pursuant to S.C. Code of Regs. §67-609 'Computation of Time,' "Sundays...are included unless the designated time period ends on a...Sunday...in which case the next day that is not a Saturday, Sunday, State, or Federal holiday is included as the last day [for filing]." (emphasis added).

Defendants/Respondents lastly assert that this line of argument is purely extraneous in light of the facts that: (a) The current issues are before the Commission on the Defendant's Form 21, not a Form 50; (b) At the time of the May 20, 2009 hearing the Claimant did not object to the Form 58 filing based on timeliness; (c) the Claimant chose not to go forward on the Form 50 hearing on May 20, 2009, which the Claimant himself had requested; and (d) The Defendants/Respondents had no authority or ability to force the Claimant to proceed on a Form 50 hearing request in order to assert their own

defenses to that Form 50 or the claim in general (but subsequently did request their own hearing via Form 21 – the proceedings from which this appeal arises)(R.O.A. p. 135).

In addition, the Claimant Holland indicates that Carrier did not pursue its request to be allowed to allege the election of remedies at the May 20, 2009 Form 50 hearing, and thereby has waived this defense, even if it was properly raised, back in May of 2009. Again, this argument is also without merit. It is the Claimant who chose not to go forward with his *own* requested Form 50 hearing on May 20, 2009. No Form 21 had been filed at that time. The Employer/Carrier does not procedurally have the ability to force a Form 50 hearing to go forward if the Claimant withdraws the hearing request or otherwise chooses not to go forward. Additionally, if the Claimant/Appellant had gone forward with his Form 50 hearing, Defendants would have had an opportunity to amend the Form 51 to conform to the evidence at trial.

To accept the Appellant Holland's line of reasoning would have created a somewhat insolvable quandary for the Employer/Carrier when there is: (1) an accepted claim; (2) giving rise to an election of remedies defense; and (3) benefits have been paid in excess of 150 days; yet (4) no Form 50 hearing is pending – or, as here – the Claimant/Appellant chooses not to go forward with a requested Form 50 hearing. Regardless, this procedural conundrum does not stand for the premise that an Employer/Carrier has waived an election of remedies defense because the Workers'

Compensation Act, and accompanying regulations, did not previously expressly provide another vehicle for bringing the issue in front of the Commission.

Did the Circuit Court err in failing to deny Carrier/Employer(s) relief due to *laches*? (Claimant's/Appellant's Appeal Issue No. V).

Laches is an affirmative defense available in workers' compensation claims. See *Richey v. Dickinson*, 359 S.C. 609, 598 S.E.2d 307 (Ct. App. 2004). "*Laches* is neglect for an unreasonable and unexplained length of time, under circumstances affording opportunity for diligence, to do what in law should have been done." *Muir v. C.R. Bard, Inc.*, 336 S.C. 266, 296, 519 S.E.2d 583, 598 (Ct. App. 1999) (citations omitted). Under the doctrine of *laches*, if a party who knows his rights does not timely assert them, and by his delay, causes another party to incur expenses or otherwise detrimentally change his position, then equity steps in and refuses to enforce those rights. *Id.* at 296, 519 S.E.2d at 599. The party asserting *laches* has the burden of showing negligence, the opportunity to act sooner, and material prejudice. *Id.* at 297, 519 S.E.2d at 599. The party asserting *laches* must show prejudice to their defense of the case, or that they have incurred expenses or otherwise detrimentally changed their position in the case due to the *laches* of the opposing party in not acting sooner.

Laches is inapplicable to the case at bar to block the defense of election of remedies. First, the burden of proving *laches* is on the party raising it, here the Claimant/Appellant. The issue of election of remedies is prefaced upon the Appellant Holland's failure to comply with the express notification requirement dictated by S.C.

Code Ann. §42-1-560 (for simultaneously pursuing a workers' compensation claim and a third party civil action for the same accident). It is undisputed that the Claimant filed a third party civil action in October of 2008, but did not file and serve his S-2 notification, per §42-1-560, until several months later (May of 2009).

Essentially, the affirmative defense of election of remedies was a complete and viable defense at 31 days after the filing of the third party action (with no notice having been provided). Defendants/Respondents were not even aware of the viability of this defense, election of remedies, until receipt of the S-2 notification several months later – or at the earliest upon information and belief that a third party action had been filed in this case (which came in approximately March of 2009). Defendants assert that no evidence in the record will support a finding that the Claimant's failure to more timely serve the S-2 notification emanated from or came about through actions, omission or representation made by the Employer/Carrier to the Claimant which may have caused him to file and serve his S-2 after the time period permitted by the statute.

Laches is an affirmative equitable defense. Even to the degree that it could be appropriate in this instance, the Claimant would have to show his failure to file the S-2 notification within 30 days of his civil action was based on some inexcusable neglect of the Defendants, upon which the Claimant/Appellant relied – to his detriment – in failing to act sooner. That is, not having more timely filed the S-2. Again, under the facts of this case, this cannot be demonstrated, as the Defendants did not even become aware of

the third party actions' filing until several months after it took place. Furthermore, South Carolina Courts have held, "previously [] that a claimant had elected a remedy, thus forgoing workers' compensation benefits, by settling a third-party claim without complying with the notice requirements of § 42-1-560, even though the carrier had **actual knowledge** of the third-party suit." (*Callahan v. Beaufort Cnty. Sch. Dist.*, 375 S.C. 92, 651 S.E.2d 311 (2007) at Footnote 2) (internal citations omitted) (emphasis added).

Lastly, the Claimant/Appellant asserts that he would have been able to 'cure' the defective notification, pursuant to *Callahan*, if it had been known to him earlier. First, the Claimant knew of the election of remedies defense at least three weeks prior to the running of the statute of limitations. Furthermore, nothing in the Act or reported opinion places an onus on the Defendants to raise defenses to a claim in the most convenient manner available to an opposing party for the purpose of circumventing such a defense.

Clearly, *Callahan* does not necessarily stand for the premise that an injured worker can dismiss his third party action, then re-file and continue to seek benefits in workers' compensation and tort through §42-1-560. To the contrary, the *Callahan* court noted that the Claimant could continue to seek workers' compensation benefits based on the voluntary dismissal of the third party action – but specifically noted that, "[a]lthough it is unclear from the record whether Claimant re-filed the third-party action, the Court was made aware at oral argument that Claimant later re-filed the third-party action

against Tech Clean. **We offer no opinion on the efficacy of this re-filing.**" (*Callahan*, at Footnote No. 1) (emphasis supplied).

Did the Circuit Court err in failing to deny Carrier/Employer(s) relief due to equitable estoppel? (Claimant's/Appellant's Appeal Issue No. VI).

The doctrine of equitable estoppel may be enforced in a court of law as well as in equity matters. *Janasik v. Fairway Oaks Villas Horizontal Prop. Regime*, 307 S.C. 339, 344, 415 S.E.2d 384, 387 (1992). Often confused with waiver, equitable estoppel focuses on a party's detrimental reliance on another party's conduct while a waiver analysis focuses on a party's "unequivocal intent to relinquish a known right." 7 *S.C. Jur. Estoppel and Waiver* § 17 (1991). South Carolina Courts have acknowledged that "the distinction between waiver and estoppel is close, and sometimes the doctrines merge into each other with almost imperceptible gradations." *Parker*, 313 S.C. at 487, 443 S.E.2d at 391 (quoting *Janasik*, 307 S.C. at 344, 415 S.E.2d at 388).

Given their derivation from the legal doctrine of waiver, the doctrines of *laches* and equitable estoppel may be similarly indistinct at times. For example, one who delays unreasonably could be said to be estopped from asserting a claim if another has relied on that delay to his detriment. See 7 *S.C. Jur. Estoppel and Waiver* § 28. Thus, it is possible to assert only one of these equitable defenses (estoppels or *laches*) - yet have successfully pled both. (See Analysis by *Strickland v. Strickland*, 375 S.C. 76, 85-86, 650 S.E.2d 465, 470 - 471 (S.C.2007)).

For the same reasons outlined above under the argument sections of waiver and *laches* the Respondents/Defendants assert there is no basis for estopping them from raising the defense of election of remedies in this claim. There were no actions, or omission made by the Defendants in this case which created the circumstances that gave rise to the election of remedies defense. Furthermore, the Claimant/Appellant did not rely on any representations of the Defendants in failing to timely file or properly serve notice under S.C. Code Ann. §42-1-560. This defense become viable 31 days after the filing of the third party action, and the Claimant/Appellant failed to provide timely notice under the statute for *many* months before the Respondent Employer/Carrier were even aware of the substantiation of such a defense – which arose solely from the actions/omissions of the Appellant. Therefore, no basis exists for the Appellant's estoppel argument.

ADDING A SECOND DEFENDANT EMPLOYER (EQUITABLE ESTOPPEL)

From the date of accident, June 1, 2006, this had remained an accepted claim for benefits. The Defendant Employer has been J.C. Witherspoon, Jr. Inc., and its Carrier, Capital City Insurance Co., have admitted liability for this claim and been paying benefits from the date of the accident forward – it would seem peculiar indeed that the Respondents (as alleged) would have somehow participated in bad faith deceitful behavior in order to accept liability as the employer/carrier wherein such liability did not lie. Notably, since Capital City Insurance is the carrier for both defendant employers, the

benefit to the Carrier of concealing the true employer (on an admitted claim) seems negligible at best. On September 29, 2009, per the request of the parties to the workers' compensation action, A&K Mulch, LLC, which is also covered for workers compensation by Capital City Insurance, was added as a second defendant employer to this claim. Notably, A&K Mulch was not substituted for J.C. Witherspoon, but only added as a Defendant Employer. To date, and for the four years prior to the election of remedies hearing from which this appeal emanates, Capital City was providing workers' compensation benefits in this case.

To the degree that the Claimant may argue that adding a second Defendant Employer would restart, toll, or excuse a tardy filing of the Form S-2 notification required under §42-1-560, the Defendants/Respondents would argue as follows. First, as to J.C. Witherspoon, through Capital City Insurance, timely notice of the October 2008 third party action was not served via an S-2 until May of 2009. There is no legal basis for arguing that the addition of another party defendant to the workers' compensation claim would somehow negate the express notification requirements of S.C. Code Ann. §42-1-560. Furthermore, if this were possible, simply adding a potential party defendant (after the time period for the S-2 had run) could be used to abrogate the notification requirement of the statute entirely.

J.C. Witherspoon was a known Defendant in the workers' compensation claim that had already accepted liability for this accident through its policy with Capital City

Ins. for over two years at the time of the filing of the third party action. Therefore, the addition of another party defendant would not serve to negate an otherwise viable election of remedies defense.

As to A&K Mulch, LLC, notably, this entity was only added as a party defendant in the case. A&K Mulch was never substituted for J.C. Witherspoon, nor was A&K Mulch adjudicated or found to be the sole employer for this action. Furthermore, because A&K Mulch is owned by J.C. Witherspoon and the two are similarly intertwined companies with the same workers' compensation insurance carrier, the Defendants did not object to adding A&K Mulch as a party Defendant. Especially so in light of the fact that J.C. Witherspoon, and its Carrier, had already admitted this accident and been providing benefits for over three years by the date of the Commission Order adding A&K Mulch as a defendant employer. Of note, by the time the Claimant moved to add A&K Mulch as a party defendant in 2009, the two year statute of limitations for filing the action against A&K Mulch would have run. (S.C. Code Ann. 42-15-40).

Moreover, as to A&K Mulch, in spite of any of these issues, South Carolina Courts have interpreted the 30 day notification requirements of §42-1-560 to the employer, by the Claimant, to be binding on the Claimant **whether he is bringing the third party action simultaneously with or even prior to the pursuit of the workers' compensation claim**.

> We therefore hold that, irrespective of whether an employee pursues a third-party action either before or simultaneously with filing a workers'

> compensation claim, the employee, to preserve his or her claim to workers' compensation, must provide the notice required by Section 42-1-560(b).
>
> *Hudson v. Townsend Saw Chain Co.*, 296 S.C. 17, 20, 370 S.E.2d 104, __ (Ct. App. 1998).

That is, in the instant case, the Claimant/Appellant still had the same notice obligations to A&K Mulch, LLC under §42-1-560 (even if they were the proper employer) within 30 days of the third party action being filed. Therefore, the Claimant's notice of the third party action was defective as to either A&K. Mulch, LLC or J.C. Witherspoon, Jr., Inc. as well as Capital City Insurance as the respective carrier for either of the Defendant employers - despite the time frame of the second employer being added.

CONCLUSION

In conclusion, the Defendants/Respondents assert that the arguments raised by the Claimant/Appellant are either: inapplicable; not preserved for review; not factually supportable under the evidence of this case; nor legally tenable to bar the defense of election of remedies in this case.

Moreover, the findings of the Hearing Commissioner, as unanimously affirmed by the Appellate Panel, and fully affirmed by the Circuit Court, are both supported by the substantial evidence in this case, and not otherwise affected by any legal error. Therefore, the Order of the Circuit Court should be affirmed in full.

Respectfully submitted,

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September 11, 2013

THE STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

APPEAL FROM CLARENDON COUNTY
Court of Common Pleas

The Honorable R. Ferrell Cothran, Jr., Circuit Court Judge

Case No. 2012-CP-14-00024

Andreal Holland,.....Appellant

v.

J.C. Witherspoon, Jr., Inc., A.K. Mulch, LLC, and
Capital City Insurance Company,.....Respondent.

CERTIFICATE OF COUNSEL

The undersigned hereby certifies that this Final Brief of Respondents J.C. Witherspoon, Jr., Inc., A.K. Mulch, LLC, and Capital City Insurance Company is in compliance with the requirements of Rule 211(b), SCACR.

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PROOF OF SERVICE

I certify that I have served the **Final Brief of Respondent** and Certificate of Counsel on Andreal Holland by depositing a copy of it via hand delivery on **September 11, 2013,** addressed to his attorney of record, Thomas K. Fowler, Jr., Peake & Fowler Law Firm, P.A., 9357 Two Notch Road, Suite 103, Columbia, SC 29224.

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