

State of South Carolina
Workers' Compensation Commission

APPELLATE PANEL DECISION AND ORDER

COMMISSION PANEL: The Honorable Cynthia C. Dooley; The Honorable Michael Campbell; and The Honorable Gabe Coggiola.

SCWCC File No.: 2024350

LenJarius Holmes, Deceased, et al.,

Claimants,

v.

Lawson Trucking, LLC,

Employer,

and

Berkshire Hathaway Direct Insurance,

Carrier,

Defendants.

RECEIVED

Sep 29 2025

SC Court of Appeals

AFFIRMED

Hearing held in Richland County, South Carolina,
on July 14, 2025

Per notice timely and properly served upon all Parties of Interest.

Appearances: Tyler Bathrick, Esq., appeared on behalf of Claimants/1st
Appellants.

George D. Gallagher, Esq. and M. Stephen Stuble, Esq.,
appeared on behalf of Defendants/2nd Appellants.

Court Reporter: Amber Scarborough, 1230 Richland St, Columbia, SC 29201,
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Filed:

August 29, 2025

I. STATEMENT OF THE CASE

Single Commissioner

On December 16, 2020, LenJarius Holmes was operating a tractor trailer owned by Lawson Trucking, LLC, with a dump trailer loaded with sand during the course and scope of his employment with Lawson Trucking, LLC, when Mr. Holmes was involved in an unwitnessed single vehicle accident that ultimately resulted in his death. Mr. Holmes' antemortem blood tested positive for 9.1 nanograms per milliliter of the psychoactive ingredient of marijuana. During a post-accident search of the truck cab, Employer discovered a partially smoked cigar allegedly containing marijuana and Mr. Holmes' book bag that contained another cigar (allegedly containing marijuana), synthetic urine, and spray to eliminate odor. The cigars were destroyed before they could be tested for marijuana.

A hearing was held before a Single Commissioner on November 29, 2023, to determine issues set forth on Claimants' Form 50. At the call of the hearing, Claimants sought a finding of compensability and benefits under the South Carolina Workers' Compensation Act. Specifically, payment of medical expenses and compensation for the death of LenJarius Holmes. Claimants maintained Defendants waived their intoxication defense when they failed to file a Form 53 in a timely manner. Claimants also maintained that Defendants could not meet their burden of proof regarding whether Mr. Holmes was intoxicated and, if intoxicated, whether said intoxication was the proximate cause of his accident. Claimants relied on the medical/expert opinions of Sabrina Gast, Erin Presnell, Jolene Bierly and Matthew Lee.

Defendants relied on Section 42-9-260 of the South Carolina Code and denied the claim alleging Mr. Holmes' accident and death were occasioned by Mr. Holmes intoxication on marijuana. Defendants maintained that Mr. Holmes was intoxicated and that Mr. Holmes' intoxication was a contributing factor to the accident. Defendants relied on the expert medical opinions of Dr. Timothy Osbon and Dr. Ira Gordon Early. Regarding whether intoxication was the cause of the accident,

Defendants maintained, "There is nothing that says that this [intoxication] has to be the sole cause, the exclusive cause, or that the intoxication - - or that the accident would not have happened but for the intoxication. There is no law that says that." (HT p. 21, lines 11-16). Defense counsel went on to state, "I will have to admit that I cannot meet a but-for standard. I cannot prove - - and my experts did even attempt to opine that this accident would not have occurred but - for his intoxication, but they did opine that this was clearly a cause." (HT p. 22, lines 5-10). Defendants went on to maintain that the definition of proximate cause in the workers compensation setting is different than the definition of proximate cause in negligence/tort.

Defendants maintained the standard in the workers compensation setting is contributing proximate cause, not the proximate cause.

The Single Commissioner determined:

[C]laimant is entitled to benefits per Section 42-9-290 of the South Carolina Code. Specifically, five hundred weeks of compensation and burial expenses not exceeding twelve thousand dollars. Additionally, per Section 42-15-60, Defendants are responsible for causally related medical treatment provided by Piedmont Medical Center and Piedmont EMS.

(Single Commissioner's Decision and Order filed on January 17, 2025, p. 93).

Appellate Panel

This matter is now before the South Carolina Workers' Compensation Commission's Appellate Panel pursuant to issues raised on cross-appeal by the parties. Within the statutory period, Claimants/1st Appellants and Defendants/2nd Appellants each filed a Form 30, Request for Commission Review. Accordingly, the parties presented for oral arguments before the Appellate Panel on July 14, 2025.

II. SINGLE COMMISSIONER FINDINGS OF FACT AND CONCLUSIONS OF LAW

FINDINGS OF FACT

1. On December 16, 2020, LenJarius Holmes (Decedent) died as a result of injuries sustained in a motor vehicle accident (MVA) occurring in the course of and within the scope of his employment with Lawson Trucking, LLC.
2. The parties stipulate that Decedent's accident occurred during the course and scope of his employment with Lawson Trucking, LLC. (Hr. Tr. p 26: 19-24).
3. Decedent's parents, Vanessa Holmes and Jesse Gladney (Claimants), brought this claim. Claimants seek payment of all causally related medical bills, a dependency determination and death benefits.
4. On February 6, 2022, Claimants' counsel filed with the Commission a Form 52, Claimants' Notice of Claim and/or Request for Hearing, Death Case. As a result of accidental injury and death. Claimants sought compensation pursuant to S.C. Code Ann. § 42-9-290.
5. Claimants' counsel served a copy of the Form 52 on the carrier of record, Berkshire Hathaway Direct Insurance Company (Carrier). Claimants' counsel did not serve Defense counsel with a copy of the form as they were not yet noted in e-Case as attorneys of record.
6. On February 15, 2022, Defendants filed with the Commission a Form 12A, First Report of Injury or Illness.
7. On February 15, 2022, the Commission noticed Claimants and advised that their filed Form 52 was deficient due to improper service to Defendants, pursuant to S.C. Code Ann. Regs. 67-210 and 211.
8. On March 9, 2022, Defendants added Defense counsel to e-Case.
9. On March 14, 2022, Claimants' counsel refiled with the Commission the Form 52 to correct errors in their service of process to Carrier.

10. On March 21, 2022, the Commission noticed Claimants' counsel and Defense counsel that information was missing from the file that would assist the Commission with evaluating the issues of this claim.
11. On April 20, 2022, e-Case reflected that the Form 53 had not been received to date by the Commission.
12. On April 20, 2022, the Commission noticed the parties of mandated mediation.
13. On March 21, 2023, Defense counsel inquired in an email to the Commission (and copied Claimants' counsel) about the about the manner in which Claimants' counsel served their Form 52 on Defendants. (Claimants' APA 7 p. 188).
14. On March 24, 2023, Defense counsel filed a Form 53, Employer's Answer to Request for Hearing, Death Case. Defendants filed this form nearly one year past the filing deadline.
15. Defendants seek to raise an affirmative defense, pursuant to S.C. Code Ann. § 42-9-60, by alleging Decedent was intoxicated at the time of his injury and death on December 16, 2020.
16. Claimants' counsel asserts that Defendants' Form 53 was not timely filed with the Commission. Accordingly, Claimants maintain Defendants waived their right to raise affirmative defenses. In the present matter, the affirmative defense of intoxication.
17. Defense counsel asserts that Carrier did not forward the Form 52 to their attention. Defense counsel further asserts, Claimants' counsel knew, or should have known, that Defendants had retained counsel but Claimants still failed to serve pleadings on Defense counsel. Defendants assert the timeframe with which their Form 53 was filed did not prejudice Claimants because Claimants have had ample time to respond and/or rebut Defendants asserted defenses.
18. Claimants' assert the Form 52 was served on the appropriate party on record at that time, pursuant to S.C. Code Ann. Regs. 67-210. Potential prejudice to Claimants is not the issue at bar;

rather, it is the time allotted for filing pleadings under the Act.

19. The evidence in the record indicates Defense counsel noticed Claimants' counsel of their representation on December 23, 2021. (Defendants' Exh. 13 p. 257). Defense counsel contacted Claimants' counsel on four occasions seeking a status update on the pending workers' compensation matter, prior to Claimants filing their claim. (Defendants' Exh. 13 p. 258-259). Claimants' counsel admitted during the hearing to receiving correspondence from Defense counsel before filing the claim. (Hr. Tr. p. 8: 13-15).

20. The evidence in the record further indicates Carrier failed to notify Defense counsel of Claimants' filed claim. Defense counsel became attorney of record in e-Case in the period following Claimants' initial filing. The Commission requested additional information for this claim's file from the legal counsel for both parties. The parties were later noticed through e-Case that the Commission had no record of receiving Defendants' Form 53. Following Defendants continued failure to respond to Claimants' Form 52, the Commission initiated the mediation process. The parties concluded their mediation nearly one year later. It wasn't until then that Defense counsel inquired about the manner in which Claimants' counsel served their Form 52 on Defendants.

21. I find that Defense counsel initially made a good faith effort to communicate with Claimants' counsel about the status of the pending workers' compensation claim. Despite Defense counsel's efforts and another unfortunate event, they were not initially noticed of Claimants' service of process. However, Defense counsel knew (or should have known) a claim had been filed and a response likely due when they were sent a letter from the Commission on March 21, 2022, about the claim; or when e-Case reflected on April 20, 2022, that the Form 53 had not been received by the Commission; or when (on that same day) the Commission initiated the mediation process between the parties. Nevertheless, Defendants did not attempt to protect their rights for nearly a year.

22. One cannot sit on their rights, with full access to the facts of a matter, without taking timely steps under the law to protect their interests.

23. Accordingly, I find Defendants Form 53 to be untimely filed.

24. I further find that because Defendants Form 53 was not timely filed, they have waived their right to raise affirmative defenses (including the intoxication defense under 42-9-60) to this claim.

25. However, even if I were to find that Defendants timely filed their Form 53 and had not waived their right to raise affirmative defenses to this claim, then I would further find:

26. The parties stipulate that Decedent was a habitual user of marijuana. (Hr. Tr. p. 72: 11-16).

27. Decedent's antemortem toxicology report found 9.1 ng/ml of delta-9 Tetrahydrocannabinol (THC); 74 ng/ml of delta-9 carboxy THC 74; and 3 ng/ml of 11-hydroxy delta-9 in his blood.

28. Decedent was stopped at a police checkpoint in October 2020, two months prior to his fatal accident. The checkpoint officer smelled the odor of marijuana emanating from the cab of Decedent's semi-trailer truck while speaking with him. Decedent admitted to smoking marijuana earlier in the day. The officer proceeded to search Decedent's person and vehicle and subsequently found two "blunts," one unsmoked and the other half-smoked. Decedent was arrested for possession of marijuana. The officer allowed Decedent to call his boss and company owner, Matthew Lawson, to pick up the truck. (Claimants' APA 11 p. 260).

29. During the hearing, Mr. Lawson testified he did not know or inquire into the reason for Decedent's arrest, even though this event required Decedent to stop working and leave costly company property on the side of the road unmanned. Mr. Lawson asserts he later learned (though he did not specify how or when) Decedent was in possession of marijuana at the time of his arrest.

30. Mr. Lawson testified that after Decedent called him to retrieve the truck from the checkpoint, it took him around an hour to get to the site. He further testified that he was familiar with the odor of

marijuana and did not smell it upon entering the cab of Decedent's truck.

31. Mr. Lawson testified that after Decedent's arrest, he allowed him to return to work without any further query or drug testing because he was a "good employee". After the arrest, Mr. Lawson continued to let Mr. Holmes drive his truck and felt that Mr. Holmes (behind the wheel of a truck) was not a danger to the public. Mr. Lawson admits he should have informed the appropriate governing authority about the drug-related violation of Decedent's commercial driver's license.

32. Mr. Lawson testified he arrived on scene about 40 minutes after the accident occurred. He testified that it was a misty day and the ground was wet. He observed one hundred yards of tire tracks down the side of the roadway ending at a driveway/culvert near the cab of the truck. He further testified he was an [unstated distance] from the vehicle when he observed that one of the doors was "still open". He maintains he did not smell the odor of marijuana at that time. He testified that while still on scene, the salvage company asked him to go to the tow yard to inventory the wrecked truck. He asserts it took him 20-25 minutes to get from the accident scene to the tow yard. The record does not indicate how long Mr. Lawson was at the accident scene before leaving for the tow yard.

33. Mr. Lawson testified that he assessed the cab of the wrecked truck at the tow yard and smelled an odor of marijuana. He further testified he observed what appeared to be a burned "joint" or "blunt" on the floor. Mr. Lawson testified that 80% of the cigar/joint was remaining. The record does not indicate whether Mr. Lawson's observations occurred from inside or outside of the cab. Mr. Lawson also found blunt spray, U-Pass and an unlit blunt/cigar in Mr. Lawson's backpack. Mr. Lawson threw out the burned joint/cigar and unburned joint/cigar before they could be tested.

34. The evidence in the record indicates one partially burned "blunt" or [cigar] was found in or around the vehicle following both the arrest and accident. Mr. Lawson testified he did not smell marijuana in the cab in the hour following the arrest; an arrest promulgated by the odor of marijuana

coming from the cab. He further testified that he did smell marijuana coming from the truck over an hour after the accident; a truck that in the interim had been (largely) left open to the elements and towed to another location.

35. I find Mr. Lawson's testimony lacks credibility. When faced with the scrutiny of possibly allowing a "habitual" marijuana user to continue operating his semi-tractor trailers, Mr. Lawson maintains he did not smell marijuana in the cab following Decedent's arrest or even inquire why his employee was taken into police custody during working hours. Presently, where questions still abound as to the cause of the tragic event, including whether Mr. Lawson's own truck played a role (i.e. a deflated tire), he asserts he did indeed smell marijuana coming from the cab when he visited the tow yard following the accident.

36. Additionally, Mr. Lawson testified that based on pre-trip and post trips the truck involved in the accident was operating appropriately. However, during his deposition Mr. Lawson testified he did not have pre-trip inspections. He then testified that he assumed pre-trips were being performed.

37. Mr. Lawson agreed that the accident could have been caused by an animal entering the roadway, another vehicle swerving into Mr. Holme's lane of travel, distraction from a cellular phone, a blown tire, excessive speed, and/or Mr. Holmes reaching for something in the cab of the truck. Mr. Lawson agreed that he did not know why the accident occurred.

38. Post-accident highway patrol reports note a deflated right outer rear tire.

39. Dr. Osbon, an expert witness for Defendants, testified that Decedent was acutely intoxicated with marijuana when the MVA occurred. Dr. Osbon stated he relied on his education, training, experience in emergency medicine, and the National Highway Transportation Safety Administration's (NHTSA's) [2017] report to formulate his opinion that the 9.1 nanograms per milliliter of delta-9 THC present in Decedent's blood post-accident was sufficient for an "emergency medical physician" to find

him impaired. Dr. Osbon opined that marijuana intoxication was a major contributing factor and proximate cause of the accident. (Claimants' APA 13).

40. Dr. Osbon is a friend of Defense Counsel Stephen Stubby by virtue of marriage to Stephen Stubby's first cousin. (Deposition of Dr. Osbon p. 125, lines 12-25; p. 126, lines 1-2).

41. Dr. Osbon testified that he was not testifying as an expert in the fields of accident reconstruction, human factors, and/or toxicology. (Deposition of Dr. Osbon p. 26, lines 9-18).

42. Dr. Osbon admitted during his testimony that he had not previously served as an expert witness to specifically opine on the effects of marijuana and driving, or how marijuana affects driving. Dr. Osbon further admitted he did not "know the specifics" of how Decedent's accident occurred and could not exclude other "lane departure" factors such as an animal in the roadway or cell phone distraction. Dr. Osbon admitted to not knowing why Decedent left the roadway. (Claimants' APA 13).

43. Dr. Osbon did not know Mr. Holme's tolerance for marijuana. (Claimant's APA 13).

44. Dr. Osbon did not follow up to determine if Mr. Holmes' vehicle was functioning properly. He testified that knowing if the vehicle was functioning properly was not important for what he was asked to do by Defendants. He indicated that know whether the vehicle was functioning correctly would be informative but would not change his opinions. (Claimant's APA 13).

45. In his medical report, Dr. Osbon referenced NHTSA's 2017 report to Congress and quoted, in part: "THC has been shown to bind with receptors in the brain (and to a lesser extent in other parts of the body) and it is likely that this process underlies some of the psychoactive (behavioral and cognitive) effects of marijuana use". (Defendants' APA 10 p. 232).

46. Dr. Osbon concluded his report by opining: "The critical abilities necessary for safe driving required a clear sensorium and full, unimpaired cognitive abilities. More likely than not, [Decedent's] acute marijuana intoxication was a major contributor to the MVC". (Defendants' APA 10 p. 232).

47. Dr. Osbon defined intoxication as compromised ability to react in the same way you would at your neurological baseline in the absence of any illicit substance, to coordinate movements, to make decisions, to recall things in terms of memory to make decisions, and any execution of something that requires a motor skill to include things like driving or reacting to the conditions for driving. (Claimants' APA 13).

48. Dr. Gordon Early, an expert witness for Defendants, testified that Decedent was intoxicated at the time of the accident based on the half-life of 9-delta THC measured against the metabolic levels for that drug found in Decedent's system antemortem. Despite his conclusion, Dr. Early stopped short of opining that Decedent's alleged intoxication was the proximate cause of the accident. (Claimants' APA 14).

49. Dr. Early testified he relied on Decedent's toxicology report and [existing] medical literature to formulate his opinion. (Claimants' APA 14).

50. Dr. Early testified over the course of his 30-year career in occupational medicine and medical toxicology that he has perhaps observed ten people whom he believed were intoxicated with marijuana. He further testified he has not done any scientific research regarding the effects of marijuana on the human system. Dr. Early testified he has not performed any studies regarding the effects of marijuana on the human system. He testified his medical practice does not regularly involve the effects of marijuana on the human system. (Claimants' APA 14).

51. Dr. Early admitted during his testimony that he had not previously been qualified as an expert witness "with regard to the effects of marijuana on the human system". (Claimants' APA 14).

52. Dr. Early is not an accident reconstruction and he did not testify as an accident reconstructionist. (Claimants' APA 14).

53. Dr. Early initially defined intoxication as when a toxin has exerted an effect upon a human

that has deterred their performance ability. (Deposition of Dr. Early p. 11, lines 10-17). Later, Dr. Early reviewed the legal definition of marijuana in the workers' compensation setting and testified that the workers' compensation definition comported with his understanding of intoxication in the medical sense. (Deposition of Dr. Early p. 80, lines 4-17).

54. Dr. Early testified that Mr. Holmes was intoxicated at the time of the accident. He used the half-life of marijuana in the blood to determine when Mr. Holmes used marijuana and how much marijuana was in his system at the time of the accident. However, Dr. Early could not provide a scientific/mathematical formula for this calculation. (Claimants' APA 14).

55. Dr. Early admitted other factors could affect an individual's level of marijuana intoxication, such as: chronic usage, weight, drug potency and the amount of the drug ingested. Dr. Early did not know Mr. Holmes tolerance to marijuana. He testified that tolerant individuals have less impairment and tend to metabolize marijuana more slowly. He also testified chronic users release marijuana from storage sites in their body and that such releases could affect serum levels. (Claimants' APA 14).

56. Dr. Early further admitted that aside from Decedent's weight, he did not know the potency, frequency or amount of Decedent's marijuana intake. He testified that potency and amount ingested both matter when determining intoxication. (Claimants' APA 14).

57. In his medical report, Dr. Early opined to a reasonable degree of medical certainty, Decedent was intoxicated at the time of the accident. He referenced the National Institute of Drug Abuse's (NIDA's) report on studies that discuss marijuana and its metabolites effect on a person's judgment. Specifically, studies that support a finding that marijuana use results in impaired skills required for safe driving. (Defendants' APA 11 p. 235).

58. Dr. Early concluded his report by opining intoxication was more likely than not a cause of Decedent's accident. He further acknowledged that other (non-intoxication factors) could have

contributed to the accident. He did not have enough evidence to opine that marijuana intoxication was the proximate cause of the accident. (Defendants' APA 11 p. 235).

59. Dr. Sabrina Gast, the presiding coroner, opined that Decedent died from cerebral disruption due to a motor vehicle accident. (Claimants' APA p. 72). She further opined to a reasonable degree of medical certainty that Decedent died as a "result of cerebral disruption due to blunt head trauma sustained in the December 16, 2020" accident. (Claimants' APA 2 p. 72).

60. Dr. S. Erin Presnell, the presiding forensic pathologist, performed Decedent's autopsy. She opined to a reasonable degree of medical certainty that "[Decedent] died as the result of cerebral disruption due to blunt head trauma sustained in the December 16, 2020 accident". She found that she "is not able to predict the antemortem effect of a THC concentration of 9.1 ng/ml on the Decedent's mind or body at the time of the crash". (Claimants' APA 3 p. 88).

61. Dr. Jolene Bierly, an independent forensic toxicologist, stated she performed a "comprehensive toxicological analysis of antemortem blood referenced in S. Erin Presnell's 'Final Autopsy Report' of [Decedent]". (Claimants' APA p. 113).

62. Dr. Bierly opined: "[T]o determine if Decedent was intoxicated (impaired in his faculties to the extent that he was incapable of carrying on his accustomed work without danger to himself) on the date of his December 16, 2020 accident, [she] would need to know how often and how much THC [Decedent] regularly used prior to said accident in order to determine how tolerant [Decedent] was to the effects of THC. Observations of signs and symptoms of marijuana use and/or marijuana impairment around the time of the accident would also be beneficial". (Claimants' APA 4 p. 113).

63. Dr. Bierly further opined that "without knowing [Decedent's] tolerance levels with regards to THC, I cannot opine, more likely than not, that [Decedent] was intoxicated (impaired in his faculties to the extent that he was incapable of carrying on his accustomed work without danger to himself) on

December 16, 2020, the date of his accident". (Claimants' APA 4 p. 114).

64. Dr. Matthew Lee, an expert retained by Claimants, stated his "professional experience as a physician, pharmacist, pharmacologist and toxicologist [make him] qualified to opine on the pharmacology and pharmacodynamics of the active ingredient in marijuana, tetrahydrocannabinol and its metabolites". (Claimants' APA 5 p. 122).

65. Dr. Lee stated he formulated his conclusions after reviewing: Decedent's autopsy, coroner's and toxicology reports; in addition to Dr. Bierly's, Dr. Gast's and Dr. Presnell's questionnaires. (Claimants' APA 5 p. 122).

66. Accordingly, Dr. Lee opined: "Intoxication from THC cannot be made from blood levels alone, behavioral observations would also be necessary to make a determination of intoxication". (Claimants' APA 5 p. 122).

67. Dr. Lee concluded his report by stating: "Based on the information available, no determination of intoxication can be made for [Decedent] on December 16, 2020." (Claimants' APA 5 p. 123).

68. The NHTSA, in its report referenced *supra*, made the following statements of note regarding marijuana-impaired skills:

- i. "Less is known about [the impairing effects of marijuana use on driving-related skills] due in part to the typical differences in research methods, tasks, subjects and dosing that are used." (Claimants' APA 6 p. 144).
- ii. "While fewer studies have examined the relationship between THC blood levels and degree of impairment, in those studies that have been conducted, the consistent finding is that the level of THC in the blood and the degree of impairment do not appear to be closely related." (Claimants' APA 6 p. 145).
- iii. Blood Testing - Blood testing is considered the "gold standard" for testing the presence of drugs in impaired driving cases. However, . . . currently there is limited ability to relate the amount of a drug or metabolite in blood to the presence and amount of impairment." (Claimants' APA 6 p. 148).
- iv. In response to the findings of other organizations that "marijuana has been shown to affect a number of driving-related skills," including NIDA, the

the use of marijuana in combination with alcohol . . . Deficits in performance can arise from a variety of causes that include alcohol, marijuana and other drug use, distraction, drowsiness, emotional states (fear, excitement, anger), and other factors." (Claimants' APA 6 p. 150)

- vi. "Traditionally, measurement of marijuana use by drivers has involved testing biological specimens for the presence of THC (typically blood samples. . .). These toxicological tests confirm presence of THC but they do not indicate driver impairment or necessarily indicate recent marijuana use (when the THC levels are low)." (Claimants' APA 6 p. 152).

69. The evidence in the record indicates confirming marijuana intoxication while driving is not as straightforward as determining alcohol intoxication. Specifically, it is an amalgamation of factors that lead one to find a person is intoxicated with marijuana. Dr. Osbon largely based his impairment finding on the results of Decedent's blood test but failed to recognize other significant variables that could have impacted his conclusion, such as: frequency of use (i.e. tolerance), amount of intake and potency.

70. Dr. Early acknowledged other (non-intoxication factors) could have contributed to Decedent's accident and that by exploring said factors, one could "most accurately answer the adverse effects [of marijuana intoxication] on judgment, coordination and/or situational awareness". Nevertheless, he still largely based his impairment finding on the results of Decedent's blood test.

71. I find the opinions of Dr. Osbon and Dr. Early are based on speculation and conjecture and are therefore afforded less weight.

72. In accordance with current modalities for measuring driver impairment from the use of

marijuana, Dr. Presnell, Dr. Bierly and Dr. Lee all recognized that the results of Decedent's blood test was not enough information to determine whether intoxication was the cause of Decedent's accident on December 16, 2020. Accordingly, I afford their opinions greater weight.

73. I find the substantial weight of the evidence indicates Decedent's alleged marijuana intoxication was not the proximate cause of the accident on December 16, 2020.

74. I further find that the greater weight of the evidence does not establish a causal link between Decedent's alleged intoxication and the accident on December 16, 2020.

75. Therefore, I find:

- i. Defendants Form 53 to be untimely filed.
- ii. As Defendants Form 53 was not timely filed, they have waived their right to raise affirmative defenses to this claim.
- iii. Based on a preponderance of the evidence, Decedent's work-related injuries and resulting death are compensable under the Act.
- iv. Claimants are entitled to all causally related medical expenses.

76. All other issues are held in abeyance.

CONCLUSIONS OF LAW

Accordingly, as provided by §42-17-40, it is the determination and finding of this Commissioner:

1. Pursuant to §42-1-130 and §42-1-140, at the time of the accident, Lenjarius Holmes and Defendant-Employer Lawson Trucking, LLC, were covered parties under the provisions of the South Carolina Workers' Compensation Act.

2. Pursuant to §42-1-160, Lenjarius Holmes sustained an injury by accident during the course and scope of his employment with Lawson Trucking, LLC that ultimately resulted in his death.

3. Regulation 67-603(B)(1) of the South Carolina Code provides that an Employer file a Form 53 and proof of service with the Commission's Judicial Department within thirty days of service of the Form 52. Regulation 67-603(C) states, "Failure to file a Form 51 or Form 53 within the period in Section B(1) shall be deemed a general denial of liability for the benefits claimed and the employer and its representative by the failure to respond within the period in section B(1) shall forfeit each special and affirmative defense allowed by the Act including the defenses available in Section 42-9-60, 42-15-20, 42-15-40, and 42-17-90 of the Act." Pursuant to Regulation 67-603 Defendants failed to file their Form 53 as required by law and have forfeited each special and affirmative defense including the defenses available in Section 42-9-60 of the South Carolina Code.

4. Section 42-9-60 of the South Carolina Act is entitled "Injury or death occasioned by intoxication....." It states, "No compensation shall be payable if the injury or death was occasioned by the intoxication of the employer or by the willful intention of the employee to injure or kill himself or another. In the even that any person claims that the provisions of this section are applicable in any case, the burden of proof shall be upon such person."

5. The Court of Appeals has defined intoxication as "a condition that results from the use of a stimulant, which renders an employee impaired in his or her faculties to the extent that the employee is incapable of carrying on the accustomed work without danger to the employee." (See Jones v. Harold Arnold's Sentry Buick Pontiac, 376 S.C 375, 656 S.E.2d 772 (Ct. App. 2008).

6. Our Supreme Court has interpreted Section 42-9-260 of the South Carolina Code as barring compensation when the employee's intoxication is the proximate cause of the injury. (See Baggot v. Southern Music, 330 S.C. 1, 496 S.E.2d 852 (1998) and Kinsey v. Champion American Service Center, 268 S.C. 177, 232 S.E.2d 720 (1977)).

7. Pursuant to Section 42-9-60 of the South Carolina Code and relevant workers' compensation case law on intoxication Defendants have been unable to meet their burden of proving that LenJarius Holmes was intoxicated and that said intoxication was the proximate cause of his accident.
8. Under §42-15-20 proper notice of the injury was given.
9. Under §42-15-40 the claim was filed in a timely manner.
10. Under §42-15-60 Claimants are entitled reimbursement/payment of causally related medical expenses following the accident.
11. Section 42-9-290 of the South Carolina Code addresses the amount and types of compensation for death of an employee due to accident. A preponderance of the evidence indicates Claimants are entitled to benefits under 42-9-290 of the South Carolina Code.

III. ISSUES ON APPEAL

Claimants/1st Appellants

1. Did the Single Commissioner err in allowing Dr(s) Osbon and Early to testify regarding Mr. Holmes' alleged marijuana intoxication?
2. Did the Single Commissioner err in allowing Dr(s) Osbon and Early to testify regarding the effects of marijuana on the human system when they have no expertise in said field?
3. Did the Single Commissioner err in allowing Dr. Early to support his opinion with hearsay testimony?
4. Did the Single Commissioner err in permitting pages 276-286 end page 296 of Defendants APA/Brief when said pages are hearsay and outside the field of expertise of trooper KC Warlick?

Defendants/2nd Appellants

1. Did the Hearing Commissioner err as a matter of law in finding that Defendants waived their

affirmative intoxication defense under S.C. Code Section 42-9-60?

2. Did the Hearing Commissioner err in all predicate findings of fact upon which he based this erroneous legal conclusion?
3. Did the Hearing Commissioner err as a matter of fact and law in failing to find that Claimants were not surprised or prejudiced by Defendants purported untimely filing of its Form 53, particularly when Claimants exercised their right to cross-examine all defense experts and procured their own expert evidence to counter Defendants' affirmative intoxication defense?
4. Did the Hearing Commissioner apply an erroneous legal standard to the affirmative defense waiver issue when WCC R. 67- 610 provides that leave shall be "freely given" to assert new claims and defenses when justice so requires and no party is prejudiced?
5. Did the Hearing Commissioner err in finding that Defendants failed to act diligently to protect their rights when such finding is unsupported by the Record and Claimants knew, or should have known, that Defendants were represented by counsel and yet failed to serve or even send a courtesy copy of their Form 52 Request for Hearing to defense counsel?
6. Did the Hearing Commissioner err as matter of law by failing to find that Defendants' affirmative intoxication defense was properly preserved and asserted?
7. Did the Hearing Commissioner err as a matter of law by failing to set forth the legal causation standard he intended to apply to the merits of the intoxication defense despite his specific request that counsel for the parties brief that issue?
8. To the extent the Hearing Commissioner applied any discernible legal causation standard to the merits of the intoxication defense, was that standard erroneous?
9. Did the Hearing Commissioner err as a matter of fact and law in finding that Defendants failed to satisfy their burden of proving that Claimants were barred from entitlement death benefits due to

Decedent's intoxication on marijuana at the time of his accident pursuant to S.C. Code Section 42-9-60?

10. Did the Hearing Commissioner err in finding that Mr. Lawson's testimony regarding his observations at the accident scene "lacks credibility," when such testimony is corroborated by other undisputed objective evidence in the record, including, but not limited to, the S.C. Highway Patrol's accident report?
11. Did the Hearing Commissioner err in failing to find that Decedent was intoxicated on marijuana at the time of his accident, contrary to the overwhelming weight of lay and expert evidence in the Record, including but not limited to, the undisputed post-mortem toxicology reports and expert medical opinions?
12. Did the Hearing Commissioner err by impugning the credibility of defense expert Dr. Tim Osbon and by failing to grasp the limited scope and relevancy of his opinions?
13. Is the Hearing Commissioner's finding of fact #48, stating in part, "Dr. Early stopped short of opining that Decedent's alleged intoxication was the proximate cause of the accident," a misunderstanding of Dr. Early's actual testimony and opinion?
14. Is the Hearing Commissioner's finding of fact #48, stating in part, "Dr. Early stopped short of opining that Decedent's alleged intoxication was the proximate cause of the accident," based on an erroneous legal understanding of the term "proximate cause?"
15. Did the Hearing Commissioner err in finding of fact # 71 that "the opinions of Dr. Osbon and Dr. Early are based on speculation and conjecture," when such finding is based on an erroneous legal standard, misrepresent the actual opinions and testimonies of those doctors, and is otherwise contrary to the greater weight of the medical evidence as a whole?
16. Did the Hearing Commissioner err in finding of fact # 72 to the extent he finds or implies that the

17. Did the Hearing Commissioner err in failing to find that Defendants met their burden of proving a) that Decedent was intoxicated on marijuana at the time of his accident and b) that such intoxication was the "proximate cause" of the Decedent's accident and ensuing death, when the preponderance of the expert medical evidence in the Record as a whole mandates otherwise?

IV. DECISION OF THE APPELLATE PANEL

The 1st Appellants are hereinafter referred to as "Claimants." The 2nd Appellants are hereinafter referred to as "Defendants".

Pursuant to S.C. Code Ann. §42-17-50, we, the Appellate Panel, have reviewed the Decision and Order of the Single Commissioner and weighed the evidence as presented at the hearing. We have also considered all issues raised in the respective Appellant and Respondent briefs of the parties, as well as those issues raised at the Full Commission Review Hearing.

After careful review, the Appellate Panel of the South Carolina Workers' Compensation Commission, by unanimous vote, does hereby **AFFIRM** the Decision and Order of the Single Commissioner filed on January 17, 2025.

Below are set out the Findings of Fact and Conclusions of Law of the Appellate Panel as to this claim.

FINDINGS OF FACT

We affirm the above-stated findings of the Single Commissioner as to this claim.

CONCLUSIONS OF LAW

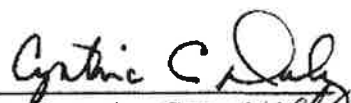
Pursuant to S.C. Code Ann. §42-17-50, we affirm the above-stated conclusions of the Single Commissioner as to this claim.

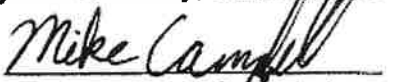
ACCORDINGLY:

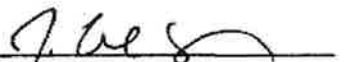
IT IS FURTHER ORDERED that Claimants are entitled to benefits per Section 42-9-290 of the South Carolina Code. Specifically, five hundred weeks of compensation and burial expenses not exceeding twelve thousand dollars. Additionally, per Section 42-15-60, Defendants are responsible for causally related medical treatment provided by Piedmont Medical Center and Piedmont EMS.

AND SO IT IS ORDERED.

_____(date)
Columbia, SC


Cynthia C. Dooley, Commissioner


Michael Campbell, Commissioner


Gabe Coggiola, Commissioner

Order Served via email:

Tyler Bathrick Stewart Law Offices, LLC tyler@stewartlawoffices.net	M. Stephen Stubley George D. Gallagher Speed, Seta, Martin, Trivett & Stubley, LLC ssubbley@speed-seta.com ggallagher@speed-seta.com
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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 August 29, 2025

LENJARIUS HOLMES, DECEASED, ET AL,
Employee,
Claimant,
vs.
LAWSON TRUCKING, LLC.,
Employer,
and
BERKSHIRE HATHAWAY DIRECT INS. CO.,
Carrier,
Defendants.

DATE OF HEARING: Hearing held in Kershaw County, South Carolina on November 29, 2023.

APPEARANCES: Claimant appeared and represented by Tyler Bathrick, Esquire of Stewart Law Offices, LLC of Rock Hill, South Carolina.

Defendants/Carrier/Employer, Lawson Trucking, LLC., and Berkshire Hathaway Direct Ins. Co. represented by George D. Gallagher, Esquire of Columbia, South Carolina.

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

COMMISSIONER: Commissioner Gene McCaskill

FILED: January 17, 2025

STIPULATIONS

1. Jurisdiction and sufficiency of the notice of the Hearing were admitted.
2. Venue for this Hearing was proper in Kershaw County, South Carolina pursuant to stipulation by the parties.
3. Dependency findings were held in abeyance.
4. On December 16, 2020 Decedent, LenJariua Holmes, sustained an injury by accident occurred during the course and scope of his employment with Lawson Trucking.
5. Decedent, LenJarius Holmes' death is directly causally related to his work accident of December 16, 2020.
5. The parties stipulated to an average weekly wage of \$1,244.94 with a corresponding compensation rate of \$830.00.

APA SUBMISSIONS

Under the Administrative Procedures Act, the following records were submitted into evidence on behalf of Claimant/Employee:

1. Piedmont Medical Center, 12/16/2020, pages 1-69;
2. Sabrina Gast, York County Coroner and CV, pages 70-81;
3. Dr. Erin Presnell Autopsy Report and CV, pages 82-108;
4. Jolene Bierly Toxicology Report and CV
5. Dr. Matthew C. Lee, pages 120-132;
6. Marijuana Impaired Driving a Report to Congress, pages 133-177;
7. Documents regarding Form 53, pages 178-189;
8. Dependency Investigation pages 190-212;
9. Wage Records pages 213-241;

10. Correspondence pages 242-244;
11. Police Reports pages 245-261;
12. Matt Lawson Deposition Transcript;
13. Dr. Osbon Deposition Transcript;
14. Dr. Gordon Early Deposition Transcript

Under the Administrative Procedures Act, the following records were submitted into evidence on behalf of Defendant/Employer:

10. Dr. Timothy Osbon, 6/25/22, page 232.
11. Dr. Ira Gordon Early, 7/7/23, pages 233-237.
12. NMS Labs, 12/31/2020, pages 238-256.
13. Defense letter of representation to opposing counsel 12/23/21, page 257
14. Email correspondence between defense counsel's office and opposing counsel, 12/31/21 to 1/28/22, pages 258-259.
15. Deceased's Form 52 date 2/7/22, pages 260-262.
16. Deceased's wage records, pages 263-276.
17. SCDPS accident report dated 12/16/20, ages 277-296
18. Photos of accident scene, pages 297-304
19. Photos of Deceased's backpack and possessions discovered in the truck cab post accident, ages 305-305
20. SLED report pages 309-310

STATEMENT OF THE CASE

On December 16, 2020 LenJarius Holmes was operating a tractor trailer owned by Lawson Trucking, LLC, with a dump trailer loaded with sand during the course and scope of his employment with Lawson Trucking, LLC, when Mr. Holmes was involved in an unwitnessed single vehicle accident that ultimately resulted in his death. Mr. Holmes' antemortem blood tested positive for 9.1 nanograms per milliliter of the psychoactive ingredient of marijuana. During a post accident search of the truck cab the Employer discovered a partially smoked cigar allegedly containing marijuana and Mr. Holmes' book bag that contained another cigar (allegedly containing marijuana), synthetic urine, and spray to eliminate odor. The cigars were destroyed before they could be tested for marijuana.

On December 23, 2021 Defendants sent a letter of representation to Claimant's counsel. On February 6, 2022 Claimant filed a Form 52 and served it on Berkshire Hathaway Direct Insurance Company at PO Box 113247, Stamford, Connecticut 06902. On February 15, 2022 Defendants filed a Form 12A with the Commission. On February 15, 2022 the South Carolina Workers Compensation Commission returned the Form 52 to Claimant and advised Claimant to serve it on Berkshire Hathaway Direct Insurance Company at 100 First Stamford Place, PO Box 113247, Stamford Connecticut, 06902. On March 9, 2022 Defendants added Defense counsel to e-Case. On March 14, 2022 Claimant served the Form 52 as directed by the Commission. The carrier received the Form 52. On March 21, 2022 the Commission noticed Claimant's counsel and Defense counsel that information was missing from the file that would assist the Commission with evaluating the issues of this claim. On April 20, 2022 e-Case reflected that a Form 53 had not been received by the Commission. On April 20, 2022 the Commission noticed the parties of mandatory mediation. On March 24, 2023 Defendants filed a Form 53 with the Commission.

On November 29, 2023 both parties presented to a hearing in Kershaw, South Carolina. Claimant was represented by Tyler Bathrick of Stewart Law Offices. Defendants were represented by George D. Gallagher of Speed, Seta, Martin, Trivett and Stubley. At the call of the hearing Claimant sought a finding of compensability and benefits under the South Carolina Workers' Compensation Act. Specifically, payment of medical expenses and compensation for the death of LenJarius Holmes. Claimant maintained Defendants waived their intoxication defense when they failed to file a Form 53 in a timely manner. Claimant also maintained that Defendants could not meet their burden of proof regarding whether Claimant was intoxicated and, if intoxicated, whether said intoxication was the proximate cause of his accident. Claimant relied on the medical/expert opinions of Sabrina Gast, Erin Presnell, Jolene Bierly and Matthew Lee.

The Defendants relied on Section 42-9-260 of the South Carolina Code and denied the claim alleging Mr. Holmes accident and death were occasioned by Mr. Holmes intoxication on marijuana. The Defendants maintained that Mr. Holmes was intoxicated and that Mr. Holmes intoxication was a contributing factor to the accident. The Defendants relied on the expert medical opinions of Dr. Timothy Osbon and Dr. Ira Gordon Early. Regarding whether intoxication was the cause of the accident, Defendants maintained, "There is nothing that says that this [intoxication] has to be the sole cause, the exclusive cause, or that the intoxica- - - or that the accident would not have happened but for the intoxication. There is no law that says that." (HT p. 21, lines 11-16). Defense counsel went on to state, "I will have to admit that I cannot meet a but-for standard. I cannot prove - - and my experts did even attempt to opine that this accident would not have occurred but – for his intoxication, but they did opine that this was clearly a cause." (HT p. 22, lines 5-10). Defendants went on to maintain that the definition of proximate cause in the workers compensation setting is different than the definition of proximate cause in negligence/tort.

Defendants maintained the standard in the workers compensation setting is contributing proximate cause not the proximate cause.

PRE-TRIAL MOTIONS AND MEMORANDUMS

On October 27, 2023 Claimant filed a Motion in Limine objecting to the following: 1) Defendants use of the intoxication defense because they did not file a Form 53 until a year after receipt of Claimant's Form 52; 2) Dr(s) Osbon and Early testifying to areas outside their fields of expertise (occupational medicine, toxicology, emergency medicine and/or family medicine; 3) Hearsay testimony from Dr. Early's deposition; and 4) pages 277-286 and page 296 of Defendants brief as inadmissible hearsay and speculation as said documents are outside the field of expertise of Officer KL Warlick.

On November 6, 2023 Defendants filed a response alleging they could raise the intoxication defense because: a) an agency regulation cannot usurp a statutory defense; b) South Carolina law favors disposition of a case on the merits; b) Claimant was not prejudiced; c) Defendants raised the defense in their Form 58; and d) Defendants were not copied on Claimant's Form 52 even though Claimant knew or should have known the Carrier was represented. Defendants maintained their expert reports be admitted into evidence because: a) the South Carolina Rules of Evidence do not apply to proceedings before the Workers Compensation Commission; b) administrative or quasi-judicial bodies are entitled to wide latitude and not restricted to strict rules of evidence; c) Dr(s) Osbon and Early meet the expert standards dictated by Rule 702 of the South Carolina Rules of Evidence; and d) medical evidence is required by Sectio 42-1-160 of the South Carolina Code. Additionally, Defendants maintained that scholarly article provided to Dr. Early be admitted as hearsay evidence is proper if corroborated by other evidence and said articles were used to bolster Dr. Early's opinions. Finally, Defendants

maintained the accident report completed by highway patrolmen Warlick only memorialized Trooper Warlick's investigation into how the accident occurred based on trooper Warlick's observations of the scene. The Defendants maintained that the report was not introduced as an opinion on why the accident occurred and/or whether Claimant was intoxicated. Defendants also maintained that the Employer, Matt Lawson, observed the accident scene and would be able to corroborate Trooper Warlick's diagram in accordance with South Carolina Law.

Claimant filed a Reply disagreeing with Defendants' interpretation of South Carolina Law regarding amending pleadings, prejudice, and how to raise affirmative defenses. Claimant renewed their objections to the inclusion of testimony from Dr(s) Gordon and Early, scholarly articles presented to Dr. Early, and Trooper Warlick's report.

Both parties handed up Memorandum's of Law regarding the intoxication defense. Specifically, whether Defendants were required to prove that intoxication was the proximate cause of the accident or a contributing proximate cause.

At the call of the hearing the Single Commissioner fully admitted the depositions of Dr. Early and Dr. Osborn into evidence as well as the alleged hearsay from Dr. Early's deposition and pages 277-286 and page 296 of Defendants' brief. The Defendants were allowed to present evidence regarding Claimant's alleged intoxication. However, Defendants were ultimately barred from raising the intoxication defense as Defendants Form 53 was not filed in a timely manner.

EVIDENCE OF THE CASE

HEARING TESTIMONY OF MATTHEW LAWSON

Claimant did not call any witnesses. Defendants called Matthew Lawson.

Direct Examination by Attorney George Gallagher

At the time of the hearing Matthew Tyler Lawson was thirty-two years old. He is married with two children ages four and eight. He has been in the trucking business since 2016 and has always operated as Lawson Trucking LLC. Before founding and operating Lawson Trucking LLC Mr. Lawson drove for other companies for approximately a year and a half and then operated his own truck before leasing it to someone else for approximately eight months. (HT p. 31, lines 4-25; p. 32, lines 1-10). Mr. Lawson started Lawson Trucking LLC with one truck. He currently has eleven. He had six trucks in December of 2020 when Mr. Holmes was working with him. (HT p. 32, lines 15-23). Mr. Lawson has either been a truck driver and/or in the trucking industry since 2014. He has had a CDL license since 2014 or 2015 and continues to drive. (HT p. 35, lines 10-25; HT p. 36, lines 1-2). Mr. Lawson obtained his CDL through the City. He went through their school and completed a written test with the DMV and a standardized road course. The road course requires the driver to back, parallel park, side dock back, and complete a road test that involved traffic sign recall and recognition, following bridge laws and basic driver safety and knowledge. (HT p. 36, lines 1-25; p. 37 lines 1-11). When asked if his education and certification involved learning what to do in certain road situations such as driving off the road Mr. Lawson explained that you more or less learn that with experience and if the truck goes off the right side of the road you react the same as you would in a car, let off the accelerator and do not jerk the wheel and do not break. (HT p. 37, lines 12-25). Mr. Lawson did not recall anything specifically from his training with regard of what to do when the truck went off the roadway. (HT p. 37, lines 25; p. 38, line 1).

Mr. Holmes completed the same CDL course as Mr. Lawson. (HT p. 38, lines 2-4). Mr. Holmes began working for Mr. Lawson approximately fix or six months prior to the accident. He already had his CDL and did not have to renew his CDL while employed with Lawson Trucking

LLC. (HT p. 38, lines 5-19). In order to get your CDL renewed you have to keep your medical card (take a physical approximately every one to two years). (HT p. 38, lines 20-25).

As far as on the job training, Mr. Lawson advised that he showed his drivers how to operate the dumps. (HT p. 39, lines 3-12). Mr. Lawson did not recall if Mr. Holmes had previously driven the same type of truck he was operating at the time of his accident. (HT p. 39, lines 14-17).

Lawson Trucking LLC hauls general freight. They started hauling local steel and transitioned to hauling sand and gravel to local concrete plants. They still do that now, but a majority of their work is now over the road. (HT p. 32, lines 23-25; p. 33, lines 1-15).

In December of 2020 Mr. Holmes was using a 2016 Peterbilt day cab tractor with dump trailer to pick up sand from a sand pit and deliver it to the concrete plant. (HT p. 33, lines 13-25). The tractor resembled a Chevrolet pick-up truck and the truck was higher end than most trucks in the industry. (HT p. 39, lines 18-25). The truck was either a 2016 or 2017 and based on pre-trip and post trip inspections, was operating normally at the time of this accident. (HT p. 40, lines 1-19). The tractor had a driver and passenger seats with no sleeper. (HT p. 34, lines 1-3). The dump trailer is a box with a back tailgate that opens and dumps the product out of the back. (HT p. 34, lines 4-25). The trailer was used to haul dirt, sand, brush and/or scrap. However, on the date of accident Mr. Holmes was hauling sand. (HT p. 35, lines 1-9).

Mr. Lawson's trucks were typically serviced every 7,000 miles or every three to four weeks. Trucks were serviced in house. (HT p. 40, lines 20-25; p. 41, lines 1-4). Mr. Lawson serviced the truck that was involved in the accident but did not recall when. He indicated that the truck involved in the accident was fairly new and had been owned a few weeks before Mr. Holmes started. The truck had under 200,000 miles and trucks like this generally require a new engine at a million miles. (HT p. 41, lines 13-24). Mr. Lawson classified the truck as new. (HT p. 42, lines 1-3).

The Federal Motor Carrier Association [here in after FMCA] regulates the trucking industry. The FMCA has a zero tolerance policy for drug use and they randomly drug test. (HT p. 42, lines 18-25). If someone is caught with drugs in their system they lose their license immediately, are required to go through a SAT program and obtain three to four clean tests before license reinstatement. (HT p. 43, lines 1-14). Mr. Lawson assumed the FMCA's drug tests checked for marijuana. (HT p. 43, lines 1-3). He did not require his drivers to do anything above and beyond what the Federal agencies require. (HT p. 43, lines 21-25). Mr. Lawson has never had a driver test positive for drugs. New hires are required to complete a drug screen. Mr. Lawson reviewed those results and recalled those tests check for methamphetamines, marijuana, cocaine and alcohol (on a separate test). (HT p. 44, lines 6-23; p. 45, lines 1-11). If the driver tests positive for any of those substances, said drivers license automatically gets suspended. The employer does not play a role in that decision. Mr. Lawson is required to submit to the same testing as he has a CDL. (HT p. 45, lines 7-25; p. 46, line 1).

Mr. Lawson found out about Mr. Holme's December 16, 2020 motor vehicle accident when he received a call from another one of his drivers and managers, Jaren Jacobs, who was running the same route as Mr. Holmes. After receiving the call Mr. Lawson drove approximately thirty-five minutes to the scene of the accident, which was somewhere between Lockhart and Sheridan, South Carolina. (HT p. 47, lines 4-12). Mr. Lawson could not recall the name of the highway where the accident occurred and he did not know if the accident occurred in Union County. Mr. Lawson described the accident location as a rural two lane back road. (HT p. 47, lines 13-25). When Mr. Lawson arrived on the scene he observed his other driver, fire trucks, and highway patrol. He observed Mr. Holmes' truck on one side of the road and the trailer overturned on the other. (HT p. 48, lines 3-25). Mr. Lawson advised that it was a misty day and the ground was not

dry. He witnessed approximately 300 feet or 100 yards of tire marks down the side of the road. Mr. Lawson testified, "So you could see – coming down the road, you could see the tire marks where it come off and then you could see the impression of the truck and trailer down the side of the road." He indicated that the track ended at a driveway culvert. (HT p. 49, lines 2-25). There were no tracks on the shoulder of the road or the wet ground beyond the culvert. Mr. Holmes' trailer was located detached from the cab thirty five degrees to the left of the culvert on the opposite side of the road from the culvert. It was facing the opposite direction. The truck cab was on the same side of the road as the culvert at a forty five degree angle. The cab of the truck had struck two embankments one on each side of the road. (HT p. 50, lines 1-25). Mr. Lawson did not witness the accident. However, when he arrived on the scene, the truck cab was located on the right side of the roadway abutted against an embankment. He testified that pieces of the grill of the tractor trailer involved in the accident were embedded in an embankment on the opposite left side of the road from the embankment where the cab came to rest. (HT p. 51, lines 10-25; p. 52, lines 1-6). Mr. Lawson toured the accident scene with Officer Ford and observed the cab from a distance. Mr. Holmes had already been transported when Mr. Lawson arrived on the scene. Mr. Lawson did not walk all the way up to the cab. However, he did look inside the cab and did not observe any items in the cab of the truck. (HT p. 52, lines 7-25; p. 53, lines 1-15). Responders began to clean up the scene and the truck was towed to the tow yard.

Mr. Lawson presented to the salvage yard to observe the truck. While at the salvage yard he observed an obvious odor of marijuana and what Mr. Lawson described as partially burnt joint on the floor. He examined Mr. Holmes book bag and discovered UPass, blunt spray, and another rolled up blunt with a green substance in it. Mr. Lawson defined "blunt" as a rolled cigar with green stuff. (HT p. 54, lines 4-18). Mr. Lawson does not use marijuana and has never used

marijuana. However, he has smelled marijuana and indicated that the blunt smelled like marijuana. He indicated that the blunt was not still smoldering. (HT p. 54, lines 19-25; p. 55, lines 1-4). UPass is synthetic urine used for drug testing. (HT p. 55, lines 1-10). The blunt spray came in a little aerosol bottle with an orange lable that read "blunt spray." (HT p. 56, lines 4-21).

Mr. Lawson took the items he found in the truck (the blunt spray, the UPass, the partially smoked blunt and the blunt), placed them in a bag, and contacted Officer Ford. Officer Ford directed Mr. Lawson to dispose of the items so Mr. Lawson placed the items in the tow yard dumpster. (HT p. 59, lines 5-14).

The right side of the roadway was not muddy. However you could see 300 feet of imbedded earth on the side of the road with a tire impressions in the grass. (HT p. 56, lines 22-25; p. 57, lines 1-4). Mr. Lawson has driven off the shoulder of the road before but not for three hundred feet. He testified that when you drive off the shoulder training dictates that you decelerate and refrain from jerking the wheel. (HT p. 57, lines 5-18). Mr. Lawson testified that Mr. Holmes truck would slow down quicker once it drove off the shoulder since it was loaded. However, he could not say if the truck would have slowed down faster if Mr. Holmes had decelerated faster than one hundred yards. (HT p. 58, lines 1-15).

Mr. Lawson reached out to the Holmes' family and they directed him to place Mr. Holmes items in his car, which was back at the yard.

Mr. Lawson testified that Mr. Holmes was a good employee. However, about a few weeks to a month prior to his death, Mr. Holmes drove through a police checkpoint where police observed the odor of marijuana in his truck. Mr. Holmes was arrested and Mr. Lawson had to pick up the truck. Mr. Holmes did not take a drug test at that time and Mr. Lawson allowed him to keep working because Mr. Holmes was a good employee. (HT p. 60, lines 1-19).

Cross Examination by Attorney Tyler Bathrick

Page 297 of Defendants Brief was identified as photos of the truck taken after the accident. The accident occurred in a wooded area on a two lane road. No serious hills, basically a flat stretch of road. Wet weather conditions. (HT p. 61, lines 20-25; p. 62, lines 1-11).

Mr. Lawson assumed that Mr. Holmes performed a pre-trip inspection. (HT p. 62, lines 12-21). However, during his deposition he testified that he did not have pre-trip inspections. (HT p. 63, lines 6-22).

Highway patrol inspected the vehicle Mr. Holmes was operating after the accident. Mr. Lawson did not know if highway patrol identified a flat tire. (HT p. 64, lines 7-25). Mr. Lawson reviewed page 258 of Defendants Brief and agreed that it documented a deflated right outer rear tire. Mr. Lawson did not know if the right outer rear tire was there before or after the accident. (HT p. 65, lines 1-7).

Mr. Holmes was paid a percentage for work completed at Lawston Trucking LLC. He received twenty five percent of the value of the loads he ran. So, the more load Mr. Holmes ran, the more money he made. In theory, the faster Mr. Holmes drove, the more money he made. The number of loads per day was capped. (HT p. 65, lines 8-23).

Mr. Lawson did not witness the accident. He agreed that an animal could have jumped out and caused Mr. Lawson to drive off the roadway. He also agreed that Mr. Lawson could have been distracted by his cellular phone and driven off the roadway. He did not feel that load shift could have caused the accident because there was no room in the dump trailer. He did indicate that a very hard sudden jolt could have caused the load to shift but not caused the accident. Mr. Lawson agreed that another vehicle could have swerved into Mr. Holmes lane of travel and forced him off the road thus causing the accident. Mr. Lawson indicated that a tire could have blown causing the

accident and that there was evidence of a deflated tire. (HT p. 66, lines 1-25; HT p. 67, lines 1-12). Mr. Lawson indicated that the highway patrol report just said deflated and not punctured. He could not say whether or not the tire was deflated because of a hole. (HT p. 67, lines 23-25; p. 68, lines 1-5). Mr. Lawson agreed that during his deposition he felt that Mr. Holmes had leaned over to pick something up (possibly the joint found on the passenger side of the vehicle) and that is what caused the accident. (HT p. 67, lines 1-22). Mr. Lawson indicated that excessive speed could have caused the accident and that he did not know why the accident occurred. (HT p. 68, lines 6-13).

Mr. Holmes was Mr. Lawson's employee when the accident occurred and Mr. Holmes was in the course and scope of his employment when the accident occurred. (HT p. 68, lines 14-19). Mr. Lawson never used marijuana before and did not have personal knowledge regarding how marijuana impairs one's body. (HT p. 68, lines 20-24).

Mr. Lawson did not want someone who posed a danger to the public driving his truck. If he knew someone was a danger to the public he would not let them drive his vehicles. He let Mr. Holmes drive his vehicle on December 16, 2020 because he did not feel Mr. Holmes was a danger to the public at that time. (HT p. 68, line 25; p. 69, lines 1-11).

Mr. Lawson denied knowing that Mr. Holmes was smoking marijuana in his vehicles and denied knowing that Mr. Holmes was using marijuana on the date of his October 2020 arrest. He indicated, "I knew that that day he got arrested, I knew he had some of it in his bookbag. But he wasn't smoking that day." (HT p. 69, lines 1-18). Mr. Lawson did not report Mr. Holmes to the Federal government when he was arrested with marijuana. He initially indicated that reporting Mr. Holmes was not his responsibility. Then he indicated that as the owner he should have reported Mr. Holmes. (HT p. 69, lines 19-25).

Mr. Lawson denied smelling marijuana in the cab of his truck when Mr. Lawson was stopped on October 13, 2020. He reviewed the officers report from the October 13, 2020 arrest. He agreed the officers report stated "...smelled the odor of marijuana" and indicated that the cab of the truck did not smell like marijuana when he arrived. Mr. Lawson testified that he did not know Mr. Holmes was smoking marijuana in the cab of his truck. (HT p. 70, lines 1-25; p. 71, lines 1-24; p. 72, lines 1-8). Mr. Lawson allowed Mr. Holmes to come back to work following the October 13, 2020 arrest because he did not feel like Mr. Holmes was a danger to the public. (HT p. 72, lines 9-10 and lines 18-23). He did not suspend Mr. Holmes following the arrest. (HT p. 73, lines 2-3). Mr. Lawson did not have any issues with Mr. Holmes driving prior to the accident. (HT p. 72, lines 24-25; p. 73, line 1).

Mr. Lawson agreed that during his deposition he was asked if Mr. Holmes was potentially using marijuana on the job and he answered no. Mr. Lawson testified that he did not remember if he brought up the October 13, 2020 arrest during his deposition. (HT p. 73, lines 10-16).

Mr. Lawson testified that the whole cigar he located contained a green leafy substance. However, he agreed that he did not unroll the whole cigar and just looked at the ends. He agreed that he had no idea what was in the middle of the cigar. (HT p. 73, lines 20-25; p. 74, lines 1-6). Mr. Lawson agreed that nobody could test the cigar because he threw it out. He testified that a police officer or highway patrolmen advised him to throw out evidence. (HT p. 74, lines 7-12).

Following the accident Mr. Lawson made it to the scene in about forty minutes. He did not smell marijuana at that point but did not walk all the way to the truck. Mr. Lawson first smelled marijuana at the tow yard. The tow yard was twenty to twenty five minutes from the accident scene. (HT p. 74, lines 13-25). When Mr. Holmes was arrested in October it took him approximately an hour to get to the scene of the arrest. (HT p. 75, lines 4-9).

Eighty percent of the cigar/blunt Mr. Lawson found post accident was still in tact. Mr. Lawson indicated that he could tell the cigar had been recently burnt because of the smell. Mr. Lawson indicated that the cigar was not still burning. (HT p. 75, lines 13-25; p. 76, lines 1-4).

Mr. Lawson testified that the front windshield of the truck was broken. (HT p. 77, lines 14-16). During his deposition he testified that the windshield had a crack in it. (HT p. 78, lines 16-20).

Mr. Lawson did not know why the accident happened outside of Mr. Holmes running off the road. (HT p. 78, lines 21-24).

Re-Direct by Attorney George Gallagher

Mr. Lawson did not know why the accident happened and he did not have any evidence or reports substantiating the causes listed by Claimant. (HT p. 79, lines 1-12).

Mr. Lawson was aware that they were testing Mr. Holmes blood following the accident. (HT p. 81, lines 18-21). Highway patrol did not interview Mr. Lawson following Mr. Holmes blood testing. (HT p. 82, lines 3-7).

Mr. Lawson did not intend to testify that the blunt was still lit when he observed it in the cab at the yard. However, he could tell that it had been smoldering. The blunt found in Mr. Holmes's bookbag had not been lit and was still in its wrapper. (HT p. 82, lines 10-21).

Mr. Lawson has been driving trucks since 2014. Truck driving involves the ability to focus, judge distance, process information, and obey the laws. (HT p. 82, lines 22-25).

Mr. Lawson was not aware Mr. Holmes was smoking marijuana in the cab of his truck at the prior arrest. (HT p. 83, lines 23-25). When he presented to the scene after the police had been called there was no evidence that Mr. Holmes had been smoking marijuana in the cab. (HT p. 84,

lines 7-10). Mr. Lawson did not know what Mr. Holmes was arrested for and it could have been for possession of marijuana. (HT p. 84, lines 4-15).

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Mr. Lawson did not know how long the 80% left cigar smoldered following the accident. (HT p. 84, lines 19-25). He did not know how much of that cigar burned post accident. (HT p. 85, lines 1-3).

Mr. Lawson smelled marijuana following the December accident but could not smell it in October. (HT p. 85, lines 4-7).

MEDICAL, TOXICOLOGICAL REPORTS, AND EXHIBITS SUBMITTED BY CLAIMANT

Claimant's APA #1 pp. 1-69. Piedmont Medical Center - On December 16, 2020 Lenjarius Holmes was transported to Piedmont Medical Center via ambulance with severe head injuries following a motor vehicle accident. EMS dispatch was notified and dispatched at 7:50. At 7:56 they arrived at Lockhart Road at Sherer Road in York County. The EMS note states, "Upon arrival the trailer to the 19 wheeler was noted to be on its side. The cab of the truck is upright and head first into a bank. A 25 year old male was found with his upper torso down in the cubby hole of the driver door." EMS noted an open skull with exposed bone fragments and brain matter. Mr. Holmes did not have a patent airway but did have a pulse. He was taking agonal breaths on his own. During transport Mr. Holmes' blood pressure began to drop. At 8:48 EMS arrived at Piedmont Medical Center. (Claimant's APA pp. 2-4).

Dr. Jeffrey Molle evaluated Mr. Holmes at Piedmont Medical Center and diagnosed a significant brain injury not amenable to surgery. (Claimant's APA p. 11). Mr. Holmes injuries were deemed terminable. (Claimant's APA p. 18 and p. 26).

On December 16, 2020 at 12:30 Mr. Holmes urine was collected for a drug screen. Mr. Holmes urine screen tested negative for amphetamine, benzodiazepine, cocaine, opiate, PCP and/or barbiturate. It was positive for cannabinoid. (Claimant's APA pp. 65-68).

Claimant's APA #2, pp 7-81. Sabrina Gast - On February 18, 2021 Sabrina Guest, York County Coroner, issued Mr. Holmes death certificate. The certificate indicates that Mr. Holmes died from blunt force trauma to the head in a motor vehicle crash. An autopsy was performed and Mr. Holmes' death was ruled an accident. (Claimant's APA p. 71). On June 13, 2022 Sabrina Guest completed a medical questionnaire stating: (Claimant's APA pp. 72-73).

- 1) I am the York County Coroner. As a coroner my principal duty is to inquire by inquest into the cause of most any death which there is reason to suppose is not due to natural cause.
- 2) I have reviewed LenJarius Holmes' autopsy report and reports generated by my office.
- 3) Ultimately, is my opinion that Mr. Holmes died from cerebral disruption due to a motor vehicle accident.
- 4) Mr. Holmes death is an accident.
- 5) It is my expert medical and/or scientific opinion, most probably and to a reasonable degree of medical certainty (greater than 50% probability) that Mr. Holmes died as the result of cerebral disruption due to blunt head trauma sustained in the December 16, 2020 motor vehicle crash.
- 6) All medical and/or scientific opinions provided in this questionnaire are stated most probably and to a reasonable degree of medical and/or scientific certainty (greater than 50% probability).

Claimant's APA #3 pp 82-108. Dr. Erin S. Presnell - On December 18, 2020 Dr. S. Erin Presnell performed an autopsy on LenJarius Holmes. Dr. Presnell determined that Mr. Holmes' cause of death was cerebral disruption due to a motor vehicle accident. (Claimant's APA p. 83). The report states, "Comprehensive toxicological analysis of antemortem blood (green vial, 12/16/2020, sent for analysis directly by the coroner) documented delta 9 THC 9.1 ng/ml; delta 9

carboxy THC 74 ng/ml; and 11 hydroxy delta 9 THC 3 ng/ml; and was positive for caffeine.” Dr. Presnell opined, “...the manner of death is best deemed an accident.” (Claimant’s APA pp 83-86).

On June 13, 2022 Dr. Presnell completed a medical questionnaire in which she opined as follows:

- 1) I am a forensic pathologist practicing at the Medical University of South Carolina. In that capacity I performed the autopsy of LenJarius Holmes.
- 2) I have reviewed LenJarius Holmes autopsy report.
- 3) Ultimately, I opined that Mr. Holmes died from cerebral disruption due to a motor vehicle crash.
- 4) I classified Mr. Holmes death as an accident.
- 5) It is my expert medical opinion, most probably and to a reasonable degree of medical certainty (greater than 50% probability) that Mr. Holmes died as the result of cerebral disruption due to blunt head trauma sustained in December 16, 2020 motor vehicle crash.
- 6) It is my expert medical opinion, most probably and to a reasonable degree of medical certainty (greater than 50% probability) that Mr. Holmes death is directly causally related to his motor vehicle crash of December 16, 2020.
- 7) I am aware that Mr. Holmes antemortem toxicology report was positive for THC.
- 8)
- 9) ...
- 10) I am not able to predict the antemortem effect of a THC concentration of 9.1 ng/ml on the decedents mind or body at the time of the crash.
- 11) I cannot predict how the THC concentrations affected the decedent....
- 12) All medical and/or scientific opinions provided in this questionnaire are stated most probably and to a reasonable degree of medical and/or scientific certainty (greater than 50% probability).

Dr. Presnell graduated from Clemson University in 1989 with a BS in Microbiology. She graduated from the Medical University of South Carolina Charleston in 1993. She performed residency in Anatomic and Clinical Pathology at the Medical University of South Carolina

Charleston from 1993-1998. She fellowship trained in forensic pathology at the Medical University of South Carolina Charleston from 1998 to 1999. She is a licensed medical examiner in South Carolina. She is a Diplomat of the National Board of Medical Examiners, of Anatomic and Clinical Pathology, and Forensic Pathology. Dr. Presnell is a professor at the Medical University of South Carolina Department of Pathology and Laboratory Medicine. (Claimant's APA pp 90-108).

Claimant's APA #4 pp 109-119 and Defendants APA pp 239-256. NMS Labs and Jolene Bierly - On December 31, 2020 Jolene Bierly, M.S.F.S., D-ABFT-FT, a forensic toxicologist, analyzed Mr. Holmes antemortem blood. Mr. Holmes antemortem blood was positive for caffeine, 3 ng/ml 11 hydroxy Delta 9 THC, 74 ng/ml of delta 9 carboxy THC, and 9.1 ng/ml of Delta 9 THC. The report indicates that 11 hydroxy Delta 9 THC is an active intermediate metabolite of tetrahydrocannabinol the active component of marijuana and usual peak levels less than 10% of THC levels after smoking. The report indicates that Delta 9 carboxy THC is an inactive metabolite of THC with peak concentrations in serum for 1.75 or 3.55% THC marijuana cigarettes are 10-101 ng/ml attained 32 minutes to 240 minutes after beginning smoking with a slow decline thereafter. The report states that the ratio of whole blood concentration to plasma concentration is unknown for this analyte and that it might be detected for up to one day or more in the blood. The report indicates that both delta 9 THC and delta 9 carboxy THC may be present substantially longer in chronic users and that THCC is usually not detectable in passive inhalation. The report goes on to indicate that Delta 9 THC is the active ingredient in marijuana and a DEA scheduled 1 hallucinogen. Pharmacologically, it has depressant realty distorting effects. It rapidly leaves the blood even during smoking falling to below detectable levels within several hours. (Claimant's APA pp. 110-112 and Defendants APA pp. 238-241).

On June 16, 2022 Ms. Bierly completed a medical questionnaire in which she opined as follows: (Claimant's APA pp. 113-114)

- 1) I am a forensic toxicologist practicing at NMS Labs in Pennsylvania. In that capacity I performed the comprehensive toxicological analysis of antemortem blood referenced in S. Erin Presnall's "Final Autopsy Report" of LenJarius Holmes.
- 2) I have reviewed LenJarius Holmes' final autopsy report and his toxicological report.
- 3)
- 4) In order to determine if LenJarius Holmes was intoxicated (impaired in his faculties to the extent that he was incapable of carrying on his accustomed work without danger to himself) on that date of his December 15, 2020 accident I would need to know how often and how much THC Mr. Holmes regularly used prior to said accident in order to determine how tolerant Mr. Holmes was to the effects of THC. Observations of signs and symptoms of marijuana use and/or marijuana impairment around the time of the accident would also be beneficial.
- 5) Without knowing Mr. Holmes tolerance levels with regard to THC, I cannot opine, more likely than not, that Mr. Holmes was intoxicated (impaired to his faculties to the extent that he was incapable of carrying on his accustomed work without danger to himself) on December 16, 2020 (the date of his accident).

On July 25, 2023 Ms. Bierly indicated, "The opinions I provided in the questionnaire dated June 16, 2022 are my opinions as a Forensic Toxicologist stated more likely than not." (Claimant's APA p. 115).

In 2008 Jolene Bierly graduated with a BS in Biology from Messiah College. In 2012 she graduated from Arcadia University with an M.S. in forensic toxicology. She has worked as a forensic toxicologist since 2017. Ms. Bierly is a diplomate of the American Board of Forensic Toxicology. In 2014 she completed the Robert F. Borkenstein Course on the Effects of Drugs on Human Performance and Behavior. She has specialized training in Postmortem Interpretive Toxicology. In 2020 she attended a Society of Forensic Toxicologist meeting titled "Cannabis

Impaired Driving: Where Are We in 2020?” In 2015 she attended Northeastern Association of Forensic Scientists meeting titled “Marijuana 2015: Identification, Validation, Potency, Toxicology, Impairment, Medical Uses, Regulations.” Jolene Bierly has given multiple presentation regarding drug driving (“Pennsylvania Driving Under the Influence of Drugs Trends 2010-2020,” “Popular Drug Combination in DUID Investigations 2018-2020,” “Interpretation of DUID and PM Cases with Case Specific Examples,” “Toxicology Testing When Traditional Matrices are Non-Existent,” “Current Trends in Popular Botanical Drugs,” “Stimulants and Novel Psychoactive Substances,” New Psychoactive Substance Trends in 2018.”). Ms. Bierly has published articles on fentanyl and driving under the influence and the utility of bile in postmortem forensic toxicology. (Claimant’s APA pp. 116-119).

Dr. Bierly’s report indicates that the report limit for Delta 9 Carboxy THC is 5 ng/mL, the report limit for 11 Hydroxy Delta 9 THC is 1 ng/mL, and the report limit for Delta 9 THC was 5 ng/mL. (Defendants APA p. 241). Defendants submitted chain of custody, analysis requisition forms, posting history reports, sample history reports, and communication history reports. (Defendants APA pp. 242-256). The communication history reports documents two conference calls with Claimant’s attorney and a questionnaire (that was unable to be completed) and a revised questionnaire from Claimant’s attorney that was completed. (Defendants APA p. 256).

Claimant’s APA #5 pp 120-132. Dr. Matthew C. Lee - On March 14, 2023 Dr. Matthew Lee reviewed the Mr. Holmes autopsy, coroners report, Dr. Bierly’s questionnaire, Sabrina Gast’s questionnaire, the toxicology report and Dr. Presnell’s questionnaire. He opined, “...intoxication from THC cannot be made from blood levels alone, behavioral observations would also be necessary to make a determination of intoxication.” (Claimant’s APA p. 122). Dr. Lee concluded,

“Based on the information available no determination of intoxication can be made for Mr. Lenjarius Holmes on December 16, 2020.” (Claimant’s APA p. 123).

Dr. Lee graduated from Virginia Commonwealth University’s Medical College of Virginia School of Pharmacy in 1995. He obtained a Masters of Science in Pharmacology and Toxicology from Virginia Commonwealth University in 1999. His research focused on drug abuse, specifically opioids and cannabinoids. Dr. Lee received his medical degree from Virginia Commonwealths School of Medicine in 2004. He is a Medical Review Officer, which is a physician who oversees Occupational drug screens. Dr. Lee has either published or spoken on the following topics: Medical Marijuana in the Workplace., Assessment of Marijuana Intoxication., The Role of Several Kinases in Mice Tolerant to Delta 9 Tetrahydrocannabinol., Reversing Delta 9 THC Antinociceptive Tolerance by inhibiting the Phosphorylation of the CB1 Receptor. Dr. Lee is a member of the American Academy of Clinical Toxicology, American College of Clinical Pharmacology, American College of Forensic Examiners, and American Medical Association.

Claimant APA #6 pp 133-177. Marijuana Impaired Driving A Report to Congress -
The National Highway Traffic Safety Administration July 2017 Marijuana Impaired Driving – A Report to Congress (here in after NHTSA report) was submitted by Claimant and incorporated by reference. (Claimants APA pp. 134-177).

Per the NHTSA report “Abstract” the report: (Claimant’s APA p. 136).

- Summarizes what is known about marijuana use and driving. The report describes the absorption, distribution and elimination of delta 9 tetrahydrocannabinol the primary psychoactive substance in marijuana in the body. It contrasts this process with the elimination of alcohol in the body.

- Discusses the poor correlation of THC concentrations in the blood with impairment along with implication that setting per se levels is not meaningful.

- Addresses challenges of measuring driving impairment resulting from marijuana use.

- Discusses state law relating to marijuana and driving.
- Addresses what is known about the prevalence of marijuana impaired driving and crash risk associated with marijuana impaired driving.
- Presents information on training for law enforcement to detect marijuana impaired drivers, the feasibility for developing an impairment standard for driving under the influence of marijuana and recommendations for increasing data collection regarding the prevalence and effects of marijuana impaired driving.

Ethyl alcohol is a relatively simple drug whose absorption, distribution and elimination from the body along with behavioral and cognitive effects are fairly well documented. In comparison, the absorption, distribution and elimination from the body of marijuana along with behavioral and cognitive effects is very different from the case with alcohol. While ethyl is readily soluble in water, and hence blood, THC is fat soluble. This means that once ingested, THC is stored in fatty tissues in the body and can be released back into the blood sometimes long after ingestion. Thus, while THC can be detected in the blood long after ingestion, the acute psychoactive effects of marijuana ingestion last mere hours, not days or weeks. Additionally, unlike alcohol, which is metabolized at a steady rate, the metabolism of THC occurs in a different fashion such that THC declines exponentially. (Claimant's APA pp. 142-143).

The report states, "While fewer studies have examined the relationship between THC blood levels and degree of impairment, in those studies that have been conducted the consistent finding is that the level of THC in the blood and the degree of impairment do not appear to be closely related." (Claimant's APA p. 7). The report states, "Thus, in contrast to the situation with alcohol, someone can show little or no impairment at a THC level at which someone else may show a greater degree of impairment." (Claimant's APA p. 145). Peak impairment occurs 90 minutes after smoking while the THC level has declined over 80% from the peak level at that point in time. (Claimant's APA pp. 145-146). The report goes on to indicate, "THC level in blood does not appear

to be an accurate and reliable predictor of impairment from THC. Also, when low levels of THC are found in the blood, the presence of THC is not a reliable indicator of recent marijuana use.” (Claimant’s APA p. 146)

The NHTSA Guide found smoking marijuana has been shown to affect a number of driving related skills including slow reaction times, cause problems with road tracking - lane position variability, and decreased divided attention. (Claimant’s APA p. 149). Alcohol increased mean speed and increased lane departures. Marijuana increased lane position variability and resulted in reduced mean speed, increased driving time below the speed limits and increased following distance. (Claimant’s APA p. 149). Research has demonstrated the potential for marijuana to impair driving related skills. It does not show a relationship between THC levels and impairment. (Claimant’s APA p. 149). The report noted that measuring driver impairment is challenging since driver performance is a product of manual, cognitive and perceptual skills and the range of performance reflected in the normal driver population is large. Deficits in performance can arise from a variety of causes that include distraction, drowsiness, emotion and other factors. (Claimant’s APA p. 150).

The NHTSA Guide found that there is no impairment standard for drivers under the influence of marijuana as there is no chemical test for marijuana, like BAC or BrAC, that quantifies the amount of alcohol in the body, indicates the degree of impairment, and the risk of crash involvement as the psychoactive ingredient in marijuana does not correlate well with impairment. (Claimant’s APA p. 151). A number have states have set a THC limit in their laws indicating that if a suspects THC concentration is above the level (typically 5 ng/ml of blood) then the suspect is to be considered impaired. However, this per se limit appears to been based on something other

than scientific evidence. Some recent per se studies demonstrate that such per se limits are not evidence based. (Claimant's APA p. 166).

The report indicates that toxicologists are not able to provide expert testimony that a specific amount of THC in a suspect's blood is definitively associated with being impaired by marijuana and render the driver unable to safely drive. (Claimant's APA p. 166). Blood THC concentrations will often impede rather than assist in making the case to a judge or jury who has to determine whether a suspect is impaired as a result of marijuana use. (Claimant's APA p. 167).

Claimant's APA #7, pp 178-189. Documents Regarding Form 52 - On February 6, 2022 Claimant filed a Form 52 request for hearing. On February 15, 2022 the Commission returned the Form 52 and advised that Berkshire Hathaway Direct Insurance Company needed to be served at 100 First Stamford Place, PO Box 113247, Stamford, Connecticut 06902. On March 14, 2022 Claimant re-served the Form 52 as directed by the Commission. (Claimant's APA pp. 179-186). On March 9, 2022 Defense Counsel was added as a part on ecase. (Claimant's APA p. 189).

Claimant's APA #8, pp 190-212. Dependency Investigation - On December 3, 2022 Christopher Tuten submitted the results of his dependency investigation. He found Mr. Holmes did not have any children at any point in his life. He listed Vanessa Holmes and Jordan, Darren, Payton, Landon, Nolan, and Reko Murphy as potential dependents. (Claimant's APA pp. 191-204). Funeral expenses in the amount of \$7,159.00 were included in the dependency investigation. (Claimant's APA p. 206).

Claimant's APA #9, pp 213-241 & Defendants Exhibit #16, pp 263-276. Wage Records
- LenJarius Holmes wage records from June 29, 2020 to December 26, 2020 were submitted. (Claimant's APA pp. 214-241).

Claimant's APA #10, pp 242-244. Correspondence – The parties canceled the deposition of an insurance company representative after Defendants stipulated the Carrier received Claimant's Form 52. (Claimant's APA p. 243).

Claimant's APA #11, pp 245-261. Police Reports - The police report dated December 16, 2020 indicates that Mr. Holmes accident took place on a rural road with a speed limit of 55 miles per hour. The road was wet asphalt and the weather condition was rain. (Claimant's APA p. 246). Trooper KL Warlick arrived on the scene at 7:45 hours and observed a tractor off the right side of the roadway with a trailer overturned on its side on the left side of the roadway with sand spilled onto the shoulder. The report states, "It was found that Unit 1 was traveling north on SC 49. The vehicle exited the right side of the roadway and traveled down the shoulder before correcting and coming back onto the roadway. As a result, the vehicle exited the left side of the roadway and struck an embankment and tress. The trailer then overturned onto the shoulder with the front of the trailer partially in the roadway and the truck detached from the trailer. The truck then ran off the right side of the roadway." (Claimant's APA p. 248). The report indicates that Mr. Holmes trip was organized by Lawson Trucking and the purpose of his trip was to pick up sand. (Claimant's APA p. 249). The vehicle involved in the accident was owned by Lawson Trucking. (Claimant's APA p. 251). No witnesses were listed in the report. (Ciamant's APA p. 254).

On October 13, 2020 Deputy Reichard arrested LenJarius Holmes for simple possession of marijuana. The arrest narrative indicates that Deputy Reichard was at a safety checkpoint in Pageland, South Carolina when Mr. Holmes pulled up in a tractor trailer. Deputy Reichard smelled marijuana and Mr. Holmes admitted to smoking marijuana earlier. Deputy Reichard searched the truck and Mr. Holmes person and located a half smoked blunt and another blunt with a green leafy substance. Mr. Holmes called the owner of the truck. The owner advised that he lived thirty

minutes away and that he would have his wife drive him to the truck so he could drive it back and not incur a tow bill. Mr. Holmes was arrested. (Claimant's APA p. 260).

Defendants APA#10, p 231. Dr. Timonthy Osbon - On June 25, 2022 Dr. Timothy Osbon reviewed the medical records from Piedmont Medical Center, the Medical University of South Carolina and NMS Labs and opined that Mr. Holmes' urine screen tested positive for a metabolite of THC and the MUSC autopsy and NMS Toxicology reports show an elevated level of delta-9-THC at 9.1 ng/ml which demonstrates that Mr. Holmes was driving while acutely intoxicated by marijuana.

Dr. Osbon went on to indicate that the National Highway Traffic Safety Administration did a comprehensive analysis for Congress in 2017 that summarizes a large amount of medical research and data about marijuana impaired driving. Dr. Osbon indicated that the salient points from that report to Congress states, "THC has been shown to bind with receptors in the brain (and to a lesser extent in other parts of the body) and it is likely that this process underlies some of psychoactive (behavioral and cognitive) effects of marijuana use." Dr. Osbon went on to indicate that the report indicates: "Laboratory, simulator, and instrumented vehicle studies have shown that marijuana can impair critical abilities necessary for safe driving, such as:

- Slow reaction time, for example, responding to unexpected events – emergency breaking.
- Cause problems with road tracking – lane position.
- Decrease divided attention – target recognition, impair cognitive performance – attention maintenance and impair executive functions – route planning, decision making, and risk taking."

Dr. Osbon went on to conclude, "Based on my review and expertise in the management of trauma patients in my practice of emergency medicine and to a reasonable degree of medical certainty, Mr. Holmes markedly elevated delta-9-THC level significantly impaired his ability to safely

operate the motor vehicle. The critical abilities necessary for safe driving requires a clear sensorium and full unimpaired cognitive abilities. More likely than not, Mr. Holmes' acute marijuana intoxication was a major contributor to the MVC." (Defendants APA p. 232).

Defendants APA#11, pp 233-237. Dr. Ira Gordon Early - On July 7, 2023 Dr. Ira Gordon Early indicated that he was asked to address whether Mr. Holmes was intoxicated at the time of his fatal accident; what extent Mr. Holmes was intoxicated in terms of adverse effects of judgement, coordination and/or situational awareness; and was intoxication more likely than not a cause of the accident?

Dr. Early opined that Mr. Holmes was intoxicated at the time of his fatal accident. He reviewed the drug screening from the Emergency Room and NMS Toxicology. He indicated that the NMS blood toxin analysis showed 9.1 ng/ml of Delta-9-tetrahydrocannabinus, 3.0 ng/ml 11-hydroxy delta 9 THC, and 74 ng/ml delta 9 carboxy THC level. Dr. Early quoted Dr. Bierly's report when he indicated:

Delta 9 THC is the principle psychoactive ingredient in marijuana. It rapidly leaves the blood falling to below detectable levels within several hours. Usual peaks in THC levels occur 6 to 9 minutes after beginning to smoke and decrease to less than 5 ng/ml by two hours. The pharmacokinetics are different in chronic daily users and delta 9 THC stays in blood for substantially longer.

Dr. Early went on to indicate that THC is metabolized into 11 Hydroxy Delta 9 THC and that peak levels of this metabolite are 10% after smoking. Dr. Early indicated that delta 9 carboxy THC (THCC) is the inactive metabolite of THC and that usual peak concentrations in serum for marijuana cigarettes are 10-101 ng/ml attained 32 to 240 minutes after beginning smoking. THCC may be detected for up to one day or more in blood and these metabolites may be present substantially longer in chronic users. Dr. Early indicated that said data was consistent with recent marijuana use and that the data supports a theory of ingestion of marijuana sometime in the

previous three hours before the accident. Dr. Early concluded, "It is more likely than not that Mr. Holmes was intoxicated at the time of the accident." (Defendants APA p. 234).

Dr. Early found that studies have shown that marijuana and its metabolites affect judgement. He indicated that studies have found a relationship between acute (short term) cannabis intoxication and driving ability such as slowed reaction time and ability to make decisions, impaired coordination, alterations in short term memory and attention, and motor skills impairment. He cited a 2017 report on several meta analyses of multiple studies which found the risk of being involved in a crash increased after recent cannabis use. Dr. Early indicated that there are many questions that need to be addressed to most accurately answer the adverse effects on judgement, coordination and situational awareness question including: 1) When did Mr. Holmes last consume marijuana and how much marijuana did he consume at the time of last ingestion; 2) Was Mr. Holmes a daily marijuana user and how much did he use daily; and 3) How much tolerance did Mr. Holmes have/develop to the effects of marijuana? Dr. Early went on to conclude, the information supplied supports a more likely than not assertion that Mr. Holmes' marijuana use affected his judgement and coordination. However, he indicated that he did not think there is sufficient data to state whether impaired situational awareness was present.

Finally, Dr. Early opined that intoxication was more likely than not a cause of the accident. He indicated that there are other non-intoxication factors which could have also contributed to the accident. Dr. Early went on to indicate that the intoxication of Mr. Holmes was supported by the SLED toxicology screen and the deposition testimony of Mr. Matthew Lawson (odor of marijuana noted in the cab of the truck, item resembling marijuana joint found in floorboard of the truck, backpack of Mr. Holmes containing paraphernalia used to eliminate truck odors and Upass urine

drug sample). Dr. Early indicated that all of these issues supported a recent ingestion of marijuana. (Defendants APA p. 235).

Dr. Early went on to opine that the absence of a chain of custody did not affect his opinions. (Defendants APA p. 236).

Defendant Exhibit #13, p. 257. Correspondence - On December 23, 2021 Defendants sent a letter of representation to Claimant's attorney. The letter states, "I would ask that you forward all correspondence, pleadings and any other file documents to me at the above-listed address." (Defendants Exhibit p. 257).

Defendant Exhibit #14, pp 258-259, Correspondence - On December 21, 2022 and January 5, 2022 and January 14, 2022 Defendants emailed Claimant's office and requested claimant's workers compensation claim number. (Defendants APA p. 258-259). On January 28, 2022 Defendants emailed Claimant's office and asked whether or not anything had been filed with the workers compensation claim number. (Defendants APA p. 258).

Defendant Exhibit #15, pp 260-261. Deceased's Form 51 - On February 6, 2022 Claimant filed a Form 52. It was served on Berkshire Hathaway Direct Insurance Company, PO Box 113247, Stamford, CT 06902. (Claimant's APA pp. 260-262)

Defendant Exhibit #17, pp 277-296. SCDPS Accident Reports - Officer KL Warlick completed an accident report on February 28, 2021. The report indicates that on December 16, 2020 at 7:45 am LenJarius Holmes was involved in a motor vehicle accident while operating a truck owned by Lawson Trucking, LLC. The report indicates that Mr. Holmes was traveling North on SC-49 while driving under the influence of drugs, ran off the roadway right, overcorrected and ran off the roadway left then striking a ditch causing the trailer to detach from the truck. The truck then ran off of the right side of the road and struck an embankment. On February 24, 2021 Officer

Warlick amended the report to indicate LenJarius Holmes was driving under the influence of drugs and blood results were added. (Defendants APA pp. 277-279).

Trooper Warlick's "Advanced Collision investigation Cover Sheet" indicates the roadway was wet asphalt and the weather conditions was rain. There were no defects in the roadway and the area was rural with a speed limit of 55 mph. (Defendants APA p. 281). At 7:45 am Trooper Warlick was dispatched to SC 49 near Sherer Road in reference to a one vehicle collision resulting in fatality. Upon arrival trooper Warlick observed a truck tractor off the right side of the roadway with a trailer overturned on its side on the left side of the roadway with sand spilled onto the shoulder. The report indicates that the vehicle exited the right side of the roadway and traveled down the shoulder before correcting and coming back onto the roadway. The vehicle then exited the left side of the roadway and struck an embankment and trees. The trailer then overturned on the shoulder with the front of the trailer partially in the roadway and the truck tractor detached from the trailer. The truck tractor then ran off the right side of the roadway. On December 17, 2020 Corporal Ford was advised that Mr. Holmes succumbed to his injuries at 8:32 pm on December 16, 2020. (Defendants APA p. 283).

Defendants APA p. 284 indicates Mr. Holmes traveled 340.2 feet on the shoulder before correcting, driving left of the roadway and striking an embankment and trees. (Defendants APA p. 284).

The report indicates that Mr. Holmes trip began at 5 am at Lawson Trucking. His last stop was Broad River Distribution at 7:00 am to pick up sand. He departed Broad River Distribution at 7:20 am. The report documents evidence of alcohol and drugs and indicates that the accident was fatal. (Defendants APA p. 285). The report goes on to indicate that headlights and wipers were on. Other lights were off. (Defendants APA p. 287). The windshield was shattered and

severe damage was noted to the front of the truck. (Defendants APA p. 288). The outer right rear wheel was deflated. (Defendants APA p. 289). No pre-collision skid marks were documented. The roadway was two lanes with roadway width of ten feet one inch. (Defendants APA p. 290). The trailer was a dump trailer loaded with sand. (Defendants APA p. 292). Hand written notes indicate Mr. Holmes was leaving Broad River Materials and traveling to Stevenson Weir in Clover, South Carolina. (Defendants APA p. 294). Page 295 of Defendants APA includes a hand drawn sketch of the accident. Defendants submitted the Driver/Vehicle Examination Report and photographs. (Defendants pp 296-304).

Defendant Exhibit #18, pp 297-304. Photographs of Accident Scene - Defendants submitted photographs of the accident scene. (Defendants APA pp. 297-304). The photographs show the trailer off the road way to the left and the tractor to the right. The roadway appears wet with debris/leaves.

Defendant Exhibit #19, pp 305-308. Photos of Deceased's Backpack and Possessions Discovered in the Truck Cab Post Accident - Photographs depicting a hand rolled "Dutch Masters" cigar/cigarette/blunt, another cigar/cigarette/blunt, U-Pass, and odor elimination spray were submitted. (Defendants APA pp. 305-308).

Defendant Exhibit #20, pp 309-210. SLED report - On September 28, 2014 Mr. Holmes was found not guilty of public disorderly conduct. (Defendants APA p. 309). On October 29, 2020 Mr. Holmes was convicted of possession of 28G or less marijuana/10G or less hash fist offense. He was arrested for this offense on October 13, 2020. (Defendants APA p. 310).

Examination by Attorney Tyler Bathrick

Dr. Osbon was hired by the Defendants. He has known Defense Counsel Stephen Stubley for twenty years. Defense counsel Stephen Stubley is married to Dr. Osbon's first cousin. Dr. Osbon did not feel his twenty year relationship with Attorney Stubley was relevant because his opinions are based on facts and nothing else. (Deposition of Dr. Osbon p. 27, lines 1-22). Dr. Osbon does not socialize with Stephen Stubley on a regular basis. However, he occasionally sees Mr. Stubley outside of a professional setting. Dr. Osbon testified, "He (Stephen Stubley) is an acquaintance who has become a friend by virtue of his marriage to my cousin." (Deposition of Dr. Osbon p. 125, lines 12-25; p. 126, lines 1-2).

Dr. Osbon attended Wofford College from 1988 to 1992. Following Wofford he reported for active duty as a Medical Service Corps officer and was stationed at the military medical school in Bethesda, Maryland. During that time he received a masters degree from John Hopkins in biotechnology and genetics. (Deposition of Dr. Osbon p. 97, lines 11-22). He graduated from the Medical University of South Carolina in 2002. Following medical school Dr. Osbon completed residency at Palmetto Health Richland from 2002 to 2005. He has been attending in emergency departments (VA Medical Center in Charleiton, Summerville Medical Center, Trident Medical Center and other freestanding emergency departments) ever since. (Deposition of Dr. Osbon p. 98, lines 1-13).

Dr. Osbon charged \$500 an hour for the opinions provided in this case. He performed approximately six or seven hours of work. (Deposition of Dr. Osbon p. 99, lines 11-15). This is the first time he testified regarding marijuana intoxication in a motor vehicle accident. (Deposition of Dr. Osbon p. 99, lines 19-25).

factors expert, and/or toxicologist. (Deposition of Dr. Osbon p. 25, line 25; p. 26, lines 1-6). He admitted that he has never done this type of work before (testifying regarding the effects marijuana on driving) and that prior testimony was limited to medical malpractice and life care work. (Deposition of Dr. Osbon p. 26, lines 9-18).

Dr. Osbon testified that he is an emergency medical physician who has treated patients similarly situated to Mr. Holmes hundreds if not thousands of times. Dr. Osbon testified that he has practiced in emergency medicine for twenty plus years and is board certified in emergency medicine. He testified that his opinion are based on the metabolism of marijuana, his understanding of the psychoactive effects of marijuana and its impact on ability to operate a motor vehicle because he has seen it hundreds of times. (Deposition of Dr. Osbon p. 25, lines 9-24).

Dr. Osbon testified that it was his medical opinion, stated most probably and to a reasonable degree of medical certainty (greater than 50% probability) that Mr. Holmes died from injuries sustained in the motor vehicle accident of December 16, 2020. (Deposition of Dr. Osbon p. 5, line 25; p. 6, lines 1-6).

Dr. Osbon admitted to not visiting the accident scene. He did not know what road or city or county the accident occurred in. He did not know which direction Mr. Holmes was traveling, how fast he was going, how many lanes of travel were on the road, which side of the road Mr. Holmes ended up on following the accident and whether there were skid marks. (Deposition of Dr. Osbon p. 7, lines 6-25; p. 8, lines 1-25). He knew that Mr. Holms was driving an 18-wheeler around 7:50 am when he drove off the road and ended up in trees. (Deposition of Dr. Osbon p. 7, lines 16-17; and p. 8, lines 1-25). Dr. Osbon did not ask for any pictures of the accident. He did not ask anyone if there were skid marks and he did not review pictures of the property damage of

Mr. Holme's vehicle. (Deposition of Dr. Osbon p. 9, lines 1-11). He did not talk to any person who witnessed the accident and he did not run any tests or mathematical equations to determine how the accident occurred. (Deposition of Dr. Osbon p. 9, lines 1-17).

Dr. Osbon did not know if Mr. Holmes fell asleep at the wheel, whether another driver pulled out of an intersection in front of Mr. Holmes, whether another driver crossed the center line, whether a deer ran out in front of Mr. Holmes causing him to change direction, whether Mr. Holmes reached for something while driving and lost control of the vehicle, whether Mr. Holmes was distracted by a cellular phone with said distraction causing the accident, and whether Mr. Holmes vehicle malfunctioned causing the accident. (Deposition of Dr. Osbon p. 9, lines 18-25; p. 10, lines 1-25; p. 11, lines 1-15).

Dr. Osbon neither asked the employer if any testing was done on the vehicle nor did he ask anyone if the vehicle was functioning properly. He testified that knowing the answer to those questions was not important for what he was asked to do. (Deposition of Dr. Osbon p.11, lines 7-25). Dr. Osbon testified that he was asked to review the medical records and evidence and determine whether or not impairment from marijuana intoxication was a contributing factor to the accident. Dr. Osbon went on to opine that marijuana intoxication was the major factor that he was able to determine from the medical records. (Deposition of Dr. Osbon p. 12, lines 1-10).

Dr. Osbon indicated that whether or not Mr. Holmes vehicle was working correctly would be informative but would not change his opinion. He testified that he did not need to know every detail of how the accident occurred because he was only here to opine based on the medical records and evidence and measurement of the levels of marijuana in Mr. Holmes system and the effects it had on his ability to operate a vehicle. (Deposition of Dr. Osbon p. 12, lines 11-25).

Dr Osbon did not know the speed of Mr. Holmes vehicle prior to the accident or what steering motions were made directly prior to the accident. (Deposition of Dr. Osbon p. 12, line 25; p. 13, lines 1-8). He did not ask for black box data. When asked if he wanted to look at black box data, Dr. Osbon responded, "Again, would be informative but it would not change my opinion about the degree of impairment from the use of marijuana in this patient and whether or not that played - - was a major contributing factor to the accident itself." (Deposition of Dr. Osbon p. 13, lines 9-20).

Dr. Osbon admitted that he did not know how Mr. Holmes accident occurred. (Deposition of Dr. Osbon p. 14, lines 1-25; p. 15, lines 1-5).

Dr. Osbon testified that not all single car accidents are due to intoxication. (Deposition of Dr. Osbon p. 15, lines 9-14).

Dr. Osbon testified that someone with a delta 9 THC level of 9.1 nanograms per milliliter are presumed impaired from an emergency medical physician perspective. Dr. Osbon did not base that opinion on the NHTSA Guide to Congress. Instead, he based it on his education, training and experience of having seen hundreds if not thousands of motor vehicle accidents involving alcohol, marijuana and other illicit substances. (Deposition of Dr. Osbon p. 15, lines 15-25).

Dr. Osbon testified that Mr. Holmes was twenty six years old when he passed away and that Mr. Holmes age was not particularly important. He then indicated that age can impact reaction time. (Deposition of Dr. Osbon p. 16, lines 18).

Dr. Osbon testified that Mr. Holmes weighed 206 pounds at the time of the accident and that weight does not affect marijuana tolerance only the capacity to store active metabolites in marijuana. (Deposition of Dr. Osbon p. 16, lines 13-22).

and admitted that lack of sleep could affect reaction time. He opined that information regarding lack of sleep would be informative but would not affect his opinion. (Deposition of Dr. Osbon p. 17, lines 1-22).

Dr. Osbon agreed that he was trying to determine what factors can affect Mr. Holmes ability to drive a vehicle safely. (Deposition of Dr. Osbon p. 17, lines 23-25; p. 18, lines 1-3). However, he did not know if Mr. Holmes was drowsy even though drowsiness can affect reaction times and ones ability to operate a vehicle. (Deposition of Dr. Osbon p. 18, lines 4-21). He did not know Mr. Holmes mood even though anger can affect how someone operates a motor vehicle. (Deposition of Dr. Osbon p. 18, lines 22-25; p. 19, lines 1-2). Dr. Osbon did not know when Mr. Holmes started his shift that morning, how often Mr. Holmes used marijuana, and/or Mr. Holmes tolerance to marijuana. He agreed that knowing tolerance and how often marijuana is used is important. (Deposition of Dr. Osbon p. 19, lines 3-18). Based on the results of Mr. Holmes drug test Dr. Osbon testified that Mr. Holmes consumed a rather large amount of marijuana in the time period immediately prior to the accident. (Deposition of Dr. Osbon p. 20, lines 1-10).

Dr. Osbon did not know what type of marijuana Mr. Holmes used on the date of the accident. He believed Mr. Holmes was perhaps smoking a joint at the time of the accident. Dr. Osbon did not know how much of the joint Mr. Holmes smoked. Dr. Osbon indicated that knowing how much of the joint Mr. Holmes smoked was not important due to the very high blood levels. (Deposition of Dr. Osbon p. 21, lines 2-25; p. 22, lines 1-3). Dr. Osborn went on to say that he agreed with the opinions provided by Dr. Early – that Mr. Holmes had to be smoking marijuana in the time period immediately proceeding the accident and that Mr. Holmes was intoxicated by marijuana. (Deposition of Dr. Osbon p. 22, lines 6-15).

consumed by Mr. Holmes. (Deposition of Dr. Osbon p. 22, lines 16-24). He did not know how fast Mr. Holmes ingested marijuana even though speed of ingestion affects intoxication. (Deposition of Dr. Osbon p. 22, line 25; p. 23, lines 1-7). Once again, he testified that Mr. Holmes antmortem blood testing was consistent with a recent use of potent marijuana. (Deposition of Dr. Osbon p. 23, lines 6-12).

Dr. Osbon defined intoxication as compromised ability to react in the same way you would at your neurological baseline in the absence of any illicit substance, to coordinate movements, to make decisions, to recall things in terms of memory to make decisions, and any execution of something that requires a motor skill to include things like driving or reacting to the conditions for driving. (Deposition of Dr. Osbon p. 24, lines 1-8). Dr. Osborn testified that he presumed to know Mr. Holmes baseline for his ability to react and make decisions and coordinate movements because Mr. Holmes presumably had a CDL. (Deposition of Dr. Osbon p. 24, lines 9-25). Dr. Osborn did not need to know Mr. Holmes non marijuana baseline for reaction time and decision making because of his experience over the years. (Deposition of Dr. Osbon p. 25, lines 2-8).

Dr. Osbon did not recall reviewing Mr. Holmes accident report. (Deposition of Dr. Osbon p. 28, lines 2-4). Dr. Osbon went on to indicate that he could opine that marijuana was the major contributing factor of the accident without reviewing the accident report. (Deposition of Dr. Osbon p. 28, lines 5-25).

Dr. Osbon went on to testify that there was a smoldering joint with levels of marijuana in Mr. Holmes system and that based on those two items he could opine that Mr. Holmes was impaired when the accident occurred. (Deposition of Dr. Osbon p. 29, lines 2-14). Dr. Osbon did not examine the marijuana cigarette. He did not do any testing to confirm that it was marijuana.

He did not know how much of the cigarette/blunt was smoked. He could not even say if the cigarette or cigar actually contained marijuana. (Deposition of Dr. Osbon p. 30, lines 6-20). Dr. Osbon went on to indicate that he knew the levels of psychoactive cannabis in Mr. Holmes system. (Deposition of Dr. Osbon p. 30, lines 20-22).

Dr. Osbon based his report on the NHTSA report to Congress and his review of the medical literature on substance abuse disorders, his work in ketamine clinics treating substance abuse disorders and his work in emergency medicine. (Deposition of Dr. Osbon p. 31, lines 15-25; p 32, lines 1-8). When asked for additional reports relied upon Dr. Osbon replied, "No, not for this report. I mean, it's—it's the background information that I am—I'm constantly doing what's called continuing medical education just like you do CLE, right. So I read about this stuff often. There's not - - I did not rely on any individual study or paper for that report." (Deposition of Dr. Osbon p. 32, lines 11-19). Dr. Osbon went on to testify that he was not relying on any other treatise besides the NHTSA report. (Deposition of Dr. Osbon p. 34, lines 3-10).

Dr. Osbon's report is not based on any independent scientific research regarding how marijuana is absorbed in the bloodstream or how marijuana impairment affects driving. (Deposition of Dr. Osbon p. 34, lines 17-25). Dr. Osbon testified that his opinions were based on 20-plus years of education, training, experience, and treating patients similar to Mr. Holmes who are under the influence of an illicit substance, specifically THC and his understanding of the manifestations of that ability to safely operate a vehicle or not. (Deposition of Dr. Osbon p. 35, lines 1-12).

Dr. Osbon did not perform any mathematical equation to come up with the conclusions provided in his report. He has never used marijuana before. He has not taught any classes

regarding how marijuana is absorbed in the bloodstream or THC levels and marijuana intoxication. (Deposition of Dr. Osbon p. 35, lines 13-25; p. 36, line 1).

Dr. Osbon did not know how long Mr. Holmes was in the cab of the truck for following the accident. (Deposition of Dr. Osbon p. 36, lines 2-6).

Dr. Osbon agreed that he did not know Mr. Holme's tolerance for marijuana and testified that he was able to account for not knowing Mr. Holme's tolerance by reviewing the levels of metabolites in his blood. He went on to indicate that Mr. Holmes did not smoke marijuana following his accident and that second hand smoke does not typically register positive test results. (Deposition of Dr. Osbon p. 37, lines 12-18). He testified that he did not recall the NHTSA Guide indicating otherwise. (Deposition of Dr. Osbon p. 37, lines 19-24). Later in the deposition Dr. Osbon agreed that the NHTSA report states, "Some studies have shown that people exposed to second hand marijuana smoke can test positive for THC." Dr. Osbon was unable to provide any research indicating otherwise and he opined that causal secondhand exposure is typically not something that would test positive. (Deposition of Dr. Osbon p. 52, lines 3-11). Dr. Osbon did not attribute for the potential for second hand exposure and opined that Mr. Holmes marijuana levels were consistent entirely with chronic use and heavy use just proceeding the accident. (Deposition of Dr. Osbon p. 52, lines 18-24).

Dr. Osbon testified that his report was not biased in favor of the Defense even though he knew Defense counsel for twenty years. (Deposition of Dr. Osbon p.38, lines 1-8).

Dr. Osbon indicated that his opinions were based on the THC in Mr. Holmes blood following the accident and his education, training, and experience. (Deposition of Dr. Osbon p. 38, lines 11-25).

correlate with impairment. (Deposition of Dr. Osbon p. 39, lines 11-14). When questioned regarding whether or not the NHTSA Guide permitted him to correlate THC levels in the blood with impairment, Dr. Osbon responded, its not authoritative, simply a very good synopsis of a lot of good research with a call for more research. (Deposition of Dr. Osbon p.41, lines 8-21). Dr. Osbon agreed that the NHTSA Guide concluded in part that there was poor correlation between THC in the blood and impairment and that setting per se limits are not meaningful. (Deposition of Dr. Osbon p.41, lines 22-25; p. 42, lines 1-6). Dr. Osbon went on to testify “Well, again, I’m simply opining on –what we know to be true, that there was marijuana in his system. And whether or not – again, you’re right in the sense that you cannot establish, again, a numerical score to level of impairment, but I can opine, to a reasonable degree of medical certainty, in agreement with Dr. Earley, that intoxication impairment was present. Even though poor correlation can be true doesn’t mean that THC was not in his system and that as a result of THC being in his system, he was impaired. He was intoxicated.” (Deposition of Dr. Osbon p.42, lines 18-25; p. 43, lines 1-3). Later, when confronted with the same statement from the NHTSA Guide to Congress Dr. Osbon testified, “Well, that is and of itself is not a recommendation (even though the statement was in a subsection entitled “Recommendations” (Deposition of Dr. Osbon p. 60, lines 13-24; p. 61, lines 1-25; p. 62, lines 1-7).

Dr. Osbon went on to agree that the NHTSA Guide found:

- “While fewer studies have examined the relationship between THC blood levels and the degree of impairment, in those that have been conducted, a consistent finding is that the level of THC in the blood and the degree of impairment do not appear to be closely related.” Dr. Osbon was unable to cite any study finding otherwise. (Deposition of Dr. Osbon p.43,lines 6-15).
- “THC level in the blood does not appear to be an accurate and reliable of predictor of impairment from THC.” Dr. Osbon was unable to cite any study finding otherwise.

(Deposition of Dr. Osbon p. 43, lines 19-25; p. 44, line 1). Dr. Osbon went on to testify that impairment was present and the literature does not support the ability to assign a numerical value to impairment. He indicated, "Impairment was present because of acute ingestion of marijuana to the point of impairment intoxication." (Deposition of Dr. Osbon p. 44, lines 3-8). Dr. Osbon based acute ingestion of marijuana on the THC in Mr. Holme's blood. (Deposition of Dr. Osbon p. 44, lines 9-23).

- "Currently there is limited ability to relate the amount of drug or metabolite in the blood to the presence and amount of impairment." Dr. Osbon took this statement to mean that you cannot assign a numerical level that is easily testable, falsifiable, quantifiable. (Deposition of Dr. Osbon 44, lines 24-25; p. 45, lines 1-20).
- "This research does not show a relationship between THC levels and impairment." Dr. Osbon was unable to cite any document stating otherwise. (Deposition of Dr. Osbon p. 45, lines 21-25; p. 46, lines 1-5).
- "There is no impairment standard for drivers under the influence of marijuana. Many reasons for this are discussed elsewhere in this report. They include the fact that there is no chemical test for marijuana impairment like BAC or BRAC test for alcohol that quantifies the amount of alcohol in their body, indicates the degree of and the risk of crash involvement that results from the use of alcohol. The psychoactive ingredient in marijuana, delta 9 THC does not correlate well with impairment." Dr. Osbon went on to testify, "I do not disagree with your statement. My point is when it says does not correlate well with impairment, that does not mean that there's no correlation because there is." He went on to testify that there is a correlation between acute intoxication impairment and one's ability to operate a motor vehicle. (Deposition of Dr. Osbon p. 46, lines 6-16).
- "...the presence of THC in the driver's body has not been shown to be a reliable amount measure of marijuana impairment of driving." (Deposition of Dr. Osbon p. 47, lines 10-20). Dr. Osbon went on to testify that the psychoactive materials in his blood were three times the report limit (the detectable limit in the toxicological report) and that he could take the amount of THC in Mr. Holmes' blood and say that Mr. Holmes was intoxicated. (Deposition of Dr. Osbon p. 49, lines 3-13).
- "...presence of THC in a driver does not establish impairment." (Deposition of Dr. Osbon p. 51, lines 23-25; p. 52, lines 1-2).
- "As previous sections of this report have indicated, the poor correlation of THC levels in the blood or oral fluid with impairment precludes using THC or oral fluid levels as an indicator of driver impairment." Dr. Osbon agreed that his report used blood THC levels to determine impairment. (Deposition of Dr. Osbon p. 54, lines 17-22; p. 55, lines 1-12).
- "Toxicologists are not able to provide expert testimony that a specific amount of THC present in a suspect's blood is definitively associated with being impaired by marijuana and render the driver unable to drive safely." Dr. Osbon testified that he could use THC in the blood to make associations and that he was not opining definitively, only to a reasonable

degree of medical certainty that Mr. Holmes was impaired by the use of alcohol just before or perhaps even during the accident. (Deposition of Dr. Osbon p. 55, lines 1-25; p. 56, lines 1-8).

- "A number of states have a set THC limit in their laws indicating that if a suspect's THC concentration is above the level, then the suspect is to be considered impaired. This per se limit appear to have been based on something other than scientific research. Some recent studies demonstrative that such per se limits are not evidence based." Dr. Osbon felt that statement was a legal question and felt that the statement was misleading. He once again opined that in our case there was impairment. (Deposition of Dr. Osbon p. 56, lines 9-25; p. 57, lines 1-9).
- "The blood THC concentrations will often impede rather than assist in making the case to a judge or jury to determine whether a suspect is impaired as a result of marijuana use." Dr. Osbon opined that a judge or jury might be confused, but not a doctor. Dr. Osbon would not agree that the NHTSA guide stated that what he was doing [basing impairment on THC in the blood] impedes rather than assists in making a determination on intoxication. (Deposition of Dr. Osbon p. 57, lines 16-25).

Dr. Osbon was asked to provide one test in the NHTSA Guide to Congress or anywhere else that permits him to review THC level in the blood and opine that someone was impaired. Dr. Osbon was unable to cite a study. Instead, he relied on his experience as an emergency room physician to opine about Mr. Holmes level of intoxication. (Deposition of Dr. Osbon p. 50, lines 11-25; p. 51, lines 1-2). He then admitted that he did not do research on crash victims regarding when they used marijuana, how much they used, and whether or not marijuana contributed to the accident. (Deposition of Dr. Osbon p. 51, lines 3-22).

Dr. Osbon has treated trauma patients for twenty years. He has not performed scientific research on this issue. He testified that he read many studies on this issue, but could not provide the name of one study. (Deposition of Dr. Osbon p. 58, lines 10-25; p. 59, lines 1-12).

Dr. Osbon went on to testify that he agreed with Dr. Early's opinion, stated most probably and to a reasonable degree of medical certainty, that marijuana use affected Mr. Holmes judgement and coordination. (Deposition of Dr. Osbon p. 63, lines 13-16).

that indicates you can base impairment from marijuana on THC levels in the bloodstream. (Deposition of Dr. Osbon p. 66, lines 1-25; p. 67, lines 1-14). When asked if his report followed or did not follow the guidelines set out by the NHTSA Guide to Congress Dr. Osbon responded, "There is no guideline that you are referring to with any specificity." (Deposition of Dr. Osbon p. 68, lines 4-12). When asked if his report followed any scientific guideline Dr. Osbon replied, "My report, yes, its empirically based in the scientific training that I've had and have employed all my career." He agreed that it was not based on any other scientific guideline. (Deposition of Dr. Osbon p. 68, lines 13-21).

Dr. Osbon testified that peak impairment after marijuana consumption varies by individual and there is wide variability. He testified, "I've been opining the whole time about there is impairment. I cannot quantify that not can anyone quantify that in terms of a number or system..." He went on to indicate that a physician could still make a judgement regarding whether impairment was present. (Deposition of Dr. Osbon p. 68, lines 22-25; p. 69, lines 1-24).

Dr. Osbon testified that he did not summarize all of the studies cited in the NHTSA Guide to Congress. He went on to state that he did not cut and paste information from the NHTSA Guide that was helpful to Defendants and completely ignore information that is not. (Deposition of Dr. Osbon p. 71, lines 5-12).

Dr. Osbon agreed that the University of Iowa lane variance test (from the NHTSA Guide to Congress) found that marijuana increased lane position variability but did not increase lane departure. He was not able to provide an opinion on whether marijuana increased lane departure. (Deposition of Dr. Osbon p. 72, lines 1-13). He agreed that the Iowa study found that individuals dosed with marijuana generally drove slower and at a greater following distance than sober

individuals. However, he did not include that finding in his report because he did not feel it was germane to Mr. Holmes case. (Deposition of Dr. Osbon p. 72, lines 14-22). Dr. Osbon agreed that the Iowa study found, "...that many studies have not shown impairment on these psychomotor tasks, cognitive and executive functions, as have shown statistically significant impairments. It is not clear why that is the case. It may stem from different THC doses, different time lags between doses and testing or driving, difference in the task used to assess the effects, tolerance developed through frequent use, and the different dependent measurements employed and the relative sensitivity to small effect." Dr. Osbon found that passage to mean that some studies do not show a high degree of correlation, but that does not mean there is no correlation. Dr. Osbon testified that the next statement indicated that research has found the potential for marijuana to impair drivers in those fields. He testified that in his experience, marijuana impairs the ability to operate a motor vehicle. (Deposition of Dr. Osbon p. 73, lines 19-25; p. 74, lines 1-25).

Dr. Osbon agreed that he did not know the THC dose used by Mr. Holmes, the time lapse between ingestion of marijuana and the accident, and/or Mr. Holmes tolerance to marijuana. He indicated that he only knew marijuana levels following the accident. (Deposition of Dr. Osbon p. 74, line 25; p. 75, lines 1-11).

Dr. Osbon agreed that studies involving driving and THC found variability based on different dependent measure like anger, sleep and driving ability. He indicated that he was not testify there was a strict correlation and that all facts needed to be put together to determine if impairment intoxication by virtue of the use of marijuana does or does not exist and in his opinion it does. (Deposition of Dr. Osbon p.75, lines 1-25; p. 76, lines 1-4).

Dr. Osbon testified that some studies in the NHTSA Guide were of better quality than others and that not all of the studies are applicable in the real world but he did not have an opinion

regarding which studies in the NHTSA Guide were better than the others. Outside of the study he was looking at, Dr. Osbon was not able to identify one study in the NHTSA Guide because he did not memorize authors names. (Deposition of Dr. Osbon p. 76, lines 5-25; p. 77, lines 1-8). Dr. Osbon agreed that slight changes in performance were often statistically significant and that there are always confounding variable. (Deposition of Dr. Osbon p. 77, lines 9-25).

Dr. Osbon agreed that a study in the NHTSA Guide found that subjects who smoked marijuana and then drove typically drove slower, followed at a greater distance, and took fewer risks than sober drivers. He also stated that they had slower reaction times to dealing with emergency situations like braking, decreased attention, decreased target recognition, impaired cognitive performance, decreased attention maintenance, impaired executive function, decision making and route planning. (Deposition of Dr. Osbon p. 78, lines 3-16).

Dr. Osbon felt “road tracking” meant lane position. When asked about lane departure he stated, “No, I don’t think it specifically refers to that in the passage.” (Deposition of Dr. Osbon p. 78, lines 17-23). He agreed that Mr. Holmes accident involved lane departure. (Deposition of Dr. Osbon p. 79, lines 1-3).

Dr. Osbon did not know Mr. Holmes level of distraction, drowsiness, emotion state, and other factors that could lead to an accident as indicated in the NHTSA Guide to Congress. However, he did know that the level of psychoactive drug in Mr. Holmes system was 18 times the report limit. (Deposition of Dr. Osbon p. 79, lines 4-13).

Dr. Osbon was not familiar with the “DEC program” referenced in the NHTSA Guide. (Deposition of Dr. Osbon p. 79, lines 16-22).

When asked if the NHTSA Guide found “Current knowledge about the effects of marijuana on driving is insufficient to allow specification of a simple measure of driving impairment outside

of controlled conditions” Dr. Osbon replied “Again, so they’re saying in a laboratory setting versus real world. I mean it may be true with the specificity they’re trying to arrive at or at least direct research to determine that.” (Deposition of Dr. Osbon p. 81, lines 9-20).

When asked if the NHTSA Guide found “Experimental and observational studies do not lend themselves to predicting real world crash risks” Dr. Osbon responded, “It’s referring to a subset and I’m certain that’s true about those particular studies they referred to. When asked for studies that show a real world predictor of crashes Dr. Osbon responded that there was literature but he had nothing specific. (Deposition of Dr. Osbon p.81, lines 21-25; p. 82, liens 1-11).

When asked if the NHTSA Guide found, “The review of research on effects of marijuana use on driving concluded that there are currently no evidence based methods to detect marijuana impaired driving” Dr. Osbon responded, “There’s similarities between the ability to quantify like what we can with blood alcohol versus marijuana I think is what they’re referring to there.” (Deposition of Dr. Osbon p.82, lines 12-21).

Again, Dr. Osborn could not rule out whether Mr. Holmes was distracted, drowsy, sick or angry and agreed that all of those things, if present, would negatively affect his ability to drive but he did not have any evidence Mr. Holmes was distracted, sick, drowsy, or angry and he could not speculate on those things contributing to the accident.. (Deposition of Dr. Osbon p. 83, lines 1-23).

Dr. Osborn was asked about epidemiological studies in the NHTSA Guide to Congress and he cited a non epidemiological study that found that marijuana has been shown to impair critical driving related skills including psychomotor abilities like reaction time, tracking ability, and target detection. Cognitive skills like judgement, anticipation, and divided attention. And executive functions like route planning and risk taking. (Deposition of Dr. Osbon p. 91, lines 14-25; p. 92,

lines 1-25). Dr. Osbon agreed that he was reading from a non-epidemiological study (Deposition of Dr. Osbon p.92, lines 22-24) but indicated that epidemiological studies went into that statement. (Deposition of Dr. Osbon p. 93, lines 1-11). When asked how much impairment marijuana was found to cause based on epidemiological studies, Dr. Osbon stated, "...that's a very difficult thing to predict or to quantify because its not quantifiable. That's why I've been very clear to say impairment was present and contributed." When asked what the NHTSA Guide says about the effects of marijuana and motor vehicle accidents based on epidemiological studies Dr. Osbon responded, "Yeah. I need you to- - again I'd have to look at certain passages and consider the context, but I'd be happy to do so, if you want to point one out." (Deposition of Dr. Osbon p. 93, lines 22-25; p. 94, lines 1-4). Dr. Osbon agreed that one epidemiological study cited in the NHTSA Guide to Congress found "Some of the studies have suggested that marijuana use has minimal or no effect on the likelihood of crash involvement while others have estimated a small increase in the risk of crash involvement." When asked to cite a study indicating otherwise Dr. Osbon stated, "I'd have to go look through the report. What page are you on?" (Deposition of Dr. Osbon p. 94, lines 5-25). Dr. Osbon then cited a study by Li estimating increased that marijuana increased risk of crash involvement at 1.83 times that of drug free-drivers. When asked if that 1.83 times was statistically significant Dr. Osbon indicated that it was. (Deposition of Dr. Osbon p.95, lines 1-8).

Dr. Osbon was asked if he has ever been qualified to testify as an expert regarding drug use and its effects on driving. He responded, "As a component of some cases. I mean, its never been exclusively that, no." When asked what cases so Claimant's counsel could look them up Dr. Osbon stated, "Yeah. I have not specifically submitted any opinions to a court based on that alone. I haven't." When asked if he had ever been qualified in that field Dr. Osbon responded, "Again, not specifically for that specific thing you just asked." (Deposition of Dr. Osbon p. 95, lines 18-25; p.

96, lines 1-10). Dr. Osbon has not performed his own research on marijuana effects and driving. He has taken classes on substance use disorders in continuing medical education classes. (Deposition of Dr. Osbon p. 96, lines 14-25). He has never measured the amount of marijuana in the bloodstream but he has drawn labs before. (Deposition of Dr. Osbon p. 97, lines 4-8).

Dr. Osbon was unable to provide Mr. Holmes with a level of impairment. He testified that Mr. Holmes impairment from marijuana was a major contributing factor and proximate cause of Mr. Holmes motor vehicle accident. (Deposition of Dr. Osbon p. 100, lines 9-25). However Dr. Osbon admitted to not knowing the specifics of how Mr. Holmes motor vehicle accident occurred. (Deposition of Dr. Osbon p. 101, lines 1-12).

Examination by Attorney George Gallagher

Dr. Osbon indicated that the NHTSA Guide does not conclude that marijuana does not cause impairment and that in his experience marijuana causes impaired faculties and judgement. (Deposition of Dr. Osbon p. 102, lines 1-5). He testified that there are twenty to thirty states that have a per se marijuana intoxication standard of five nanograms per milliliter. He could not recall what states. (Deposition of Dr. Osbon p. 102, lines 1-25). Dr. Osbon testified that Mr. Holmes' THC level was 9.1 nanograms per milliliter. (Deposition of Dr. Osbon p. 103, lines 4-12). Dr. Osbon testified that trucking regulation provided a zero tolerance policy for marijuana use. (Deposition of Dr. Osbon p. 103, lines 13-20.) Dr. Osbon testified that he could not think of one jurisdiction in the country that endorses marijuana use while driving. (Deposition of Dr. Osbon p. 104, lines 2-8). Dr. Osbon did not know how states came up with the five nanogram per milliliter standard. (Deposition of Dr. Osbon p. 109, lines 9-13).

When asked what the THC report level means, Dr. Osbon testified: "So that report level is the means by which toxicology is measuring the presence or absence of any particular substance.

In this case they have a cutoff limit and I forget the number there. I could look it up, but I do recall calculation that the number of Mr. Holmes' result was 18 times the report limit.” (Deposition of Dr. Osbon p. 105, lines 5-15).

Dr. Osbon went on to testify that a report level is used to determine if THC is there or not. (Deposition of Dr. Osbon p. 105, lines 1-17). Dr. Osbon testified that the minimal detectable report level is .5 nanograms per milliliter. He testified that someone with that level could be impaired. (Deposition of Dr. Osbon p. 106, lines 14-25). When asked what the minimum amount of level that would affect safe operation of a motor vehicle Dr. Osbon indicated that he did not have a reliable number. (Deposition of Dr. Osbon p. 107, lines 2-18).

When asked if the NHTSA report says or concludes that toxicologists not use THC levels as a clinical factor for determining impairment or intoxication, Dr. Osbon responded, “I do not see anything to suggest that a clinician needs to do that.” (Deposition of Dr. Osbon p.107, lines 23-25; p. 108, lines 1-4). Dr. Osbon opined that he believes the NHTSA Guide was created to understand the prevalence of marijuana use and its impact on the ability of people to conduct themselves safely on the roads. Dr. Osbon indicated that a large part of the report was to help determine research methodologies that can be used to ultimately conduct a means by which law enforcement or anyone else can assess the degree of impairment and understand that it is not as straightforward as blood alcohol levels. (Deposition of Dr. Osbon p.108, lines 5-25).

Dr. Osbon testified that a partially smoked marijuana cigarette is consistent with his opinion in his report of recent marijuana use and acute intoxication but he could not draw a conclusion about intoxication or impairment from a partially consumed marijuana cigarette without additional empirical data. (Deposition of Dr. Osbon p. 110, lines 21-25; p. 111, lines 1-7).

Dr. Osbon testified that a couple of tokes off a joint would cause acute intoxication and impairment. (Deposition of Dr. Osbon p. 111, lines 8-11).

Dr. Osbon testified that the THC nanograms in Mr. Holmes blood was higher after the accident than when his blood was taken. Given the metabolism of marijuana, the THC in Mr. Holmes bloodstream was not from use a day or days prior. It was highly suggestive of acute intoxication. (Deposition of Dr. Osbon p. 112, lines 1-25).

Dr. Osbon was shown the responding officers accident report that included a diagram of how the accident allegedly occurred. (Deposition of Dr. Osbon p. 114, lines 8-25). Dr. Osbon testified that accident report indicates that Mr. Holmes vehicle ran off the roadway to the right, over corrected, ran off the roadway left, struck a ditch causing the trailer to detach, and then the truck ran off the right side of the roadway into an embankment. (Deposition of Dr. Osbon p. 115, lines 1-25). Dr. Osbon testified that previously cited NHTSA reports did not find much of an effect between marijuana use and lane departure. However, Dr. Osbon testified, "My take on it though was again it was always a function of the other motor skills that are required and to include things like reaction time and stuff like that. So what I see here is consistent with delayed reaction times cognitively and from a motor skills perspective." (Deposition of Dr. Osbon p. 116, lines 13-25).

Dr. Osbon did not have a specific recollection of studies regarding lane departures. Only that lane departures are a component part of all the other skills that are needed to operate a motor vehicle. (Deposition of Dr. Osbon p. 177, lines 12-24).

Dr. Osbon testified that the skills necessary to operate a motor vehicle within a lane of travel can be impaired by acute marijuana intoxication. (Deposition of Dr. Osbon p. 118, lines 15-23). He testified that marijuana impairs judgement, function, and other things. (Deposition of Dr. Osbon p. 118, lines 21-25; p. 119, lines 1-3).

When asked what the most compelling factor for his opinion that Mr. Holmes was intoxicated on marijuana at the time of his accident, Dr. Osbon responded: “The most compelling is again a magnitude of measurement as determined by toxicology of the two active metabolites, not just the one, but the other that both have profound psychoactive effects. That really has been—was the basis upon which I began to analyze the case itself and with those numbers in mind ultimately to assess the medical records as well to find any inconsistencies and did not find any based on my review.” (Deposition of Dr. Osbon p. 119, lines 4-12).

Dr. Osbon testified that there was no way in his mind, given the level that was 18 times above reporting level, that Mr. Holmes was not intoxicated. Dr. Osbon testified that in his opinion, to a reasonable degree of medical certainty, Mr. Holmes was acutely intoxicated. (Deposition of Dr. Osbon p. 119, lines 18-24; p. 120, lines 1-2). Dr. Osbon testified that it was his opinion, stated within a reasonable degree of medical certainty that intoxication was a major contributing factor to the occurrence of this accident. (Deposition of Dr. Osbon p. 120, lines 3-7). Dr. Osbon was not able to exclude other factors including factors mentioned by Claimant’s counsel. He testified that he could only render an opinion based on what is empirically shown. Dr. Osbon was unaware of any evidence of factors mentioned by Claimant’s counsel. He testified that he was happy to review his testimony if more evidence was brought to him but did not know if his opinion would change due to the acute intoxication of marijuana. (Deposition of Dr. Osbon p. 120, lines 10-25; p. 121, lines 1-7).

Dr. Osbon testified that the NHTSA Guide discussed the difficulty in correlating THC levels and impairment but it did not find that there was no correlation. Dr. Osbon went on to testify that from a clinical standpoint a person could still make a determination based on evidence at hand. (Deposition of Dr. Osbon p. 121, lines 8-15). Dr. Osbon testified that the NHTSA Guide was in

part commissioned to attempt to set a gold standard for marijuana intoxication like blood alcohol but could not come to a consensus with the available testing. (Deposition of Dr. Osbon p. 121, lines 16-25).

Dr. Osbon did not feel the NHTSA Guide established any professional guidelines for experts or clinicians called upon to render an opinion on marijuana intoxication. (Deposition of Dr. Osbon p. 122, lines 11-19).

Dr. Osbon testified that witness reports would be very helpful in establishing intoxication but from a legal perspective but not necessarily from a medical perspective. Dr. Osbon testified that from a medical perspective he was relying on toxicology report to determine that Mr. Holmes was intoxicated. Dr. Osbon testified that the two metabolites that are psychoactive and manifest themselves in impairment were markedly elevated above the report limit. (Deposition of Dr. Osbon p. 123, lines 3-19). Dr. Osbon indicated that Delta 9 THC was three times the limit and delta 9 itself was 18 times the limit.

Re-Examination by Tyler Bathrick

Dr. Osbon testified that Mr. Holmes THC level was at 9.1 nanograms per milliliter. However, after smoking THC levels can reach 200 nanograms per milliliter. (Deposition of Dr. Osbon p. 126, lines 22-25; p. 127, line 1). Dr. Osbon did not know the expected nanograms per milliliter two minutes after smoking because nanograms per milliliter is not a linear number like blood alcohol. (Deposition of Dr. Osbon p. 127, lines 2-25). Dr. Osbon testified that peak marijuana intoxication is thirty minutes after smoking. His thirty minutes answer was based on talking to his patients about marijuana use and residency training and treatment of patients acutely intoxicated by marijuana. (Deposition of Dr. Osbon p. 128, lines 21-25; p. 129, lines 1-25; p. 130, lines 1-25; p. 131, lines 1-7). Dr. Osbon was not surprised to learn that the NHTSA Guide found

peak intoxication 90 minutes after smoking because peak intoxication is widely variable. (Deposition of Dr. Osbon p.131, lines 8-13).

When asked about the per se state limit for marijuana intoxication Dr. Osbon did not know if that that limit was based on any scientific research. (Deposition of Dr. Osbon p. 131, lines 18-23).

Dr. Osbon agreed that our accident is a lane departure case. He was not able to cite one study or case showing marijuana leads to lane departure. (Deposition of Dr. Osbon p.137, lines 21-25; p. 138, lines 17-21). Dr. Osbon went on to testify that it was his medical opinion that it was plausible that lane departure can occur when someone is under the influence of marijuana. He went on to testify, "I do not need a citation on that. Its based on my clinical experience." However, Dr. Osbon admitted that he never personally saw someone intoxicated on marijuana depart a lane of travel while operating a motor vehicle. Dr. Osbon testified that in the emergency room setting he never went back with an accident reconstruction in order to determine why accidents occurred. (Deposition of Dr. Osbon p. 139, lines 1-25; p. 140, lines 5-8).

Dr. Osbon agreed that road departure accidents are also consistent with animals in the roadway, cell phone useage, picking up a marijuana cigarette from the floor of the truck, trailer disconnection, (Deposition of Dr. Osbon p. 141, lines 8-25; p. 142, lines 1-23). Dr. Osbon opined that Mr. Holmes was intoxicated on marijuana but admitted that he did not know why Mr. Holmes left the roadway. (Deposition of Dr. Osbon p. 143, lines 1-12).

DEPOSITION OF DR. GORDON EARLY

Examination by Attorney Tyler Bathrick

On October 19, 2023 both parties deposed Dr. Gordon Early.

He performed his residency at Colorado and received an occupational medicine fellowship at Duke University. (Deposition of Dr. Early p. 8, lines 8-15). Dr. Early is still in practice. He sees approximately eighteen patients a day. Out of those eighteen approximately four are workers compensation patients or occupational medicine patients. (Deposition of Dr. Early p. 5, lines 11-23). Dr. Early agreed that his curriculum vitae does not address the effects of marijuana on the human system. (Deposition of Dr. Early p. 9, lines 11-13). He has not testified regarding the effects of marijuana on the human system but has performed medical reviews regarding positive drug screens. (Deposition of Dr. Early p. 9, 18-22).

Dr. Early did not hold himself out to be a forensic toxicologist and/or human factors expert. (Deposition of Dr. Early p. 10, lines 12-18). He has never been qualified as an expert witness with regard to the effects of marijuana on the human system. (Deposition of Dr. Early p. 11, lines 18-21). Dr. Early's training with regard to the effects of marijuana on the human system consist of his fellowship in occupational medicine and his board certification in toxicology. (Deposition of Dr. Early p. 11, lines 22-25). Dr. Early indicated that as a toxicologist and occupational medicine provider he deals with marijuana on a rather frequent basis. As a medical review officer since 1994 he reviewed a number of drug screens over the years. He has also been asked questions about marijuana from a toxicological perspective. (Deposition of Dr. Early p. 12, lines 4-15). His training regarding the effects of marijuana on the human system consisted of residency fellowship and twenty five years of practice. (Deposition of Dr. Early p. 12, lines 16-20). Dr. Early estimated that he saw approximately ten people intoxicated on marijuana over his thirty years of practice. (Deposition of Dr. Early p. 13, lines 1-3). Dr. Early has not performed studies on the effects of marijuana on the human person. He has not performed any research on the effects of marijuana

on the human person. His medical practice does not regularly involve the effects of marijuana on the human person. (Deposition of Dr. Early p. 13, lines 4-12). Dr. Early was hired by Defendants to determine if Mr. Holmes was intoxicated at the time of his accident, the effects of Mr. Holmes intoxication, and whether the accident would not have occurred but for Mr. Holmes intoxication. (Deposition of Dr. Early p. 13, lines 13-25; p. 14, lines 1-4). Dr. Early charged between \$250 and \$280 for work. As of the date of the deposition he had worked twenty hours and a majority of that work was performing scientific studies. (Deposition of Dr. Early p 14, lines 5-13).

Dr. Early defined intoxication as it relates to his report and his deposition as when a toxin has exerted an effect upon a human that has deterred their performance ability. (Deposition of Dr. Early p. 11, lines 10-17).

Dr. Early estimated when Mr. Holmes last used marijuana on the date of accident based on half life of Delta 9 THC. He did not use a calculation or formula to come up with this time. He testified that there is not a scientific formula used to determine ingestion of marijuana based on Delta 9 THC in the system. (Deposition of Dr. Early p. 16, lines 8-25). Dr. Early used half lives to determine when Mr. Holmes last used marijuana. He testified that Mr. Holmes used marijuana sometime approximately three hours prior to the accident, but he did not know exactly when. Knowing when Mr. Holmes last used marijuana would not help Dr. Early determine Mr. Holmes level of impairment. (Deposition of Dr. Early p. 17, lines 1-25). Dr. Early explained that the half life of marijuana was typically 60 to 70 minutes in chronic users and 30 minutes in non chronic users. (Deposition of Dr. Early p. 18, lines 1-25). Given the time of the accident and when Mr. Holmes blood was drawn postmortem, given half lives, Dr. Early anticipated the level of Delta 9 in Mr. Holmes system to be substantially higher than 9.1. He believed the Delta 9 in Mr. Holmes system to be closer to 30 to 50. Dr. Early was not aware of Mr. Holmes injury affecting half life.

He again testified that chronic use would affect half life. He indicated that age would not, but that height and weight (specifically obesity) would. (Deposition of Dr. Early p. 20, lines 1-25; p. 21, lines 1-14). Dr. Early testified that potency of marijuana and amount ingested would not affect half life. (Deposition of Dr. Early p. 21, lines 1-21).

Dr. Early opined that Mr. Holmes was intoxicated at the time of his accident. He based his opinion on Mr. Holmes toxicology report and the literature he reviewed regarding the affects of marijuana on the human person. (Deposition of Dr. Early p. 22, lines 1-25; p. 23, lines 1-6). He did not use an equation to determine intoxication and he was not able to provide an equation that could be used to determine if someone was intoxicated. Dr. Early indicated that there is an equation that can be used for alcohol. However, he did not know it off the top of his head. (Deposition of Dr. Early p. 23, lines 7-25).

Dr. Early determined Mr. Holes was intoxicated based on pharmacological principles. He used the half life of Delta 9 THC to determine the amount of Delta 9 THC in Mr. Holmes blood. However, he did not know how potency of the marijuana ingested by Mr. Holmes and he did not know how much marijuana Mr. Holmes ingested. Dr. Early agreed that potency and amount ingested both matter when determining intoxication. (Deposition of Dr. Early p. 24, lines 1-25; p. 25, lines 1-25; p. 26, lines 1-25).

Dr. Early testified that THC levels in the blood are a reliable measurement of impairment (Deposition of Dr. Early p. 28, lines 1-2) and that blood alcohol levels (when dealing with alcohol in the blood) is an imperfect monitoring device and an imperfect measurement but reliable. (Deposition of Dr. Early p. 27, lines 5-25). Dr. Early agreed that not everyone with 9.1 nanograms per milliliter in their blood acted the same. He indicated that he would have to know tolerance and that people who are tolerant have less impairment and tend to metabolize marijuana more slowly.

He also testified that regular users can release marijuana from storage sites in their body (fatty cells) and that such a release could affect serum level. Dr. Early was unable to account for tolerance level and fat release with regard to Mr. Holmes. (Deposition of Dr. Early p. 28, lines 3-24).

Dr. Early estimated that Mr. Holmes accident occurred around 7:44 am. When EMS arrived Mr. Holmes was found between the steering wheel and drivers door. Dr. Early agreed that Mr. Holmes could have been alive followed by the accident in the cab of his truck surrounded by marijuana smoke. Dr. Early did neither accounted for second hand smoke nor did he believe the second hand smoke to be significant. He explained that second inhalation is not as rapid and substantial as direct inhalation. He also indicated that the windows were out and the doors of the cab were open so marijuana would have diffused from the cab. He also indicated that since it was raining there was also, he guesses, wind and the wind would increase the rate of dispersion. (Deposition of Dr. Early p. 29, lines 1-25; p. 30, lines 1-7).

Dr. Early neither knew the potency nor the amount of marijuana ingested by Mr. Holmes on the date of his accident. He did not know how much marijuana was already in Mr. Holmes system when he woke up on the date of accident, and he did not know Mr. Holmes tolerance for marijuana (Deposition of Dr. Early p. 32, lines 24-25; p. 33, lines 1-12). Additionally, Dr. Early did not know which strain of marijuana Mr. Holmes used. When asked what the two common strains of marijuana are, he replied Delta 8 and Delta 9 (Depo p. 33, lines 1-25). He was not aware of Sativa and/or Indica strains of marijuana. He did agree that different strains have different potency and/or effects. (Depo p. 34, lines 1-16). Dr. Early agreed that assuming sativa and indica have different effects on people, knowing the difference would be helpful. (Deposition of Dr. Early p. 34, lines 1-23).

Dr. Early agreed that a portion of his report was cut and pasted from Dr. Bierly's report. (Deposition of Dr. Early p. 34, lines 24-25; p. 35, lines 1-35). During this line of questioning Dr. Early admitted that there were different drafts of his reports and that his first draft was not submitted. (Deposition p. 35, lines 1-25). Dr. Early indicated that there were two different drafts of his report and two additional addendums that were submitted when a third question was tweaked on two different occasions. (Deposition of Dr. Early p. 36, lines 16-25). Dr. Early submitted his first report to Defendants on May 7, 2023. Defendants requested Dr. Early revise his report with regard to how question number three was answered. Dr. Early does not recall anything else being revised at that time. Dr. Early then submitted the revised report to Defendants. (Deposition of Dr. Early p. 38, lines 3-17). On May 18, 2023 Dr. Early created his first addendum to the report. In June he believes he came out with a second addendum. (Deposition of Dr. Early p. 38, lines 18-25). Dr. Early indicated that Defendants revised question number three to, "Was the intoxication more likely than not a cause of the accident?" (Deposition of Dr. Early p. 39, lines 6-15).

Dr. Early indicated that his report states, "Studies have shown that marijuana affects judgement, coordination, situational awareness." Dr. Early stated that this conclusion was based solely on studies that he had reviewed and not scientific research that he had personally performed. (Deposition of Dr. Early p. 39, lines 18-25; p. 40, lines 1-2). Dr. Early indicated that in Medical Review Officer training he was trained to address the relationship between consumption and intoxication impairment. Dr. Early went on to testify that he attended two forty five to fifty minute seminars on the issue. (Deposition of Dr. Early p. 40, lines 3-12). His Medical Review Officer course was a two day, sixteen hour course with approximately less than 10% of the course focusing on the effects of marijuana on the system. (Deposition of Dr. Early p. 13-25). When asked how much of the medical review course was related to marijuana intoxication and the effects of

marijuana on the system, Dr. Early indicated, "...I trained in 1994, so it's been quite a while. Can't remember." (Deposition of Dr. Early p. 40, lines 18-25; p. 26, line 1). He went on to indicate that they probably spent half of the course on marijuana. (Deposition of Dr. Early p. 41, lines 1-13). Dr. Early reviewed Matthew Lawsons deposition before providing an addended report. Dr. Early did not know how much of the alleged blunt located in Mr. Holmes cab was remaining. He indicated that knowing how much of an alleged marijuana cigar was left would have been helpful. (Deposition of Dr. Early p. 41, lines 1-25; p. 42, lines 1-3).

Dr. Early opined that peak impairment after ingesting marijuana via inhalation was ten to fifteen minutes after inhalation. (Deposition of Dr. Early p. 42, lines 7-16). Dr. Early indicated that chronic users of marijuana exhibited less severe behavioral abnormalities if given the same dose as non-chronic users. (Deposition of Dr. Early p. 42, lines 19-25; p. 43, lines 1-2). In the acute phase of use there is less intoxication for chronic users. (Deposition of Dr. Early p. 43, lines 1-9).

One of Dr. Early's reports indicated that other factors could have contributed to the accident. (Deposition of Dr. Early p. 44, lines 12-18). Dr. Early indicated that he modified his report to indicate that intoxication was a cause of the accident, not the cause of the accident. (Deposition of Dr. Early p. 46, lines 2-22). Dr. Early indicated that he saw of video depicting heavy rain on the road. He was not certain on the condition of the truck at the time of the accident and the truck could have had faulty breaks, problems with the gas intake, the manifold or other things that could affect the truck. (Deposition of Dr. Early p. 47, lines 3-23).

Dr. Early indicated that he is neither an accident reconstructionist nor testifying as an accident reconstructionist. (Deposition of Dr. Early p. 48, lines 1-6). He has not visited the accident scene and he has not viewed any video depicting the accident, just the aftermath.

(Deposition of Dr. Early p. 48, lines 7-12). Dr. Early indicated that it is his understanding that the accident happened on a rainy December. He indicated that terrain was hilly but the road was straight. He did not know the speed limit on the road Mr. Holmes was traveling on and he did not know how fast Mr. Holmes was traveling when the accident occurred. (Deposition of Dr. Early p. 48, lines 14-25; p. 49 lines 1-2).

Dr. Early agreed that it was possible that: a) another vehicle swerved into Mr. Holmes' lane of travel causing Mr. Holmes to swerve; b) a deer or other animal ran into the roadway causing Mr. Holmes to swerve; c) Mr. Holmes fell asleep due to lack of sleep the night before; d) Mr. Holmes reached to grab something on in the cab of his truck and lost control of his vehicle; and e) Mr. Holmes tire went flat causing the accident. Dr. Early indicated that all of those types of accidents happen to people who are not intoxicated and that he could not rule them out. (Deposition of Dr. Early p. 49, lines 10-25; p. 50, lines 1-25; p. 51, lines 1-11). Dr. Early indicated that the scenarios listed in a-e above did not change his opinions regarding whether Mr. Holmes was intoxicated and whether his intoxication resulted in adverse affects on his judgement, concentration, and/or situational awareness. Finally, he indicated that it did not change his opinion as to whether or not intoxication was a cause of the accident. He indicated, "There may be other causes. A cause doesn't mean the only cause." (Deposition of Dr. Early p. 51, lines 15-25; p. 52, lines 1-5).

Dr. Early indicated that he was not testifying that intoxication was the proximate cause of the accident. He testified that he did not have enough evidence to say intoxication was the proximate cause of the accident. (Deposition of Dr. Early p. 52, lines 6-12).

Dr. Early went on to testify that the accident could have occurred due to the load in the trailer shifting or Mr. Holmes simply losing control of the vehicle or Mr. Holmes paying more

attention to his phone than the road. He indicated that all of those scenarios cause accidents whether someone is intoxicated or not and he could not rule out said scenarios. (Deposition of Dr. Early p. 53, lines 1-14).

Dr. Early indicated that he did not know how Mr. Holmes accident occurred. (Deposition of Dr. Early p. 53, lines 15-17).

Dr. Early testified that “The effects of cannabis and alcohol on simulated arterial driving” found high doses of cannabis lowered speed in drivers compared to placebos and that mean headway or following distance increased after cannabis use. The study found reaction times slowed by .05, steering wheel deviation increased .1 degrees, and lateral movements in a lane of travel increased four to eight centimeters. Dr. Early agreed that subjects in this study were not just driving off the road. In fact, Dr. Early agreed that the study found subjects dosed with higher doses of marijuana drove slower and at greater following distances. (Deposition of Dr. Early p. 54, lines 2-25; p. 55, lines 1-24).

Dr. Early testified that the Meta-analysis “Cannabis Effect on Driving” found that acute cannabis intoxication produces dose related impairment in cognitive and psychomotor functioning and it can produce risk taking behavior that can impair driving skill. However, he went on to testify that dose refers to THC content and that he did not know Mr. Holmes dose, smoking topography, or THC concentration. (Deposition of Dr. Early p. 57, lines 3-16). The study goes on to state, “The intensity of euphoria or dysphoria varies with expectations of effects in the cannabis smokers environment and personality.” Dr. Early admitted that we do not know Mr. Holmes personality and/or expectation of effect. (Deposition of Dr. Early p. 57, lines 1-23; p. 58, lines 1-8). Dr. Early agreed that the study states, “...there is no direct correlation between driving impairment and THC concentration” and that further research is needed to define cannabis’ effects

on driving performance and to provide a scientific basis for laws to improve road safety (Deposition of Dr. Early p. 58, lines 23-25; p. 59, lines 1-6).

Dr. Early testified that the study “Cannabis Effects on Driving Lateral Control” found a 1 centimeter to 3.5 centimeter difference in marijuana dosed subjects for standard deviation of lane position. (Deposition of Dr. Early p. 59, lines 7-25). The study also found that standard deviation of lane position was not validated to predict crash risk and that alcohol affected lane departure and acceleration. (Deposition of Dr. Early p. 60, lines 4-10). The study also found that frequent marijuana smokers demonstrated tolerance to some acute cannabis intoxication effects. (Deposition of Dr. Early p. 60, lines 14-17)

Dr. Early testified that the study “Risk of Road Accident in Association With the Use of Drugs” is an epidemiological study that did not find a statistically significant increase in relative risk of accident involvement causing injury or fatality when cannabis was used. The study also found only a modest risk of increased accident with marijuana use. The study also found that the association between the use of drugs and accident risk presented in the paper could not be interpreted as a causal relationship. (Deposition of Dr. Early p. 61, lines 15-25; p. 62, lines 1-2). Dr. Early testified that the most common people to use marijuana are sometimes the highest drivers (teenagers, boys, children with ADD) and that marijuana might not be the corresponding etiological factor, rather kids at high risk happen to smoke more marijuana. (Deposition of Dr. Early p. 63, lines 11-18). Dr. Early agreed that Mr. Holmes was 24 or 25 and although he did not know if Mr. Holmes was a high risk driver, he did testify, “I don’t know if he’d be a high risk as an individual, but you don’t have a 24 year old kid; I do, and his premiums are four times higher than mine per year.” (Deposition of Dr. Early p. 63, lines 19-24). Dr. Early also testified that men are higher risk drivers than women. (Deposition of Dr. Early p. 63, line 25; p. 64, lines 1-2). Dr.

Early agreed that the study found the association between THC and driver impairment to be dose related (the higher the dose the more impairment) and he did not know Mr. Holmes dose. (Deposition of Dr. Early p. 64, lines 3-14). He also agreed that the study found that it has not been established yet whether performance impairment observed at certain concentrations also coincide with crash risk. (Deposition of Dr. Early p. 64, lines 15-19).

Dr. Early testified that the study, "Acute Cannabis Consumption and Motor Vehicle Accidents" was another meta-analysis that found, "...a lack of consensus exists on whether the risk of motor vehicle collisions is elevated or lowered when drivers have recently consumed cannabis." (Deposition of Dr. Early p. 64, lines 20-25; p. 65, lines 1-4). The study went on to indicate that the overall quality of evidence on the association between cannabis use and motor vehicle collisions was moderate. (Deposition of Dr. Early p. 65, lines 1-8). The study neither examined the dose effects on the risk of severity of collisions and differences between habitual and occasional users. (Deposition of Dr. Early p. 65, lines 9-17). This study did not account for confounders and it found that there was not enough data on THC concentration to examine a dose-response effect. (Deposition of Dr. Early p. 66, lines 1-7).

Next, Dr. Early reviewed a study by Elvik titled "The Effects of Cannabis Intoxication on Motor Vehicle Collisions Revisited and Revised." He agreed that this study was another meta-analysis that found: 1) the Asbridge study substantially overestimated the effect of acute cannabis intoxication on crash risk; 2) 85% of crash accidents involving alcohol occur because of alcohol whereas only 20-30% of crashes involving cannabis use occur because of cannabis use; 3) alcohol is linked more reliably to an increase in risky driving; 4) there is no comparable increase in the risk of crashes involving fatalities in cannabis sub sample. (Deposition of Dr. Early p.66, lines 20-24; p. 67, lines 16-25; p. 68, lines 1-25; p. 69, lines 1-10). Dr. Early went on to comment that

this study was a large analysis with 4,236 cases and 88,000 controls. (Deposition of Dr. Early p.69, lines 16-19). Dr. Early agreed that the study concluded, “A comprehensive review of the literature on acute cannabis intoxication and road traffic crashes finds that acute intoxication is related to a statistically significant risk of increase of low to moderate magnitude.” (Deposition of Dr. Early p. 69, lines 24-25; p. 70, lines 1-3).

Due to time constraints the deposition adjourned for the day and was scheduled to resume on October 25, 2023.

Examination by Attorney George Gallagher

Dr. Early is a medical toxicologist. He is board certified and has been board certified with the American Board of Medical Specialties under medical toxicology for almost twenty years. (Deposition of Dr. Early p. 77, lines 2-6). As a medical toxicologist he deals with a lot of issues relating to exposure disease correlation. Other times he deals with acute intoxication and the exposure disease relationship between acute intoxication and driving. (Deposition of Dr. Early p. 77, lines 15-18). Dr. Early has an MPH in epidemiology that he utilizes to further address the exposure disease relationship. He indicated that the whole process of getting board certified in medical toxicology involved a pharmacology focus with a focus on metabolism, half lives, and things of that sort. (Deposition of Dr. Early p. 77, lines 19-24). Dr. Early has been retained in legal proceedings approximately five to six times regarding whether someone was intoxicated by a substance. (Deposition of Dr. Early p. 78, lines 1-7).

Dr. Early explained that an epidemiological study refers to the study of a distribution of disease with part of the focus on causation or what exposures increase your risk of developing a disease. He explained that epidemiological studies evaluate the distribution of disease frequently in an exposed population and compare it to a controlled population to see if exposure increases

risk of developing a disease. (Deposition of Dr. Early p. 78, lines 8-21). He testified that our case is similar because the literature was attempting to correlate marijuana and impairment or risk of fatality in an auto accident. (Deposition of Dr. Early p. 79, lines 1-10).

Dr. Early testified that the subject matter in the pending case and the questions he was asked to address are within his field of expertise based on his board certification in the field of toxicology and his degree in epidemiology. (Deposition of Dr. Early p. 79, lines 11-18).

Dr. Early testified that the legal definition of intoxication in the workers compensation setting (“...a condition that results from the use of a stimulant, which renders an employee impaired in his or her faculties to the extent that the employee is incapable of carrying on the accustomed work without danger to the employee.”) comported with his understanding of intoxication in the medical sense. (Deposition of Dr. Early p. 80, lines 4-17).

Dr. Early explained that the leading theory is that delta 9 tetrahydrocannabinol is the ingredient in the marijuana plant most significantly associated with intoxication. (Deposition of Dr. Early p. 80, lines 18-25). He indicated that the potency of marijuana refers to the amount of delta 9 THC in a particular strain of marijuana similar to alcohol by volume in beer, wine or liquor. (Deposition of Dr. Early p. 81, lines 1-14). Delta 9 THC is the intoxicating ingredient in marijuana. (Deposition of Dr. Early p. 81, lines 15-17). Dr. Early indicated that delta 9 THC is the first and most important analyte analyzed in a post mortem drug test. (Deposition of Dr. Early p. 82, lines 1-9). Dr. Early testified that delta 9 carboxy THC (THCC) and 11 hydroxy delta 9 THC are evaluated in postmortem drug screens and are not as psychoactive or associated with impairment as delta 9 but they show what has been going on with the metabolism. For instance, if someone had just taken a hit and it had been a few seconds ago there would be no metabolites so the

metabolites help indicate how long marijuana has been in the system and how far along it is in its metabolic process. (Deposition of Dr. Early p. 82, lines 4-25).

Dr. Early testified that in South Carolina there is not an apples to apples comparison for determining a presumption of intoxication based solely on level of THC detected in a postmortem drug test like there would be for blood alcohol content. However, lack of a clean analogy between blood alcohol content and THC level in a postmortem blood test does not mean intoxication did not exist and it does not mean that marijuana intoxication does not impair driving. He indicated that he could determine intoxication on a case by case basis based on post mortem serum blood test for THC. (Deposition of Dr. Early p. 83, lines 1-25). Dr Early indicated that in his medical opinion, stated within a reasonable degree of medical certainty more likely than not as a medical doctor and a professional toxicologist, one can determine intoxication at the time of an accident based on post mortem drug test. Dr. Early explained that intoxication would be determined by looking at the amount of concentration of delta 9 THC in the blood. Dr. Early testified, "...in my opinion there is substantial literature to correlate levels of THC in the range that we got, which was 9, one hour post accident with impairment and intoxication." (Deposition of Dr. Early p. 84, lines 1-20).

In the present case, Mr. Holmes postmortem THC blood serum level was 9.1 nanograms per milliliter. Dr. Early testified that 9.1 nanograms per milliliter was a significant amount based on marijuana impaired driving laws in certain states. (Deposition of Dr. Early p. 85, lines 13-25). He testified that he thought five states had a THC intoxication threshold post accident and the threshold they used was five nanograms per milliliter. (Deposition of Dr. Early p. 86, lines 1-5). Assuming that Mr. Holmes was not a regular marijuana user, Dr. Holmes was able to extrapolate the 9.1 nanograms per milliliter detected in the blood and opine that the THC in his blood was

roughly four times the nine, somewhere around thirty nanograms per milliliter at the time of accident. (Deposition of Dr. Early p. 86, lines 23-25; and p. 87, lines 1-3). Dr. Early testified that in his opinion, someone with thirty nanograms per milliliter in their blood would be intoxicated on marijuana. (Deposition of Dr. Early p. 87, lines 1-9).

Dr. Early testified that intoxication on Delta 9 THC causes delayed reaction time, lane swaying, impaired coordination, and alteration in short term memory and attention. (Deposition of Dr. Early p. 87, lines 17-25; p. 88, lines 1-2). Dr. Early indicated that all of those skills are employed by someone who drives a car. (Deposition of Dr. Early p. 88, lines 3-25).

Dr. Early testified that thirty six nanograms per milliliter level of delta 9 THC at the time of the accident was intoxicating because there is a dose relationship between the severity of impairment and the magnitude of intoxicant and thirty six is a pretty good dose. He also based his opinion on the per se level of intoxication (5 nanograms per milliliter) adopted by some states. He indicated that thirty six would be more than seven times five and in his opinion that was a significant level of concern. (Deposition of Dr. Early p. 89, lines 10-22). Dr. Early has experienced people with elevated levels of THC but he has never personally experienced someone with thirty six nanograms per milliliter of THC in their blood. (Deposition of Dr. Early p. 90, lines 1-9).

Dr. Early reviewed a Frontiers in Psychiatry article dated September 24, 2021 by Pearson, Stevens, and D'Souza that was provided by defense counsel. (Deposition of Dr. Early p. 90, lines 10-25; p. 91, lines 18-25). Dr. Early indicated that the article summarized other articles and was not a classical meta analysis. Dr. Early defined a meta-analysis as evaluates the exposure and disease relationship. In this case, the exposure of marijuana and the disease of driving impairment. Dr. Early indicated that a classical meta analysis lumps studies together to get a larger group of participants and analyses the data of the larger group of participants. (Deposition of Dr. Early p.

92, lines 1-25). Dr. Early agreed that the authors of the article found as follows: a) alcohol and cannabis to be very important contributors to impaired driving and motor vehicle accidents; b) that aside from alcohol cannabis is the primary drug detected in drug driving cases in fatal motor vehicle accidents; c) next to alcohol cannabis is the second most frequent found substance in the bodies of drivers involved in fatal MVAs. Dr. Early indicated that the article cited Rogeberg and Elvik's meta analysis (that evaluated data derived from 240,000 individuals across multiple published studies) and indicated, "the exposure of marijuana detection in the blood postmortem was 36 percent more likely than those without marijuana use so you were more likely to get into a fatal accident with active marijuana use." (Deposition of Dr. Early p. 95, lines 5-22). Dr. Early agreed that the authors of the section titled "Does Cannabis Impair Driving Related Behavior and Cognitive Processes?" assessed 15 different parameters that they have quoted articles on that show active marijuana intoxication impedes or impairs working memory, hand body coordination, short term memory and attention allocation. Dr. Early indicated that the authors found other variables, not previously discussed in the deposition, were also impaired like motor tracking, times estimation of self paced timing, distance estimation, short term memory retention, vigilance, decreased corner instability, increased braking distance time, increased lateral position error or variability with lane deviation, errors in speedometer tracking, altered passing behavior, and things increased start time. Dr. Early indicated that the authors were looking at tests that you can measure that could potentially be related to impaired driving. (Deposition of Dr. Early p. 96, lines 1-19; p. 97, lines 17-25). Dr. Early went on to indicate that the authors seem to admit that there is an effect on certain driving measures like steering wheel reversals/variability; increased speed variance/excessive speed or slowness; and fewer fine manipulative steering movements/steering instability. (Deposition of Dr. Early p. 97, lines 2-16).

Dr. Early reviewed a video clip of Mr. Holmes drive that morning and indicated that it was a rainy day in the winter with not great road conditions. (Deposition of Dr. Early p. 98, lines 1-6). He reviewed and relied on the officers report. (Deposition of Dr. Early p. 98, lines 7-25; p. 99, lines 1-12). Based on the depiction from the highway patrol report the truck was found disassociated with the cab on the right hand side of the roadway and the driver pretty much almost dead with his brain protruding from the cranium. Dr. Early indicated that the report found no other vehicles or animals in the area. (Deposition of Dr. Early p. 99, lines 10-25).

Defense counsel asked Dr. Early to assume that Mr. Holmes ran off the right side of the road, corrected to re-enter by turning left, swerved across the center line, the trailer disconnected and exited the roadway on the left side of the road and then the cab containing Mr. Holmes swerved back across the right side of the road and hit an embankment. Defense counsel asked if that type of accident could have been contributed to by the intoxication. Dr. Early answered, "Could cannabis affect this sequence of events, yeah it could. It slows down you processing of a number of things." Dr. Early went back over the Frontiers in Psychiatry report by Pearlson et al and indicated that there would be an issue of distance estimation (and how far Mr. Holmes went off the road would be relevant) information processing speed, attention allocation, decreased cornering instability. Dr. Early indicated that all of those items were variables that were tracked and there was a statistically poor performance in the cannabis group versus the non-cannabis. (Deposition of Dr. Early p. 100, lines 1-25; p. 101, lines 1-25; p. 102, lines 1-24). Dr. Early indicated that the variables he referenced would have been most relevantly implicated in this mechanism of accident. (Deposition of Dr. Early p. 103, lines 3-12). Dr. Early went over the Pearson article provide to him by Defense counsel and indicated that the article/study found alcohol and cannabis both impaired lane position, divided attention, and concentration. Dr. Early

found reaction times had a variable outcome with marijuana use and with marijuana there was an inability to compensate for deficits. (Deposition of Dr. Early p. 104, lines 2-25). Dr. Early indicated that alcohol more significantly impedes those driving related functions than marijuana when comparing all variables. (Deposition of Dr. Early p. 104, lines 2-5).

Dr. Early testified that in his opinion, stated to a reasonable degree of medical certainty as a doctor and toxicologist was that intoxication played a very relevant factor in this accident. He testified, "It wasn't the only factor. We discussed that before. We do not know how much sleep he got. We don't know if there were other issues impeding his concentration focus. We don't know the exact road condition, whether or not there could have been an animal, whether or not there was another car involved that was never detected, whether or not other variables were relevant, lighting strike, et cetera." Dr. Early went on to testify that he thinks intoxication is an important and relevant variable. (Deposition of Dr. Early p. 105, lines 1-16).

Defense counsel asked Dr. Early if other the other factors discussed (sleep, animal, working operation of the truck) would be compounded by marijuana use. Dr. Early testified that each factor needed to be take one at a time. Dr. Early indicated that distraction can be impaired by marijuana. (Deposition of Dr. Early p. 106, lines 6-25). Dr. Early then discuss sedation. He testified, "I think there is evidence that marijuana slows cognition and could aggravate any, theoretically, co-existant cognitive defect that was existent on the date of the accident." (Deposition of Dr. Early p. 107, lines 5-9)

Dr. Early testified that in his opinion stated to a reasonable degree of medical certainty, more likely than not, as a medical doctor and toxicologist, marijuana intoxication contributed to the accident where Claimant ran off the roadway leading to the ensuing events and his death. (Deposition of Dr. Early p. 107, lines 10-18).

Doctor Early testified that he is often asked to give medical causation and it is never as simple as one thing being the cause and there are always multiple variables that need to be considered. (Deposition of Dr. Early p. 107, lines 19-25; p. 108, lines 1-2). Dr. Early indicated, "...the fact that I don't have all answers to all the relevant variables do not keep me from making a statement about causation aggravation." (Deposition of Dr. Early p. 108, lines 6-13).

When asked if he had been given sufficient information to answer the questions he has been asked to answer Dr. Early indicated, "Well, actually one piece of information I've never been given that I think would be highly relevant – I don't know if it's essential, but nobody ever told me how much marijuana Mr. Holmes smoked on a daily/weekly basis. That would be very helpful." Dr. Early went on to indicate that lack of information does not preclude him from making a decision and that absence of that information did not preclude him from forming his opinions. (Deposition of Dr. Early p. 108, lines 14-25). Dr. Early indicated that family, friends and housemates could testify to Mr. Holmes marijuana use. (Deposition of Dr. Early p. 109, lines 6-7). He went on to indicate that a habitual heavy use of marijuana would have a slower half life than every thirty minutes and the projected level would be lower than thirty six nanograms per deciliter at time of accident. (Deposition of Dr. Early p. 109, lines 8-19).

Dr. Early testified that Mr. Holmes THC level would have to be under five nanograms per deciliter for him to opine that Mr. Holmes was not intoxicated and that was no way Mr. Holmes level could be less than that if his postmortem level (one hour after the accident) was 9.1. (Deposition of Dr. Early p. 109, lines 20-25; p. 110, lines 1-22).

Dr. Early indicated that he was initially asked by Defendants to determine if marijuana was the sole proximate cause of this accident. Dr. Early indicated that he could not provide that opinion. As a result, Defendants changed the question to whether or not marijuana was a cause of

the accident. (Deposition of Dr. Early p. 111, lines 1-25). Dr. Early testified that Defense counsel never asked him to change his opinion but simply asked him a different question. (Deposition of Dr. Early p. 112, lines 1-8).

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Dr. Early indicated that he was not testifying that marijuana intoxication was the proximate cause of Mr. Holmes accident. (Deposition of Dr. Early p. 112, lines 15-18).

He testified that it was his expert medical opinion, stated most probably and to a reasonable degree of medical certainty (greater than 50% probability) that Mr. Holmes death was caused by or related to his motor vehicle accident of December 16, 2020. (Deposition of Dr. Early p. 112, lines 19-25; p. 113, lines 1-2).

Dr. Early testified that Defendants provided him with the Pearlson article one hour prior to the deposition and he did not have enough time to read all one hundred and forty six articles cited in the Pearson article. (Deposition of Dr. Early p. 113, lines 3-24).

Dr. Early reviewed the section titled "Cannabis impairment effects on driving related cognitive tasks" in the Pearlson article and agreed that neither Table 1 did not indicate how much the cognitive tasks in Table 1 were affected by cannabis impairment and he had not yet reviewed that information from the article. Additionally he did not know the dose amount referenced in that section of the article (Deposition of Dr. Early p. 114, lines 12-24;p. 115, lines 1-2). Dr. Early agreed that he did not know, based solely on the Pearlman article, how much cannabis affected the ability to drive. He indicated that most likely, cannabis would affect ones ability to drive listed in Table 1 by a limited amount although he did not know what thaa limited about would be. (Deposition of Dr. Early p. 115, lines 13-25; p. 116, lines 1-4). Based on the article, he did not know how much marijuana impacted decreased cornering, brake distance/stop time, and other

driving factors in Table 2. (Deposition of Dr. Early p. 116, lines 5-25). Dr. Early indicated that amount of impairment to driving was not stated but impairment on driving was statistically significant. (Deposition of Dr. Early p. 116, lines 24-25; p 117, lines 1-7).

When asked if, based on a prior article, that cannabis increased reaction time .5 seconds, Dr. Early testified, "I don't know." (Deposition of Dr. Early p. 117, lines 17-20). When asked about the effect of cannabis on lane leaving Dr. Early did not know if the parties reviewed an article finding marijuana did not increase lane leaving. (Deposition of Dr. Early p. 118, lines 1-10). Additionally, he could not comment on a prior article documenting in-lane variability by one inch. (Deposition of Dr. Early p. 118, lines 11-15).

Going back to the Pearlson article, Dr. Early did not know how much, based on the article, that marijuana increased lane positioning. (Deposition of Dr. Early p. 118, lines 16-25; p. 119, lines 1-12). Similarly, based on that study, he could not say how much marijuana affected car following tasks or gap acceptance task. (Deposition of Dr. Early p. 119, lines 11-25; p. 120, lines 1-6) He agreed that he did not know how much marijuana was given or how much was in the blood stream when that test was conducted. (Deposition of Dr. Early p. 120, lines 7-10).

Dr. Early agreed that the Pearlson article found, "Studies can only point to generalities in the population as there might always be exceptions of cannabis intoxicated people who do not drive more slowly or carefully. Factors including youth, driving experience, and substance tolerance may all influence an individuals response to a drug." (Deposition of Dr. Early p. 120, lines 17-25; p. 121, lines 1-3).

Dr. Early was asked if he could cite one article showing cannabis increased lane departure he responded, "Not off the top of my head. But if you give me fifteen minutes I think I could find one." (Deposition of Dr. Early p. 125, lines 4-8).

Dr. Early was asked to provide one article in which five nanograms per milliliter threshold was found to be a scientifically valid threshold for intoxication. Dr. Early responded, “No, I can’t give you one particular article.” (Deposition of Dr. Early p. 125, lines 9-25; p. 126, lines 6-10). Dr. Early went on to testify that a per se limit could be established and that per se laws are a legislative issue more than a scientific issue. (Deposition of Dr. Early p. 130, lines 22-25).

When asked if the NHTSA Guide to Congress indicates that toxicologists should not testify that certain amounts of marijuana in the system equate to intoxication Dr. Early testified, “I’m not aware of what that guide – it’s hundred’s of pages long—says on that specific issue.” (Deposition of Dr. Early p. 131, lines 1-8). Dr. Early did not know whether or not the NHTSA Guide found that per se limits equating intoxication to a blood level of THC is more likely to mislead a jury. (Deposition of Dr. Early p. 131, lines 9-12). Dr. Early testified that he did review the NHTSA Guide and cited it in his bibliography. (Deposition of Dr. Early p. 131, lines 13-16).

Dr. Early testified that he based Mr. Holmes THC level based on two thirty minute half lives and that he was calculating half life without knowing when marijuana exposure occurred. (Deposition of Dr. Early p. 132, lines 1-25). Dr. Early could not provide the equation he used. (Deposition of Dr. Early p. 133, lines 1-10). Dr. Early testified that one puff of marijuana immediately prior to the accident would not impact half life. (Deposition of Dr. Early p. 133, lines 11-16). When asked if Mr. Holmes would have been impaired if he inhaled marijuana ten seconds prior to the accident Dr. Early testified, “I don’t have enough information to answer that.” (Deposition of Dr. Early p. 133, lines 21-25).

Dr. Early testified that it would be really hard to get 36 per nanograms per milliliter in your system with one inhalation and he did not know how many inhalations would be required to get to 36 nanograms per milliliter. (Deposition of Dr. Early p. 134, lines 9-25).

the potency of marijuana allegedly used, when Mr. Holmes inhaled marijuana, how deep he inhaled, or how often he used marijuana. (Deposition of Dr. Early p. 135, lines 15-25; p. 136, lines 1-4).

Dr. Early testified that in order to have second hand absorption one needed to be in an enclosed cavity for a significant period of time and that in this case the cab was blown up, the windshield was thrown apart, the drivers side window was thrown apart and the door was ajar. (Deposition of Dr. Early p. 136, lines 19-25; p. 137, lines 1-5). Dr. Early did not account for second hand smoke. (Deposition of Dr. Early p. 137, lines 4-5).

FINDINGS OF FACT

Based on the stipulations of the parties, testimony and evidence received and produced at the Hearing, the undersigned Commissioner finds the following facts based upon a preponderance of the evidence:

1. On December 16, 2020, LenJarius Holmes (Decedent) died as a result of injuries sustained in a motor vehicle accident (MVA) occurring in the course of and within the scope of his employment with Lawson Trucking, LLC.
2. The parties stipulate that Decedent's accident occurred during the course and scope of his employment with Lawson Trucking, LLC. (Hr. Tr. p 26: 19-24).
3. Decedent's parents, Vanessa Holmes and Jesse Gladney (Claimants), brought this claim. Claimants seek payment of all causally related medical bills, a dependency determination and death benefits.

4. On February 6, 2022, Claimants' counsel filed with the Commission a Form 52, Claimants' Notice of Claim and/or Request for Hearing, Death Case. As a result of accidental injury and death. Claimants sought compensation pursuant to S.C. Code Ann. § 42-9-290.
5. Claimants' counsel served a copy of the Form 52 on the Carrier of Record, Berkshire Hathaway Direct Insurance Company (Carrier). Claimants' counsel did not serve Defense counsel with a copy of the form as they were not yet noted in e-Case as attorneys of record.
6. On February 15, 2022, Defendants filed with the Commission a Form 12A, First Report of Injury or Illness.
7. On February 15, 2022, the Commission noticed Claimants and advised that their filed Form 52 was deficient due to improper service to Defendants, pursuant to S.C. Code Ann. Regs. 67-210 and 211.
8. On March 9, 2022, Defendants added Defense counsel to e-Case.
9. On March 14, 2022, Claimants' counsel refiled with the Commission the Form 52 to correct errors in their service of process to Carrier.
10. On March 21, 2022, the Commission noticed Claimants' counsel and Defense counsel that information was missing from the file that would assist the Commission with evaluating the issues of this claim.
11. On April 20, 2022, e-Case reflected that the Form 53 had not been received to date by the Commission.
12. On April 20, 2022, the Commission noticed the parties of mandated mediation.
13. On March 21, 2023, Defense counsel inquired in an email to the Commission (and copied Claimants' counsel) about the about the manner in which Claimants' counsel served their Form 52 on Defendants. (Claimants' APA 7 p. 188).

14. On March 24, 2023, Defense counsel filed a Form 53, Employer's Answer to Request for Hearing, Death Case. Defendants filed this form nearly one year past the filing deadline.

15. Defendants seek to raise an affirmative defense, pursuant to S.C. Code Ann. § 42-9-60, by alleging Decedent was intoxicated at the time of his injury and death on December 16, 2020.

16. Claimants' counsel asserts that Defendants' Form 53 was not timely filed with the Commission. Accordingly, Claimants maintain Defendants waived their right to raise affirmative defenses. In the present matter, the affirmative defense of intoxication.

17. Defense counsel asserts that Carrier did not forward the Form 52 to their attention. Defense counsel further asserts, Claimants' counsel knew, or should have known, that Defendants had retained counsel but Claimants still failed to serve pleadings on Defense counsel. Defendants assert the timeframe with which their Form 53 was filed did not prejudice Claimants because Claimants have had ample time to respond and/or rebut Defendants asserted defenses.

18. Claimants' assert the Form 52 was served on the appropriate party on record at that time, pursuant to S.C. Code Ann. Regs. 67-210. Potential prejudice to the Claimant is not the issue at bar; rather, it is the time allotted for filing pleadings under the Act.

19. The evidence in the record indicates Defense counsel noticed Claimants' counsel of their representation on December 23, 2021. (Defendants' Exh. 13 p. 257). Defense counsel contacted Claimants' counsel on four occasions seeking a status update on the pending workers' compensation matter, prior to Claimants filing their claim. (Defendants' Exh. 13 p. 258-259). Claimants' counsel admitted during the hearing to receiving correspondence from Defense counsel before filing the claim. (Hr. Tr. p. 8: 13-15).

20. The evidence in the record further indicates Carrier failed to notify Defense counsel of Claimants' filed claim. Defense counsel became attorney of record in e-Case in the period

following Claimants' initial filing. The Commission requested additional information for this claim's file from the legal counsel for both parties. The parties were later noticed through e-Case that the Commission had no record of receiving Defendants' Form 53. Following Defendants continued failure to respond to Claimants' Form 52, the Commission initiated the mediation process. The parties concluded their mediation nearly one year later. It wasn't until then that Defense counsel inquired about the manner in which Claimants' counsel served their Form 52 on Defendants.

21. I find that Defense counsel initially made a good faith effort to communicate with Claimants' counsel about the status of the pending workers' compensation claim. Despite Defense counsel's efforts and another unfortunate event, they were not initially noticed of Claimants' service of process. However, Defense counsel knew (or should have known) a claim had been filed and a response likely due when they were sent a letter from the Commission on March 21, 2022, about the claim; or when e-Case reflected on April 20, 2022, that the Form 53 had not been received by the Commission; or when (on that same day) the Commission initiated the mediation process between the parties. Nevertheless, Defendants did not attempt to protect their rights for nearly a year.

22. One cannot sit on their rights, with full access to the facts of a matter, without taking timely steps under the law to protect their interests.

23. Accordingly, I find Defendants Form 53 to be untimely filed.

24. I further find that because Defendants Form 53 was not timely filed, they have waived their right to raise affirmative defenses (including the intoxication defense under 42-9-60) to this claim.

25. However, even if I were to find that Defendants timely filed their Form 53 and had not waived their right to raise affirmative defenses to this claim, then I would further find:

26. The parties stipulate that Decedent was a habitual user of marijuana. (Hr. Tr. p. 72: 11-16).
27. Decedent's antemortem toxicology report found 9.1 ng/ml of delta-9 Tetrahydrocannabinol (THC); 74 ng/ml of delta-9 carboxy THC 74; and 3 ng/ml of 11-hydroxy delta-9 in his blood.
28. Decedent was stopped at a police checkpoint in October 2020, two months prior to his fatal accident. The checkpoint officer smelled the odor of marijuana emanating from the cab of Decedent's semi-trailer truck while speaking with him. Decedent admitted to smoking marijuana earlier in the day. The officer proceeded to search Decedent's person and vehicle and subsequently found two "blunts," one unsmoked and the other half-smoked. Decedent was arrested for possession of marijuana. The officer allowed Decedent to call his boss and company owner, Matthew Lawson, to pick up the truck. (Claimants' APA 11 p. 260).
29. During the hearing, Mr. Lawson testified he did not know or inquire into the reason for Decedent's arrest, even though this event required Decedent to stop working and leave costly company property on the side of the road unmanned. Mr. Lawson asserts he later learned (though he did not specify how or when) Decedent was in possession of marijuana at the time of his arrest.
30. Mr. Lawson testified that after Decedent called him to retrieve the truck from the checkpoint, it took him around an hour to get to the site. He further testified that he was familiar with the odor of marijuana and did not smell it upon entering the cab of Decedent's truck.
31. Mr. Lawson testified that after Decedent's arrest, he allowed him to return to work without any further query or drug testing because he was a "good employee". After the arrest Mr. Lawson continued to let Mr. Holmes drive his truck and felt that Mr. Holmes (behind the wheel of a truck) was not a danger to the public. Mr. Lawson admits he should have informed the appropriate governing authority about the drug-related violation of Decedent's commercial driver's license.

32. Mr. Lawson testified he arrived on scene about 40 minutes after the accident occurred. He testified that it was a misty day and the ground was wet. He observed one hundred yards of tire tracks down the side of the roadway ending at a driveway/culvert near the cab of the truck. He further testified he was an [unstated distance] from the vehicle when he observed that one of the doors was “still open”. He maintains he did not smell the odor of marijuana at that time. He testified that while still on scene, the salvage company asked him to go to the tow yard to inventory the wrecked truck. He asserts it took him 20-25 minutes to get from the accident scene to the tow yard. The record does not indicate how long Mr. Lawson was at the accident scene before leaving for the tow yard.

33. Mr. Lawson testified that he assessed the cab of the wrecked truck at the tow yard and smelled an odor of marijuana. He further testified he observed what appeared to be a burned “joint” or “blunt” on the floor. Mr. Lawson testified that 80% of the cigar/joint was remaining. The record does not indicate whether Mr. Lawson’s observations occurred from inside or outside of the cab. Mr. Lawson also found blunt spray, U-Pass and an unlit blunt/cigar in Mr. Lawson’s backpack. Mr. Lawson threw out the burned joint/cigar and unburned joint/cigar before they could be tested.

34. The evidence in the record indicates one partially burned “blunt” or [cigar] was found in or around the vehicle following both the arrest and accident. Mr. Lawson testified he did not smell marijuana in the cab in the hour following the arrest; an arrest promulgated by the odor of marijuana coming from the cab. He further testified that he did smell marijuana coming from the truck over an hour after the accident; a truck that in the interim had been (largely) left open to the elements and towed to another location.

35. I find Mr. Lawson’s testimony lacks credibility. When faced with the scrutiny of possibly allowing a “habitual” marijuana user to continue operating his semi-tractor trailers, Mr. Lawson

maintains he did not smell marijuana in the cab following Decedent's arrest or even inquire why his employee was taken into police custody during working hours. Presently, where questions still abound as to the cause of the tragic event, including whether Mr. Lawson's own truck played a role (i.e. a deflated tire), he asserts he did indeed smell marijuana coming from the cab when he visited the tow yard following the accident.

36. Additionally, Mr. Lawson testified that based on pre-trip and post trips the truck involved in the accident was operating appropriately. However, during his deposition Mr. Lawson testified he did not have pre-trip inspections. He then testified that he assumed pre-trips were being performed.

37. Mr. Lawson agreed that the accident could have been caused by an animal entering the roadway, another vehicle swerving into Mr. Holme's lane of travel, distraction from a cellular phone, a blown tire, excessive speed, and/or Mr. Holmes reaching for something in the cab of the truck. Mr. Lawson agreed that he did not know why the accident occurred.

38. Post accident highway patrol reports note a deflated right outer rear tire.

39. Dr. Osbon, an expert witness for Defendants, testified that Decedent was acutely intoxicated with marijuana when the MVA occurred. Dr. Osbon stated he relied on his education, training, experience in emergency medicine, and the National Highway Transportation Safety Administration's (NHTSA's) [2017] report to formulate his opinion that the 9.1 nanograms per milliliter of delta-9 THC present in Decedent's blood post-accident was sufficient for an "emergency medical physician" to find him impaired. Dr. Osbon opined that marijuana intoxication was a major contributing factor and proximate cause of the accident. (Claimants' APA 13).

40. Dr. Osbon is a friend of Defense Counsel Stephen Stubleby by virtue of marriage to Stephen Stubleby's first cousin. (Deposition of Dr. Osbon p. 125, lines 12-25; p. 126, lines 1-2).
41. Dr. Osbon testified that he was not testifying as an expert in the fields of accident reconstruction, human factors, and/or toxicology. (Deposition of Dr. Osbon p. 26, lines 9-18).
42. Dr. Osbon admitted during his testimony that he had not previously served as an expert witness to specifically opine on the effects of marijuana and driving, or how marijuana affects driving. Dr. Osbon further admitted he did not "know the specifics" of how Decedent's accident occurred and could not exclude other "lane departure" factors such as an animal in the roadway or cell phone distraction. Dr. Osbon admitted to not knowing why Decedent left the roadway. (Claimants' APA 13).
43. Dr. Osbon did not know Mr. Holme's tolerance for marijuana. (Claimant's APA 13).
44. Dr. Osbon did not follow up to determine if Mr. Holmes' vehicle was functioning properly. He testified that knowing if the vehicle was functioning properly was not important for what he was asked to do by Defendants. He indicated that know whether the vehicle was functioning correctly would be informative but would not change his opinions. (Claimant's APA 13).
45. In his medical report, Dr. Osbon referenced NHTSA's 2017 report to Congress and quoted, in part: "THC has been shown to bind with receptors in the brain (and to a lesser extent in other parts of the body) and it is likely that this process underlies some of the psychoactive (behavioral and cognitive) effects of marijuana use". (Defendants' APA 10 p. 232).
46. Dr. Osbon concluded his report by opining: "The critical abilities necessary for safe driving required a clear sensorium and full, unimpaired cognitive abilities. More likely than not, [Decedent's] acute marijuana intoxication was a major contributor to the MVC". (Defendants' APA 10 p. 232).

47. Dr. Osbon defined intoxication as compromised ability to react in the same way you would at your neurological baseline in the absence of any illicit substance, to coordinate movements, to make decisions, to recall things in terms of memory to make decisions, and any execution of something that requires a motor skill to include things like driving or reacting to the conditions for driving. (Claimants' APA 13).

48. Dr. Gordon Early, an expert witness for Defendants, testified that Decedent was intoxicated at the time of the accident based on the half-life of 9-delta THC measured against the metabolic levels for that drug found in Decedent's system antemortem. Despite his conclusion, Dr. Early stopped short of opining that Decedent's alleged intoxication was the proximate cause of the accident. (Claimants' APA 14).

49. Dr. Early testified he relied on Decedent's toxicology report and [existing] medical literature to formulate his opinion. (Claimants' APA 14).

50. Dr. Early testified over the course of his 30-year career in occupational medicine and medical toxicology that he has perhaps observed ten people whom he believed were intoxicated with marijuana. He further testified he has not done any scientific research regarding the effects of marijuana on the human system. Dr. Early testified he has not performed any studies regarding the effects of marijuana on the human system. He testified his medical practice does not regularly involve the effects of marijuana on the human system. (Claimants' APA 14).

51. Dr. Early admitted during his testimony that he had not previously been qualified as an expert witness "with regard to the effects of marijuana on the human system". (Claimants' APA 14).

52. Dr. Early is not an accident reconstruction and he did not testify as an accident reconstructionist. (Claimants' APA 14).

53. Dr. Early initially defined intoxication as when a toxin has exerted an effect upon a human that has deterred their performance ability. (Deposition of Dr. Early p. 11, lines 10-17). Later, Dr. Early reviewed the legal definition of marijuana in the workers' compensation setting and testified that the workers' compensation definition comported with his understanding of intoxication in the medical sense. (Deposition of Dr. Early p. 80, lines 4-17).

54. Dr. Early testified that Mr. Holmes was intoxicated at the time of the accident. He used the half life of marijuana in the blood to determine when Mr. Holmes used marijuana and how much marijuana was in his system at the time of the accident. However, Dr. Early could not provide a scientific/mathematical formula for this calculation. (Claimants' APA 14).

55. Dr. Early admitted other factors could affect an individual's level of marijuana intoxication, such as: chronic usage, weight, drug potency and the amount of the drug ingested. Dr. Early did not know Mr. Holmes tolerance to marijuana. He testified that tolerant individuals have less impairment and tend to metabolize marijuana more slowly. He also testified chronic users release marijuana from storage sites in their body and that such releases could affect serum levels. (Claimants' APA 14).

56. Dr. Early further admitted that aside from Decedent's weight, he did not know the potency, frequency or amount of Decedent's marijuana intake. He testified that potency and amount ingested both matter when determining intoxication. (Claimants' APA 14).

57. In his medical report, Dr. Early opined to a reasonable degree of medical certainty, Decedent was intoxicated at the time of the accident. He referenced the National Institute of Drug Abuse's (NIDA's) report on studies that discuss marijuana and its metabolites effect on a person's judgment. Specifically, studies that support a finding that marijuana use results in impaired skills required for safe driving. (Defendants' APA 11 p. 235).

58. Dr. Early concluded his report by opining intoxication was more likely than not a cause of Decedent's accident. He further acknowledged that other (non-intoxication factors) could have contributed to the accident. He did not have enough evidence to opine that marijuana intoxication was the proximate cause of the accident. (Defendants' APA 11 p. 235).

59. Dr. Sabrina Gast, the presiding coroner, opined that Decedent died from cerebral disruption due to a motor vehicle accident. (Claimants' APA p. 72). She further opined to a reasonable degree of medical certainty that Decedent died as a "result of cerebral disruption due to blunt head trauma sustained in the December 16, 2020" accident. (Claimants' APA 2 p. 72).

60. Dr. S. Erin Presnell, the presiding forensic pathologist, performed Decedent's autopsy. She opined to a reasonable degree of medical certainty that "[Decedent] died as the result of cerebral disruption due to blunt head trauma sustained in the December 16, 2020 accident". She found that she "is not able to predict the antemortem effect of a THC concentration of 9.1 ng/ml on the Decedent's mind or body at the time of the crash". (Claimants' APA 3 p. 88).

61. Dr. Jolene Bierly, an independent forensic toxicologist, stated she performed a "comprehensive toxicological analysis of antemortem blood referenced in S. Erin Presnell's 'Final Autopsy Report' of [Decedent]". (Claimants' APA p. 113).

62. Dr. Bierly opined: "[T]o determine if Decedent was intoxicated (impaired in his faculties to the extent that he was incapable of carrying on his accustomed work without danger to himself) on the date of his December 16, 2020 accident, [she] would need to know how often and how much THC [Decedent] regularly used prior to said accident in order to determine how tolerant [Decedent] was to the effects of THC. Observations of signs and symptoms of marijuana use and/or marijuana impairment around the time of the accident would also be beneficial". (Claimants' APA 4 p. 113).

63. Dr. Bierly further opined that “without knowing [Decedent’s] tolerance levels with regards to THC, I cannot opine, more likely than not, that [Decedent] was intoxicated (impaired in his faculties to the extent that he was incapable of carrying on his accustomed work without danger to himself) on December 16, 2020, the date of his accident”. (Claimants’ APA 4 p. 114).

64. Dr. Matthew Lee, an expert retained by Claimants, stated his “professional experience as a physician, pharmacist, pharmacologist and toxicologist [make him] qualified to opine on the pharmacology and pharmacodynamics of the active ingredient in marijuana, tetrahydrocannabinol and its metabolites”. (Claimants’ APA 5 p. 122).

65. Dr. Lee stated he formulated his conclusions after reviewing: Decedent’s autopsy, coroner’s and toxicology reports; in addition to Dr. Bierly’s, Dr. Gast’s and Dr. Presnell’s questionnaires. (Claimants’ APA 5 p. 122).

66. Accordingly, Dr. Lee opined: “Intoxication from THC cannot be made from blood levels alone, behavioral observations would also be necessary to make a determination of intoxication”. (Claimants’ APA 5 p. 122).

67. Dr. Lee concluded his report by stating: “Based on the information available, no determination of intoxication can be made for [Decedent] on December 16, 2020.” (Claimants’ APA 5 p. 123).

68. The NHTSA, in its report referenced *supra*, made the following statements of note regarding marijuana-impaired skills:

- i. “Less is known about [the impairing effects of marijuana use on driving-related skills] due in part to the typical differences in research methods, tasks, subjects and dosing that are used.” (Claimants’ APA 6 p. 144).
- ii. “While fewer studies have examined the relationship between THC blood levels and degree of impairment, in those studies that have been conducted, the consistent finding is that the level of THC in the blood and the degree of impairment do not appear to be closely related.” (Claimants’ APA 6 p. 145).

ability to relate the amount of a drug or metabolite in blood to the presence and amount of impairment.” (Claimants’ APA 6 p. 148).

- iv. In response to the findings of other organizations that “marijuana has been shown to affect a number of driving-related skills,” including NIDA, the NHTSA noted: “[T]his type of research typically does not involve measurement of blood THC levels; rather, subject’s performance between non-dosed trials (placebo condition) and dosed trials (when administered marijuana) are compared. As a result of differences in how subjects conduct the smoking regime (inhalation rate, depth of inhalation, and time between inhalation and exhalation), fairly wide differences in blood THC levels are likely between subjects.” (Claimants’ APA 6 p. 149).
- v. “Congress requested an assessment of methodologies and technologies for measuring driver impairment resulting from the use of marijuana, including the use of marijuana in combination with alcohol.... Deficits in performance can arise from a variety of causes that include alcohol, marijuana and other drug use, distraction, drowsiness, emotional states (fear, excitement, anger), and other factors.” (Claimants’ APA 6 p. 150)
- vi. “Traditionally, measurement of marijuana use by drivers has involved testing biological specimens for the presence of THC (typically blood samples...). These toxicological tests confirm presence of THC but they do not indicate driver impairment or necessarily indicate recent marijuana use (when the THC levels are low).” (Claimants’ APA 6 p. 152).

69. The evidence in the record indicates confirming marijuana intoxication while driving is not as straightforward as determining alcohol intoxication. Specifically, it is an amalgamation of factors that lead one to find a person is intoxicated with marijuana. Dr. Osbon largely based his impairment finding on the results of Decedent’s blood test but failed to recognize other significant variables that could have impacted his conclusion, such as: frequency of use (i.e. tolerance), amount of intake and potency.

70. Dr. Early acknowledged other (non-intoxication factors) could have contributed to Decedent’s accident and that by exploring said factors, one could “most accurately answer the adverse effects [of marijuana intoxication] on judgment, coordination and/or situational

awareness. Nevertheless, he still largely based his impairment finding on the results of Decedent's blood test.

71. I find the opinions of Dr. Osbon and Dr. Early are based on speculation and conjecture and are therefore afforded less weight.

72. In accordance with current modalities for measuring driver impairment from the use of marijuana, Dr. Presnell, Dr. Bierly and Dr. Lee all recognized that the results of Decedent's blood test was not enough information to determine whether intoxication was the cause of Decedent's accident on December 16, 2020. Accordingly, I afford their opinions greater weight.

73. I find the substantial weight of the evidence indicates Decedent's alleged marijuana intoxication was not the proximate cause of the accident on December 16, 2020.

74. I further find that the greater weight of the evidence does not establish a causal link between Decedent's alleged intoxication and the accident on December 16, 2020.

75. Therefore, I find:

- i. Defendants Form 53 to be untimely filed.
- ii. As Defendants Form 53 was not timely filed, they have waived their right to raise affirmative defenses to this claim.
- iii. Based on a preponderance of the evidence, Decedent's work-related injuries and resulting death are compensable under the Act.
- iv. Claimants are entitled to all causally related medical expenses.

76. All other issues are held in abeyance.

1. Pursuant to §42-1-130 and §42-1-140, at the time of the accident, Lenjarius Holmes and defendant employer Lawson Trucking, LLC, were covered parties under the provisions of the South Carolina Workers' Compensation Act.

2. Pursuant to §42-1-160, Lenjarius Holmes sustained an injury by accident during the course and scope of his employment with Lawson Trucking, LLC that ultimately resulted in his death.

3. Regulation 67-603(B)(1) of the South Carolina Code provides that an Employer file a Form 53 and proof of service with the Commission's Judicial Department within thirty days of service of the Form 52. Regulation 67-603(C) states, "Failure to file a Form 51 or Form 53 within the period in Section B(1) shall be deemed a general denial of liability for the benefits claimed and the employer and its representative by the failure to respond within the period in section B(1) shall forfeit each special and affirmative defense allowed by the Act including the defenses available in Section 42-9-60, 42-15-20, 42-15-40, and 42-17-90 of the Act." Pursuant to Regulation 67-603 Defendants failed to file their Form 53 as required by law and have forfeited each special and affirmative defense including the defenses available in Section 42-9-60 of the South Carolina Code.

4. Section 42-9-60 of the South Carolina Act is entitled "Injury or death occasioned by intoxication....." It states, "No compensation shall be payable if the injury or death was occasioned by the intoxication of the employer or by the willful intention of the employee to injure

or kill himself or another. In the even that any person claims that the provisions of this section are applicable in any case, the burden of proof shall be upon such person.”

5. The Court of Appeals has defined intoxication as “a condition that results from the use of a stimulant, which renders an employee impaired in his or her faculties to the extent that the employee is incapable of carrying on the accustomed work without danger to the employee.” (See Jones v. Harold Arnold’s Sentry Buick, Pontiac, 376 S.C 375, 656 S.E.2d 772 (Ct. App. 2008).

6. Our Supreme Court has interpreted Section 42-9-260 of the South Carolina Code as barring compensation when the employee’s intoxication is the proximate cause of the injury. (See Baggot v. Southern Music, 330 S.C. 1, 496 S.E.2d 852 (1998) and Kinsey v. Champion American Service Center, 268 S.C. 177, 232 S.E.2d 720 (1977).

7. Pursuant to Section 42-9-60 of the South Carolina Code and relevant workers’ compensation case law on intoxication Defendants have been unable to meet their burden of proving that LenJarius Holmes was intoxicated and that said intoxication was the proximate cause of his accident.

8. Under §42-15-20 proper notice of the injury was given.

9. Under §42-15-40 the claim was filed in a timely manner.

10. Under §42-15-60 Claimant is entitled reimbursement/payment of causally related medical expenses following the accident.

11. Section 42-9-290 of the South Carolina Code addresses the amount and types of compensation for death of an employee due to accident. A preponderance of the evidence indicates Claimant is entitled to benefits under 42-9-290 of the South Carolina Code.

ORDER

Based upon the above Findings of Fact and Conclusions of Law set forth herein, it is hereby **ORDERED** that Claimant is entitled to benefits per Section 42-9-290 of the South Carolina Code. Specifically, five hundred weeks of compensation and burial expenses not exceeding twelve thousand dollars. Additionally, per Section 42-15-60 Defendants are responsible for causally related medical treatment provided by Piedmont Medical Center and Piedmont EMS.

AND IT IS SO ORDERED.

SOUTH CAROLINA WORKERS'
COMPENSATION COMMISSION



Commissioner Gene McCaskill

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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 Patty Lundy on January 17, 2025